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Human Rights Council
Working Group on Arbitrary Detention**ADVANCE UNEDITED VERSION****Opinions adopted by the Working Group on Arbitrary
Detention at its seventy-third session,
31 August– 4 September 2015****No.28/2015 (Kuwait)****Communication addressed to the Government on 22 January 2015****Concerning Abdullah Fairouz Abdullah Abd al-Kareem****The Permanent Mission of the State of Kuwait requested an extension of the time limit on 29 January 2015, the Government of Kuwait replied to the communication on 10 March 2015.****The State is a party to the International Covenant on Civil and Political Rights. Kuwait acceded to the International Covenant on Civil and Political Rights on 21 May 1996**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/30/69), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Abdullah Fairouz Abdullah Abd al-Kareem, age 30, is a Kuwaiti national, possessing Birth Certificate No. 0512072 issued by the Kuwaiti authorities. He is a member of the Kuwaiti Human Rights Society and has worked to rectify the stateless situation of the 'Bidun' people. He is also a writer and journalist.

4. On 4 November 2013, Mr. al-Kareem was arrested without a warrant in Kuwait City by the national police. It is alleged that the police beat him during the arrest, particularly on his head. Mr. al-Kareem is currently detained in the Central Jail.

5. On 9 January 2014, the Court of First Instance convicted Mr. al-Kareem on charges of having insulted the Emir of Kuwait on Twitter. The legal basis for the conviction is article 25 of the State Security Crimes Act which applies to anyone who publicly "objects to the rights and authorities of the Emir or faults him," and misuses his mobile phone to disseminate objectionable comments. The court also issued a deportation order against Mr. al-Kareem to be executed following the completion of his sentence.

6. On 5 June 2014, the Court of Appeals upheld the sentence against Mr. al-Kareem, confirming his five- year imprisonment and the deportation order against him.

7. On 24 December 2014, the Court of Appeals reduced Mr. al-Kareem's prison sentence from two years to six months.

8. The source informs that under Kuwait's laws, non-citizens convicted of serious crimes can be deported after completion of their prison sentence. However, it argues that these circumstances do not apply to Mr. al-Kareem as he is considered a citizen of Kuwait pursuant to the Law of Kuwaiti nationality 1959/19, article 2, due to his father's status as a Kuwaiti citizen. This was confirmed by the Administrative Court of Cassation in its decision 2011/333, and by the Administrative Court of Appeals by its decisions 2011/529 and 2013/1570.

9. Although the Ministry of Interior issues all Kuwaiti citizens with a citizenship certificate, a document ensuring proof of citizenship, in addition to a passport or national ID card, it did not issue one for Mr. al-Kareem, for reasons unknown to the source. It is on the basis of not having a citizenship certificate that the Court of First Instance, in its sentencing order for Mr. al-Kareem, treated him as a noncitizen.

10. The arrest and detention of Mr. al-Kareem is considered by the source as arbitrary and falls under category II of the Working Group's defined categories of arbitrary detention. In its view, all of his statements made on Twitter and on blog posts were

peaceful in nature and did not express any support for violence. Mr. al-Kareem is being detained and may possibly be exiled on the basis of his political commentary, in violation of his rights to free expression and movement, guaranteed by Articles 19 and 20 of the Universal Declaration of Human rights, Articles 12, 19 and 21 of the International Covenant on Civil and Political Rights.

Response from the Government

11. In the communications addressed to the Government of Kuwait on 22 January 2015, the Working Group transmitted a summary of the allegations made by the source. The Working Group stated that it would appreciate it if the Government could, in its reply, provide it with detailed information about the current situation of the Mr. al-Kareem and clarify the factual basis and legal provisions justifying his continued detention. The Government of Kuwait replied to the communication from the Working Group on 10 March 2015, as stated in the following paragraphs.

