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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November – 4 December 2015

Opinion No. 42/2015 concerning Irina Zakharchenko and Valida Jabrayliova (Azerbaijan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the 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 1/102 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.
2. In accordance with its methods of work (A/HRC/30/69), on 13 July 2015 the Working Group transmitted a communication to the Government of Azerbaijan concerning Irina Zakharchenko and Valida Jabrayliova. The Government replied to the communication on 11 September 2015. The State is a party to the International Covenant on Civil and Political Rights.
3. 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 sentence or despite an amnesty law applicable to him) (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, that aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

4. Ms. Zakharchenko, aged 54, and Ms. Jabraylova, aged 37, are residents of Baku and members of the Jehovah's Witnesses minority religion community in Azerbaijan. Ms. Zakharchenko is a person with disability

5. On 5 December 2014, police arrested Ms. Zakharchenko and Ms. Jabraylova in the midst of their religious activity. The officers accused them of preaching illegally. Following the arrest, the police took Ms. Zakharchenko and Ms. Jabraylova to the station for questioning. After several hours, they were released without charges.

6. Reportedly, that day Ms. Zakharchenko and Ms. Jabraylova were sharing their faith with the residents of an apartment complex in Baku. They were offering without charge a brochure *Teach Your Children* (Övladlarımızı öyrədək), designed to aid parents in teaching their children Bible stories and lessons. This brochure was approved by the decision No.DK-349/M of the Azerbaijan's State Committee for Work with Religious Associations (SCWRA) for import on 11 August 2014.

7. On 9 February 2015, Matlab Mehdiyev, Chief Investigator of the Main Investigation Office of the Ministry of National Security of the Azerbaijan Republic (MNS), summoned Ms. Zakharchenko and Ms. Jabraylova to the MNS headquarters. On 10 February, MNS agents interrogated them for hours, shouting at them and applying psychological pressure. They were released in the evening and ordered to return the next day.

8. On 17 February 2015, the MNS charged Ms. Zakharchenko and Ms. Jabraylova under article 167-2.2.1 of the Criminal Code of Azerbaijan Republic, which prohibits production, import, sale, or distribution of religious literature by an organized group without having obtained the appropriate approval. This offence is punishable with a fine of 7,000-9,000 AZN (approximately 6600-8500 USD) or imprisonment from two to five years.

9. The source claims that charges against Ms. Zakharchenko and Ms. Jabraylova are based on the fact that they were distributing the Bible-based brochure *Teach Your Children* (Övladlarımızı öyrədək). The source argues that such activity falls under protection of the freedom of religion or belief, as the distribution of the religious literature is an integral part of Ms. Zakharchenko's and Ms. Jabraylova's faith. Furthermore, the brochure was approved for internal circulation in Azerbaijan by SCWRA.

10. The same day, 17 February, the MNS brought Ms. Zakharchenko and Ms. Jabraylova before Judge Rauf Ahmadov, who, following a hearing in camera, decided to place them in pre-trial detention. This was despite the legal counsels' objection that the detention was due to Ms. Zakharchenko's and Ms. Jabraylova's consistent cooperation with the authorities.

11. In his ruling, Judge Ahmadov described activity of Ms. Zakharchenko and Ms. Jabraylova as a "threat to the public" and granted the investigator's motion to place them

for three months' detention in the MSN's jail. The Court ignored the fact Ms. Zakharchenko is a person with disability and Ms. Jabrayilova is the primary caregiver for her aged mother. Reportedly, Ms. Jabrayilova has not received a copy of the ruling. Nevertheless, both women appealed the ruling through their lawyers.

12. On 26 February 2015, Baku Court of Appeal denied the appeals in a closed hearing.

13. The source argues that neither the prosecutor nor the MNS investigator presented any evidence supporting the need for pre-trial detention. Ms. Zakharchenko and Ms. Jabrayilova were returned to the MNS jail. Since then, it has not been possible for family or friends to visit Ms. Zakharchenko and Ms. Jabrayilova in jail.

14. On 6 March 2015, the MNS obtained the court orders and searched homes of Ms. Zakharchenko and Ms. Jabrayilova, confiscating their religious literature, notebooks, a computer and a mobile phone.

