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Working Group on Arbitrary Detention

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No. 21/2015 (New Zealand)

Communication addressed to the Government on 22 January 2015

Concerning Mr. A, whose name is known to the Working Group on Arbitrary Detention

The Government has not replied to the communication of 22 January 2015.

The State is party to the International Covenant on Civil and Political Rights.[*]

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/16/47 and Corr.1, annex), 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);

[*] New Zealand ratified to the International Covenant on Civil and Political Rights on 28 December 1978.

(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. Mr. A, born on 21 September 1956, is a national of New Zealand. In 1973, he was diagnosed with "mild mental retardation", according to the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, also referred to as an "intellectual disability".

4. To date, Mr. A has been detained for 45 years in psychiatric institutions or in prisons. From 1969 to 1993, he was held in psychiatric detention at Kingseat Hospital, Oakley Hospital, Lake Alice Hospital, Mount Eden Prison and Carrington Hospital. From 1994 to the present, Mr. A has been detained, on a sentence of preventive detention, in Auckland Prison, Kaitoke Prison (Wanganui), Pohutukawa Unit of Mason Clinic and Tongariro Prison. Since 1994, brief periods have been spent in psychiatric facilities.

5. In 1968, at the age of 12, Mr. A was admitted to Kingseat Hospital for allegedly sexually abusing a young girl. From 1969 to 1989, he was transferred among various psychiatric hospitals for allegedly committing sexual offences while on leave.

6. In 1973, at the age of 17, Mr. A was charged with sodomy. He was found to be legally disabled and unfit to plead. He was therefore committed to Lake Alice Hospital under the Criminal Justice Act, 1954. In 1984, he was again charged with sodomy and found to be disabled under the Criminal Justice Act.

7. In 1989, Mr. A's legal disability was questioned. He became an informal patient at Kingseat Hospital until 1992, at which time he had weekend leaves with his mother. In 1993, he became an informal patient and later that year was released and went to live with his sister in Mangere, South Auckland.

8. In 1992, the Mental Health (Compulsory Assessment and Treatment) Act came into force, changing the legal landscape by removing the previous protection from prosecution and imprisonment accorded to individuals with intellectual disabilities, including those such as Mr. A with a mild mental retardation. The source submits that this resulted in the courts having limited options for dealing with persons with an intellectual disability who were charged or convicted with an imprisonable offence, often resulting in an inappropriate placement in prison or other place of detention.

9. In 1994, Mr. A was prosecuted and convicted of unlawful sexual connection with a minor. On 20 April 1994, the High Court sentenced him to preventive detention with a minimum period of detention of 10 years without parole pursuant to section 75 of the Criminal Justice Act, 1985 (now repealed). Under that section, preventive detention could be imposed if a person has been convicted of a sexual offence under section 128 (1) of the Crimes Act and if the Court is satisfied that it is necessary for the person to be detained in

custody for a substantial period. Relying on a 1994 psychiatric report, the Court determined that Mr. A's conviction fell under that section. On 7 October 1994, the High Court sentenced him to a second preventive detention. On 22 May 1995, both sentences of preventive detention were affirmed by the Court of Appeal. Mr. A remains detained.

10. The source submits that the detention of Mr. A is arbitrary and falls under categories I and V on the basis that he has been deprived of his liberty since 1994 for reasons of discrimination based on disability and that he has been deprived of his liberty since 2004 without any legal basis.

11. The source submits that when Mr. A was sentenced in 1994 there was no legislative scheme to ensure that he would be placed in a proper facility, one that would take into account his intellectual deficiencies and protect his rights, or provide rehabilitation, in contrast to individuals with mental health concerns, who could be detained in psychiatric hospitals. In view of the Mental Health (Compulsory Assessment and Treatment) Act, 1992, removing the previous exemption of individuals with intellectual disabilities from standing trial before criminal courts, the courts sentenced Mr. A to preventive detention in prison, having no other legitimate domestic law choice. The source argues that this violates article 7 of the Universal Declaration of Human rights, article 26 of the International Covenant on Civil and Political Rights and article 13 of the Convention on the Rights of Persons with Disabilities, as it fails to recognize the rights of the intellectually disabled as a discrete and vulnerable group to be treated equally before the law.