12. In its response to the Working Group, the Government informs that the status of the right to human dignity in the State of Kuwait is clearly illustrated by the provisions of the Constitution under which “everyone is equal in human dignity” (art. 29) and “no one shall be arrested, detained, searched or compelled to reside in a specified location, nor shall his freedom of residence or movement be restricted, except as provided by law; no one shall be subjected to torture or degrading treatment” (art. 31). Moreover, all persons enjoy protection under the terms of article 34 of the Constitution according to which “an accused person is presumed innocent until proved guilty in a legal trial during which the requisite safeguards for his exercise of the right of defence are secured”.

13. In keeping with these principles, article 184 of the Criminal Code (Act No. 16 of 1960) stipulates as follows: “Anyone who arrests, imprisons or detains a person in circumstances other than those in which such is permitted by law, or without observing the legally prescribed procedures, shall be liable to a penalty of up to 3 years’ imprisonment and/or a fine of up to 225 dinars. If such acts are combined with physical torture or a threat to kill, the penalty shall be up to 7 years’ imprisonment to which a fine of up to 525 dinars may be added.” This was further emphasized in Act No. 31 of 1970 amending the Criminal Code (Act No. 16 of 1960), particularly in regard to public officials and law enforcement officers. Under article 53 of the Code, as amended: “Any public servant or official who, in person or by instructing others, is responsible for the torture of an accused person, a witness or an expert with a view to inducing them to confess to an offence or make statements or provide information in connection therewith shall be liable to a penalty of up to 5 years’ imprisonment and/or a fine of up to 500 dinars. If the torture leads to, or is combined with, an act carrying a heavier legal penalty, the penalty for the said act shall be imposed. If the torture proves fatal, the penalty shall be that prescribed for intentional homicide.”

14. It should again be noted that, under article 34 of the Constitution, “an accused person is presumed innocent until proved guilty in a legal trial during which the requisite safeguards for his exercise of the right of defence are secured”.

15. From the above, according to the Government’s response, it is evident that the allegations made by the source of the information are incompatible with the laws and regulations in force in the State of Kuwait.

16. With regard to the question concerning the nationality of Mr. al-Kareem, the Ministry of Justice of the State of Kuwait confirmed the refusal to issue him with a citizenship certificate, after a lengthy examination of case file No. 84/2013 by the Criminal Enforcement and International Cooperation Department. For the State of Kuwait it is evident that Mr. al-Kareem has not yet obtained Kuwaiti citizenship, given that a number of

administrative issues are still being deliberated and no final judgements have been rendered thereon. The case remains under investigation.

17. With regard to the question concerning the cases in which Mr. al-Kareem was sentenced to a penalty of imprisonment and the propriety of the material that he disseminated, the State of Kuwait informs that according to its study of Case No. 18/2013/State Security Crimes, the Public Prosecution, having indicted the accused, Mr. al-Kareem, for publicly contesting the rights and authority of the Emir, defaming his person, disparaging the basis on which he holds office and deliberately misusing means of telecommunication to disseminate the comments referred to in the case file through his two social networking (Twitter) accounts, called for imposition of the penalties prescribed in article 25 of Act No. 31 of 1970, amending various provisions of the Criminal Code, and article 1 of Act No. 9 of 2001 concerning the misuse of telecommunication and eavesdropping equipment. At a hearing on 9 January 2014, the criminal court sentenced him to an enforceable term of 5 years' "penal servitude" on the charges brought against him and ordered his deportation from the country on completion of his sentence. Mr. al-Kareem lodged appeal No. 304/2014/Criminal Misdemeanours/7. At the hearing on 5 June 2014, the Criminal Appeal Court ruled that his appeal was admissible in form but not in substance and upheld the sentence, which thereby became final. Mr. al-Kareem is currently serving his sentence in the Central Prison run by the Directorate General of Correctional Institutions of the Ministry of the Interior.