15. On 10 March 2015, the MNS, SCWRA, and police presented the court orders to search the Kingdom Hall, which is the house of worship of Jehovah's Witnesses in Baku and the home of one of the congregation elders. The law-enforcements informed those present that the search was in relation to the case against Ms. Zakharchenko and Ms. Jabrayilova. The authorities found and confiscated a lot of religious literature and other documents. Since then, the MNS has summoned more than a dozen Jehovah's Witnesses for interrogation in an effort to collect incriminating evidence against Ms. Zakharchenko and Ms. Jabrayilova.

16. On 1 April 2015, Ms. Jabrayilova through her lawyer filed a motion in Sabail District Court to substitute her pre-trial detention with house arrest. On 4 April, Judge Elshad Shamayev dismissed the motion. On 7 April, Ms. Jabrayilova appealed to Baku Court of Appeal. On 10 April, the Court of Appeal dismissed her appeal.

17. On 15 April 2015, Ms. Zakharchenko through her lawyer filed a motion in Baku Sabail District Court to substitute pre-trial detention with house arrest. On 17 April, Judge Ayten Aliyeva refused the motion. On 20 April, Ms. Zakharchenko appealed to Baku Court of Appeal. On 27 April, the Court of Appeal dismissed her appeal.

18. On 7 May 2015, the MNS applied to Baku Sabail District Court to extend the pre-trial detention of Ms. Zakharchenko and Ms. Jabrayilova for an additional two months, until 17 July 2015. The Court approved the extension of the pre-trial detention. Ms. Zakharchenko and Ms. Jabrayilova appealed to Baku Court of Appeal on 12 May. On 18 and 19 May, Baku Court of Appeal dismissed the appeals of Ms. Jabrayilova Ms. Zakharchenko.

19. The source argues that Ms. Zakharchenko's and Ms. Jabrayilova's deprivation of liberty is arbitrary, and falls under Categories I, II, III and V as classified by the Working Group. In particular, Ms. Zakharchenko and Ms. Jabrayilova's deprivation of liberty had no legal basis justifying their arrest, as they were arrested and detained by MNS personnel for distribution of a religious brochure, which was a lawful religious activity. (Category I).

20. Ms. Zakharchenko and Ms. Jabrayilova's deprivation of liberty resulted from the exercise of fundamental rights protected by international law, in particular, rights to freedom of religion or belief. Ms. Zakharchenko and Ms. Jabrayilova have been treated like they are threats to national security when in reality their purported offence is having distributed religious literature of Jehovah's Witnesses (Category II).

21. Ms. Zakharchenko and Ms. Jabrayilova were deprived of their liberty in violation of due process rights. In particular, all court hearings related to pre-trial detention have been conducted in camera. The court ignored all motions of the defence, including Ms. Zakharchenko's disability and that Ms. Jabrayilova is the primary caregiver to her aged

mother. Both have not been allowed to see family members, friends, or religious ministers for pastoral care for more than three months. The only visitors permitted to see them are their lawyers. The MNS has forbidden Ms. Zakharchenko and Ms. Jabrayilova to have access to any religious literature, including personal copies of the Holy Bible (Category III).

22. Furthermore, the source argues that Ms. Zakharchenko and Ms. Jabrayilova were arrested and detained because of their religion. Reportedly, over the past several years, the state authorities have imposed increasingly severe restrictions on the peaceful religious activity of Jehovah's Witnesses in Azerbaijan. They have prohibited the import of some of their religious literature and have imposed heavy administrative fines on individual Jehovah's Witnesses as punishment for holding religious services and for speaking to others about their faith. The source asserts that the criminal prosecution of Ms. Zakharchenko and Ms. Jabrayilova is indicative of the intensity of the state authorities' campaign of persecution of Jehovah's Witnesses in Azerbaijan. Hence their deprivation of liberty constitutes a violation of international law for reasons of discrimination based on religion (Category V).