12. The source draws attention to paragraph 19 of Human Rights Committee general comment No. 35, according to which any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question from harm or for preventing injury to others. It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. In the source's view, such factors as acceptance of responsibility, steps taken to avoid reoffending, and predilection and proclivity for offending should have been assessed in a different light given Mr. A's intellectual disabilities, yet they were not.

13. The source refers to the Working Group's visit to New Zealand from 24 March to 7 April 2014, at the conclusion of which the Working Group stated that it heard consistent testimonies that people with intellectual or learning disabilities were at a particular disadvantage in the criminal justice system. The Working Group stresses that, pursuant to article 13 of the Convention on the Rights of Persons with Disabilities, persons with disabilities must be afforded access to justice on an equal basis with others.

14. The source further submits that meeting the threshold for a sentence of preventive detention has become more onerous since Mr. A was sentenced in 1994. At that time, a single psychiatric opinion was required. That requirement has since been amended by the Sentencing Act, 2002, pursuant to which two health assessors' reports must be obtained before a sentence of preventive detention can be handed down. The source argues that were the sentencing judge to apply this new standard to Mr. A's case, the threshold to indeterminately detain him would not be reached.

15. When a preventive detention sentence has been handed down, the person is entitled to be considered for parole annually after the expiry of a minimum period without parole. Hence, in 2004, after the expiry of his 10-year tariff period, Mr. A was eligible to be considered for parole. That same year, the Intellectual Disability (Compulsory Care and Rehabilitation) Act, 2003, was implemented, providing for the compulsory care of offenders with intellectual disabilities. The goal of the Act, it is submitted, is to ensure that the rights of intellectually disabled offenders are accounted for and protected, effectively to remedy past legislative discrimination.

16. The source submits that multiple psychological reports stated that Mr. A met the criteria specified in section 7 of the act for the diagnosis of intellectual disability, and was therefore eligible for a compulsory care order. However, the New Zealand Parole Board has continuously denied Mr. A's applications for compulsory care under the statute. In its determination that he is not eligible for parole, the Board has relied exclusively on the finding of one psychologist, who stated that it was inappropriate for Mr. A to be transferred from the criminal justice system to a placement provided under the Intellectual Disability (Compulsory Care and Rehabilitation) Act, 2003, as he posed too high a risk. Despite previous counsel's application for judicial review regarding the decision not to apply for compulsory care and the subsequent decision to deny parole, Mr. A remains in prison.

17. For support, the source draws attention to paragraph 21 of Human Rights Committee general comment No. 35, in which it is stated that when a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals, once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of committing similar crimes in the future. States should use such detention only as a last resort, and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society.

18. The source submits that the continuation of Mr. A's incarceration after 2004, following the expiry of his 10-year tariff period in prison, is arbitrary and in contravention of the rights guaranteed to him under article 9 of the International Covenant on Civil and Political Rights and article 14 of the Convention on the Rights of Persons with Disabilities. It argues that, given Mr. A's disabilities, there is no legal basis for keeping him detained in prison with no plan for integration or rehabilitation, when he should be receiving the psychological and rehabilitative care the law provides. The decision to keep Mr. A in prison was taken to protect the public, given that there are less restrictive and more humane alternatives to prison, and was based on a suspicion that he might reoffend. In the source's view, the decision is punitive.

No response from the Government

19. The Working Group addressed a communication to the Government on 22 January 2015, requesting detailed information about the current situation of Mr. A and clarification of the legal basis and justification for his continued detention.

20. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

21. Despite the absence of any further information from the Government, the Working Group has decided to render its opinion in conformity with paragraph 16 of its methods of work. The Government has not rebutted the prima facie reliable allegations submitted by the source (see opinion No. 52/2014 (Australia and Papua New Guinea)).