18. With regard to the question concerning the reduction of his sentence to 2 years and 6 months under the terms of the ruling delivered on 24 December 2014 in case No. 297/2013/Kuwaiti City (37/2013/Criminal Misdemeanours), the Government informs that the Public Prosecution indicted the accused, Mr. al-Kareem, on the charge of using a public social networking site (Twitter) on the Internet in a manner that failed to show due respect for two judges, the Chairman of the Supreme Judicial Council and Ayman Abdullah Al-Azzaz, judge of a court of first instance, for sending the tweets referred to in the case file which were regarded as casting doubt on those judges' integrity, professional diligence and commitment to the provisions of the law. The Public Prosecution called for imposition of the penalty prescribed in article 147, paragraph 1, of the Criminal Code. He was sentenced to an enforceable term of 2 years' penal servitude and a fine of 150 Kuwaiti dinars on the charge brought against him and was ordered to pay a fixed amount of 5,000 Kuwaiti dinars in damages to the civil party. Mr. al-Kareem lodged appeal No. 685/2013 and, at a hearing on 24 December 2014, the Misdemeanours Appeal Court ruled that his appeal was admissible in both form and substance and, accordingly, commuted his sentence to an enforceable term of 6 months' penal servitude and a fine of 150 Kuwaiti dinars on the charge brought against him while upholding the appealed judgement in the civil lawsuit. This sentence will be served immediately after completion of the sentence imposed in the case referred above in accordance with article 221, paragraph 1, of the Code of Criminal Procedure under which multiple prison sentences must be served consecutively.

19. With regard to the legality of his deportation after completion of his sentence, it should be noted that article 66 of the Criminal Code prescribes consequential penalties for persons convicted under articles 3, 57 and 62 and these penalties include deportation of a foreigner from the country on completion of his prison sentence (art. 97 of the Code). The Court of Cassation, which is the highest court in the Kuwaiti judicial hierarchy, has ruled that a foreigner is any non-Kuwaiti regardless of whether he holds a nationality or is stateless. Whereas, in accordance with this judicial ruling, the person in question is still a foreigner insofar as he has not obtained Kuwaiti citizenship as has already been explained above, the penalty of deportation to which he has been sentenced is a mandatory penalty as stipulated in the Kuwaiti legislation promulgated with the approval of the National Assembly (Parliament) and is not politically motivated.

20. With regard to the allegation that Mr. al-Kareem was arrested without a warrant, detained arbitrarily and subjected to torture during his arrest, a study of case file No. 18/2013/State Security Crimes shows that said person was arrested by duly authorized police officers on the afternoon of Monday, 4 November 2013, pursuant to a warrant issued by the Public Prosecution on the same day.

21. He was held in custody by the competent police authority for no longer than the legally prescribed period, having been brought before the Public Prosecution on the afternoon of 5 November 2013, the day after his arrest.

22. His pre-trial detention was based on an order issued by the Public Prosecution on 6 November 2013 for his remand in custody for a period of 10 days with effect from the date of his arrest.

23. His remand in custody pending trial was extended on the expiration of the said 10-day period under the terms of an order issued by the competent court at a hearing on 14 November 2013.

24. The allegation that he was arrested without a warrant and detained arbitrarily is therefore unfounded and contrary to the true facts since a study of the case file shows that all these measures were taken on the basis of orders in due and proper form issued by competent bodies acting within the limits of their legal authority and in accordance with articles 9, 10, 11, 39 (a) and (b), 48, 53 (a), 60, 62, 67, 69, 70 and 144 of the Code of Criminal Procedure.

25. With regard to the convicted person's statements made during the investigation to the effect that he was blindfolded, beaten and insulted during his detention in police premises, this was denied by the police officer and no visible traces substantiating that allegation were found when he was brought before the Public Prosecution for questioning. Moreover, he asserted that the culprit responsible for those acts was unknown and he did not accuse any specific person. He added that the acts to which he had been subjected were not of a coercive nature, his statements during the investigation had been made of his own free will and the incident had not left any medically detectable injuries or traces. Consequently, that allegation is unsubstantiated by presumptive or other evidence and could not be verified during the investigation.