Response from the Government

23. In its response of 11 September 2015, the Government provided the Working Group with the following information:

24. On 17 February 2015, the criminal case against Ms. Zakharchenko and Ms. Jabrayilova, members of the Jehovah's Witnesses minority religious community was instituted under article 167-2.2.1 of the Criminal Code of the Republic of Azerbaijan with regard to the distribution of the religious literature, namely the brochure "Teach Your Children" by an organized group without having obtained the appropriate approval.

25. They were arrested by the decision of Sabail district Court of Baku on the same day under the abovementioned article of the Criminal Code. On 13 April 2015, the expertise was conducted to clarify whether the abovementioned literature is of religious nature and its import and distribution was allowed.

26. According to the Opinion rendered on 26 May 2015 by the experts of the Ministry of Justice's Court Expertise Center, the brochure "Teach Your Children" is of religious nature and its import and distribution was approved by the State Committee for the Work with Religious Associations of the Republic of Azerbaijan, but only within the Jehovah's Witnesses minority religious community.

27. There is no approval for individual distribution and sale of the abovementioned literature outside community. Currently, the investigation is conducted in an objective and thorough manner.

28. The Government also noted that there are a number of cases that activity of Jehovah's Witnesses was accompanied by violations of Azerbaijani legislation. Since Azerbaijan, which is still at the state of war and 20 % of its territory under occupation, has not adopted legislation on alternative service, legal action has been taken against some followers of this community refusing to serve in the army.

Further comments from the source

29. In its comments on the Government's response, the source noted that it fails to provide any rational factual or legal basis justifying the detention. In the source's view, the response confirms that the criminal case is wholly contrary to international law and relies on extraneous and irrelevant considerations.

30. The source reiterates that the detention of Ms Zakharchenko and Ms Jabrayilova is arbitrary in that none of the conditions for pre-trial detention under the Criminal Procedure Code of the Azerbaijan Republic are met. The Government does not explain why it has been necessary to deprive Ms Zakharchenko and Ms Jabrayilova of their liberty for ten months.

31. The source reiterates that there is no basis under the Criminal Procedure Code of Azerbaijan Republic (CPC) to justify their pre-trial detention:

- they have never hidden from the prosecuting authority. Prior to their arrest, they voluntarily went to the police station whenever called;
- they have never obstructed the normal course of the investigation or court proceedings by illegally influencing parties to the criminal proceedings, hiding material significant to the prosecution or engaging in falsification;
- they did not commit a further act provided for in criminal law or create a public threat;
- they never failed to comply with a summons from the prosecuting authority, without good reason, or otherwise evaded criminal responsibility or punishment;
- aside from the fact the alleged offence is on its face unconstitutional and contrary to international law, it is not a violent, dangerous, or subversive offence. The Government's response confirms that the brochure contained no harmful elements;
- the authorities and courts failed to take into account age, health, financial and social positions of the detainees. Ms Jabrayilova, a hardworking young woman, prior to arrest she lived with, and was the primary caregiver for, her elderly, ill mother. Ms Zakharchenko has been on a disability pension since.

32. The source recalls that on 7 September 2015, the Parliamentary Assembly of the Council of Europe (PACE) has criticized Azerbaijan for its abuse of pre-trial detention.¹ Citing examples from Azerbaijan, PACE noted that "abusive grounds" for pre-trial detention were sometimes used, in particular to discredit political competitors, to extort bribes, or even to intimidate civil society and silence critical voices.

33. The source notes that the Government's response suggests the pre-trial detention of the two women may be justified on the basis "there are a number of cases that activity of Jehovah's Witnesses was accompanied by violations of Azerbaijani legislation." In the source's view, Ms Zakharchenko and Jabrayilova are being punished as part of a religiously-motivated campaign of state persecution against Jehovah's Witnesses in Azerbaijan.

34. The source considers that it absurd to suggest Ms Zakharchenko and Ms Jabrayilova should be deprived of their liberty because Azerbaijan has failed to adopt a law on alternative service and has imprisoned Jehovah's Witnesses who conscientiously objected to military service.

35. The source reiterates that Ms Zakharchenko and Ms Jabrayilova have been denied the right to meet with close relatives or persons of legal interest to them, and to have telephone conversations while in detention. Religious officials from their community have refused access to them to provide pastoral care and support.