Discussion

22. The case of Mr. A concerns certain aspects of New Zealand criminal law and its compliance with international law that have been the subject of the Working Group's report

on its 2014 visit to New Zealand (A/HRC/30/36/Add.2)and also of a communication of the Human Rights Committee.[1]

23. Mr. A remains in prison long after having completed his 10-year tariff period, which expired in 2004. In its submission on Mr. A's case, the source has drawn the Working Group's attention to many aspects relating to the compliance with international law of New Zealand legislation and practice. In its conclusion, the source submits that Mr. A, who suffers from serious disabilities, should not be detained in prison with no plan for integration or rehabilitation. He should receive psychological and rehabilitative care. Mr. A is kept in prison on the basis of a suspicion that he might reoffend and for the protection of the public, a decision that is punitive, while less restrictive and more humane alternatives to prison are available. The Working Group agrees with the source. International law requires that conditions of detention such as those of Mr. A must be distinct from the conditions of convicted prisoners serving a punitive sentence.

24. The Working Group has addressed such issues in its report on its 2011 mission to Germany (A/HRC/19/57/Add.3).[2] The conditions of preventive detention regimes must satisfy demanding proportionality requirements and establish a difference between the regimes for preventive detention and for ordinary prison sentences. In its report, the Working Group discusses the jurisprudence of German courts and the European Court on Human Rights and, in the present opinion, again confirms that the requirements laid down in the European Court's jurisprudence constitute international law.

25. The Human Rights Committee followed up on these issues in its concluding observations on the sixth periodic report of Germany (see CCPR/C/DEU/CO/6, para. 14), adding that States parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The Committee restated the international law requirements set out in paragraph 21 of its general comment No. 35 on liberty and security of person, on detention when a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals. The Committee set out the requirements that must be satisfied to comply with international law and to avoid arbitrariness under article 9 of the International Covenant on Civil and Political Rights. The additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. States parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The requirement that the conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence, restated by the Committee, determines Mr. A's case now before the Working Group. The Committee refers to its views in *Allan Kendrick Dean v. New Zealand*. Moreover, the requirement that the detention must be aimed at the detainees' rehabilitation and reintegration into society, also restated by the Committee, contributes to the outcome in Mr. A's case.

26. The above-mentioned restatements were made by the Human Rights Committee in its general comment No. 35, under the heading "Arbitrary detention and unlawful detention". In paragraph 10 of that general comment, the Committee restated that a person's right to liberty is not absolute, that article 9 of the International Covenant on Civil and Political Rights recognizes that sometimes deprivation of liberty is justified, for example, in

[1] Communication No. 1512/2006, *Allan Kendrick Dean v. New Zealand*, views adopted on 17 March 2009, para. 7.5.

[2] See, in particular, paragraph 28, in which it is stated that post-sentence preventive detention is subject to the ban on retroactivity in a strict sense, and paragraph 29.

the enforcement of criminal laws, and that paragraph 1 of that article requires that deprivation of liberty must not be arbitrary and must be carried out with respect for the rule of law. In paragraph 12 of the general comment, the Committee explained that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. Laws and practices that are in breach of the requirements set out in paragraph 24 above are in breach of article 9 of the Covenant.

27. The Working Group concludes that the continuation of Mr. A's incarceration after 2004 for the protection of the public constitutes arbitrary deprivation of liberty under category I and a violation of international law for reasons of discrimination under category V.

Disposition

28. In the light of the preceding, the Working Group renders the following opinion:

> The deprivation of liberty of Mr. A is arbitrary and in contravention of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights. It falls into categories I and V of the categories applicable to the consideration of the cases submitted to the Working Group.

29. Consequent upon the opinion rendered, the Working Group requests the Government of New Zealand to take the steps necessary to remedy the situation of Mr. A and bring it into conformity with the standards and principles in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

30. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. A from prison and accord him an enforceable right to compensation in accordance with article 9 (5) of the International Covenant on Civil and Political Rights.

[Adopted on 29 April 2015]