26. With regard to the other questions, such as the non-applicability of the penalty of deportation to Mr. al-Kareem and the possibility of it being politically motivated, article 3 of the Criminal Code stipulates that: "Felonies are offences punishable by death or imprisonment for life or for a fixed term of more than 3 years." Article 57 of the said Code further stipulates that: "The principal penalties that can be imposed in accordance with this Code are: ... (c) A fixed term of imprisonment." Under article 62 of the Code: "A fixed term of imprisonment amounts to not less than 24 hours and not more than 15 years." According to article 66 of the Code: "The consequential and supplementary penalties prescribed in this Code are: ... (7) A foreigner's deportation from the country." Under article 67 of the Code: "A penalty is consequential if prescribed by law as an inevitable effect of the imposition of the principal penalty ..." Under article 79, paragraph 2, of the Code: "If a foreigner is sentenced to a criminal or custodial penalty for a dishonourable offence or breach of trust, the judge shall order his deportation from the country on completion of his sentence."

27. The rulings of the Court of Cassation are based on the firmly established principle that a foreigner is any non-Kuwaiti regardless of whether he holds another nationality or is stateless (ruling of the Court of Cassation delivered at the hearing of criminal objection No. 85/1994 on 24 October 1994).

28. Article 25 of Act No. 31 of 1970 amending various provisions of the Criminal Code stipulates that: “Anyone who, openly or in a public place or in a place where he can be heard or seen by a person in a public place, by word of mouth, outcry, in writing or through graphic or pictorial representation or any other means of expression of thought, contests the rights and authority of the Emir, defames his person or disparages the basis on which he holds office shall be liable to a penalty of up to 5 years’ imprisonment.”

29. In the light of the above, insofar as the judgement handed down in case No. 18/2013/State Security Crimes sentenced the convicted person, Mr. al-Kareem, to the prescribed penalty of 5 years’ imprisonment in respect of his commission of the offence specified in article 25 of Act No. 31 of 1970 amending various provisions of the Criminal Code, the order for his deportation from the country as a consequential penalty was inevitable given the fact that the penalty to which he was sentenced constituted a criminal penalty of more than 3 years’ imprisonment and also in view of the fact that he was still a foreigner due to his non-acquisition of Kuwaiti citizenship as has already been explained in above. Accordingly, the penalty of deportation that was imposed on him was a legally mandatory penalty as prescribed in the above-mentioned articles and was not politically motivated.

30. The State of Kuwait mentioned that the Court of Appeal may, at its discretion, order two prison sentences to run concurrently if so requested by the convicted person and, furthermore, the Emir of the country is empowered to waive penalties, including the penalty of deportation from the country, in accordance with the provisions of articles 221 and 239 of the Code of Criminal Procedure.

31. From the perspective of the Government of Kuwait, it could be inferred from the above review of the facts, that Mr. al-Kareem’s alleged subjection to a beating is unfounded. He is serving a prison sentence pursuant to a court judgement handed down against him after legal proceedings in which he enjoyed all the safeguards provided for in the Constitution, Kuwaiti law and international instruments, including the right to a fair trial at all levels of jurisdiction in keeping with the principle that the accused is innocent until proved guilty, the right to appoint defence counsel, the right to be tried in public, and all the other guaranteed rights to which any accused person is entitled under Kuwaiti law. It is noteworthy that Mr. al-Kareem was defended by the attorney Dr. Khaled Al-Kafifa and all the details of the trial and the substantiating grounds for the judgement were published in full in the news and social networking media.

32. The authorities of Kuwait consider that Mr. al-Kareem’s situation cannot be considered as a case of arbitrary detention since he has fully enjoyed, and is still enjoying, all the fundamental legal guarantees of the right to a fair and public trial and all the legal rules have been applied in accordance with the national and international norms. He was not held in solitary confinement and was detained only after the institution of proceedings against him and his sentencing as a result thereof. In their opinion he received a fair and public trial and “remain in detention even though the punishment applied to him had been executed” (as stated in Fact Sheet No. 26) or in spite of the promulgation of an amnesty enactment applicable to him. This is in conformity with the provisions of the International Covenant on Civil and Political Rights and, in particular, article 2, paragraphs 3 (a) and (b); and article 9, paragraphs 1, 2, 3 and 4, in part II thereof, as well as article 12, paragraph 3; article 13; article 14; article 15; article 18, paragraph 3; and article 19, paragraph 3, of the said Covenant.