¹ Reference is made to the Report of the PACE Committee on Legal Affairs and Human Rights, Doc. 13863, 7 September 2015, paragraphs 82 and 83.

36. The source also reiterates that the detention of Ms Zakharchenko and Ms Jabrayilova for peacefully sharing their religious faith with others is contrary to Articles 18, 19, 26, and 27 of the ICCPR and Articles 7, 18, and 19 of the UDHR.

37. The source recalls that the Special Rapporteur on freedom of religion or belief reiterated that “governments should widely inform the population, including appropriate law enforcement agencies, about the principle that registration does not constitute a precondition for practicing one’s religion or belief.”²

38. The source concludes that the entire foundation of the criminal case against Ms. Zakharchenko and Ms. Jabrayilova is fundamentally flawed. They are being persecuted for exercising their faith, in disregard of their right to freedom of religion and freedom, and of expression, guaranteed by the ICCPR.

Discussion

Categories II and V violations

39. The Working Group recalls that Article 18.3 of the ICCPR permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

40. The Working Group also concurs with the Human Rights Committee which affirmed that the practice and teaching of religion includes the freedom to distribute religious texts or publications.³

41. The Government failed to present any argument explaining why and how the distribution of the religious brochure which was approved by the relevant State Committee by the two women could have been detrimental to the society as a whole or to other individuals.

42. The Government’s argument that because the State “has not adopted legislation on alternative service, legal action has been taken against some followers of this community refusing to serve in the army” is irrelevant to the deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova. In this regard, the Working Group also notes that more than six years ago, the Human Rights Committee expressed concern that no legal provision in Azerbaijan regulates the status of conscientious objectors to military service. Accordingly, in 2009, the Committee recommended Azerbaijan to adopt “*at an early date*” a “law exempting conscientious objectors from compulsory military service and providing for alternative civilian service.”⁴

43. The Working Group considers that in the case under consideration Ms. Zakharchenko and Ms. Jabrayilova have been deprived liberty for peacefully exercising the rights to freedom of religion and belief, as guaranteed under article 18 of the UDHR and article 18 of the ICCPR. Thus, the deprivation of liberty of Ms. Zakharchenko and Ms. Jarayilova falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

44. Furthermore, the deprivation of liberty of Ms. Zakharchenko and Ms. Jarayilova also falls within category V of the applicable categories as they have been deprived liberty for

² Reference is made to Statement to the UN General Assembly, 29 July 2010, paras 22, 23, A/65/207.

³ General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18), para. 4

⁴ Concluding observations of the Human Rights Committee (2009), Azerbaijan, CCPR/C/AZE/CO/3, para. 14.

the reason of discrimination based on their religion in violation of article 7 of the UDHR and article 26 of the ICCPR.

Category III violations

45. The Working Group recalls that article 9.3 of the ICCPR requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It should not be the general practice to subject defendants to pre-trial detention.⁵

46. The Government in its response did not provide any reason for the detention of two women. Nor the Government refuted the allegation that the prosecutor did not present to the judge any evidence supporting the need for the pre-trial detention.

47. Indeed, a detention pending trial “must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.”⁶ The relevant factors should not include vague and expansive standards such as “public security.”⁷ In the case under consideration, no reasons for the detention were given.

48. The Working Group considers that the non-observance of the international norms established in article 9 of the UDHR and article 9 of the ICCPR in this case is of such gravity as to give the deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova arbitrary character. Thus, the deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

49. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Ms. Zakharchenko and Ms. Jabrayilova is arbitrary, being in contravention articles 7, 9, 18 of the UDHR and articles 9, 18, 26 of the ICCPR; it falls within categories II, III, and V of the categories applicable to the consideration of the cases submitted to the Working Group.

50. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Ms. Zakharchenko and Ms. Jabrayilova and bring it into conformity with the standards and principles set forth in the UDHR and ICCPR.

51. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release of Ms. Zakharchenko and Ms. Jabrayilova and accord them an enforceable right to compensation in accordance with article 9(5) of the ICCPR.

[Adopted on 2 December 2015]

⁵ General comment No. 35: Article 9 (Liberty and security of person), para. 38.

⁶ Ibid.

⁷ Ibid.