Comments by the source

33. The Working Group addressed a letter to the source on 18 March 2015, requesting the source to submit its comments or observations on the Government’s reply. The source has not responded to the letter from the Working Group.

Discussion

34. Despite the lack of comments from the source, the Working Group is in the position to render an Opinion on the basis of all information that it has obtained. In particular, Mr. al-Kareem has worked to rectify the stateless situation of the 'Bidun' people, and is a writer and journalist. On 4 November 2013, Mr. al-Kareem was arrested in Kuwait City by the national police.

35. It was confirmed by the Government of Kuwait that Mr. al-Kareem, was indicted for publicly contesting the rights and authority of the Emir, defaming his person, disparaging the basis on which he holds office and deliberately misusing means of telecommunication to disseminate the comments referred to in the case file through his two social networking (Twitter) accounts, called for imposition of the penalties prescribed in criminal codes.

36. It was also confirmed by the Government that Mr. al-Kareem is serving a prison sentence pursuant to a court judgement handed down against him after legal proceedings for having insulted the Emir of Kuwait on Twitter. Even more the Court of Appeals upheld the sentence.

37. The Working Group in its Deliberation No. 8 on "deprivation of liberty linked to/resulting from the use of the internet" emphasised that "the application of any measure of detention against Internet users, taken in the framework of criminal investigation, proceeding, conviction or by an administrative authority, undoubtedly amounts to a restriction on the exercise of the freedom of expression. Unless it complies with the conditions prescribed by international law, such restriction by the authorities is arbitrary, hence unlawful."¹

38. It was noted by the Working Group that "peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of the freedom of expression. Hence, deprivation of liberty applied on the sole ground of having committed such actions is arbitrary."²

39. Furthermore, the legislation, on which the judgement against Mr. al-Kareem is based, is contrary to international law and thus inhibits free expression and punishes the use of the Internet.

40. With regard to violations of national legislation, the Working Group reiterates that, in conformity with its mandate, it must ensure that national law is consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments to which the State concerned has acceded. Consequently, even if the detention is in conformity with national legislation, the Working Group must ensure that such detention is also consistent with the relevant provisions of international human rights law.

41. The Working Group recalls that holding and expressing opinions, including those that are not in line with official government policy, are protected by article 19 of the Universal Declaration of Human Rights and article 19, paragraph 2 of the International Covenant on Civil and Political Rights. In its general comment No. 34 (2011) on freedoms of opinion and expression, the Human Rights Committee emphasized that "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, all public figures, including those exercising the

¹ E/CN.4/2006/7, 12 December 2005, para. 39.

² Ibid., para. 47.

highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition" (para. 38).

42. Also the Working Group expresses concern about the lack of recognition of the nationality of Mr. al-Kareem, that lead to discriminatory conduct from authorities of Kuwait by treating him as a non national.

43. The Working Group considers that Mr. al-Kareem's deprivation of liberty resulted from the exercise of his rights or freedoms guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), for having peacefully exercised his right to freedom of expression through social media, as guaranteed by Article 19 of the UDHR and Article 19 of the ICCPR. Thus, his deprivation of liberty of falls within categories I and II of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

44. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. al-Kareem is arbitrary, being in contravention of Articles 10 and 19 of the UDHR, and Articles 9, 14, and 19 of the ICCPR; it falls within categories I and II of the categories applicable to the consideration of the cases submitted to the Working Group.

45. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. al-Kareem and to bring it into conformity with the standards and principles set forth in the UDHR and ICCPR.

46. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release immediately Mr. al-Kareem and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the ICCPR.

47. In accordance with Article 33(a) of its Revised Methods of Work, the Working Group considers it appropriate to refer the allegations of torture to the Special Rapporteur on torture for appropriate action. Also, the Working Group considers it appropriate to refer the allegations of discriminatory treatment of Mr. al-Kareem, being born in Kuwait and treated as non-citizen by authorities, to the Special Rapporteur on minority issues for appropriate action.

[Adopted on 3 September 2015]