
Advance Edited Version

Distr.: General
23 June 2021

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its ninetieth session, 3–12 May 2021

Opinion No. 15/2021 concerning Nasibe Shamsaei (Islamic Republic of Iran and Turkey)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work,¹ on 11 January 2021 the Working Group transmitted to the Government of the Islamic Republic of Iran and the Government of Turkey a communication concerning Nasibe Shamsaei. The Government of the Islamic Republic of Iran did not reply to the communication on time, while the Government of Turkey replied to the communication on 10 March 2021. Both States are parties 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 or her sentence or despite an amnesty law applicable to him or her) (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 Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

¹ A/HRC/36/38.

or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Nasibe Shamsaei, born in 1984, is a national of the Islamic Republic of Iran, architect and women's rights activist. She usually resides in Teheran. Ms. Shamsaei fled from the Islamic Republic of Iran to Turkey in February 2020 and faces deportation after having been arrested in Istanbul.

5. According to the information received, since 2016 Ms. Shamsaei had engaged in virtual activities expressing her opinion against the compulsory use of the hijab in the Islamic Republic of Iran. In 2018, she climbed the highest peak in the country, Mount Damavand, and took off her scarf for a picture in solidarity with the "Girls of Revolution Street", who had participated in protests against the compulsory hijab in 2017. After that, she continued her activities in the form of civil protest in the city and crowded places, buses and subways, in defence of political prisoners and protesting against the forced hijab. She was also in a "White Wednesdays" video, in which she could be seen handing out white flowers to women passengers in the Tehran metro, to show solidarity with Nasrin Sotoudeh, a prominent human rights lawyer who was in prison.

6. Ms. Shamsaei was arrested at her home in Tehran on 18 June 2019. Allegedly, the arresting officers did not show a warrant, nor did they cite legislation or reasons for such deprivation of liberty. The source reports that eight men and a woman blindfolded her and drove her to an unknown location. She was then charged with insulting the sanctities of Islamic society and colluding against national security, collaborating with dissident networks, and engaging in propaganda activity against the Government. She was transferred to solitary confinement in Evin Prison for, among other things, removing her hijab in public places and insulting the founder of the Islamic Republic of Iran.

7. Ms. Shamsaei allegedly spent 15 days in solitary confinement, undergoing repeated daily interrogations and experiencing psychological pressure and harassment. Her family was not aware of her whereabouts. She was then transferred to Qarchak Prison in Varamin.

8. In August 2019, the first trial hearing took place at Branch 28 of the Islamic Revolutionary Court. Ms. Shamsaei was reportedly convicted of all charges and sentenced to 12 years in prison. The source claims that she was denied the right to a lawyer throughout the proceedings, and her family was prohibited from attending court. In addition, Ms. Shamsaei was forced to sign a paper without being given the opportunity to read it; it stated that she was unable to post bail.

9. After three weeks before the Court of Appeals, Ms. Shamsaei's sentence was suspended for five years. She was released on parole from Qarchak Prison in October 2019. Ms. Shamsaei went to the prosecutor's office to recover belongings that had been confiscated from her house on the day of the arrest, including laptops, mobile telephones, hard drives, and passports. Once there, she found out that the prosecutor had reissued the 12-year prison sentence and that the 5-year suspension had been revoked.

10. Ms. Shamsaei left the Islamic Republic of Iran and entered Turkey through the mountains at the border near Maku, Islamic Republic of Iran around May 2020. Once in Istanbul, Turkey, she was kept hidden by a smuggler for six months, without contact with anyone, with the promise that she would be able to travel to another country, in Europe, to seek asylum. On 5 November 2020, Ms. Shamsaei, in possession of a fake passport, was arrested by the Turkish police at the Istanbul airport while she was trying to reach another country in Europe to seek asylum.

11. Ms. Shamsaei was transferred to a location in Fatih, Turkey, where conditions were unpleasant and dirty; there she endured inhuman treatment by unknown people. She was then transferred to the Edirne removal centre. On the second day in Edirne, she had to resist attempts to force her to sign an order for deportation to the Islamic Republic of Iran.

a. Alleged violations in respect of the Islamic Republic of Iran

i. Category II

12. The source claims that the Islamic Republic of Iran has violated Ms. Shamsaei's right to freedom of expression under article 19 of the Covenant, which is also protected under article 19 of the Universal Declaration of Human Rights. Freedom of expression is essential for the full development of an individual. In its general comment No. 34 (2011), the Human Rights Committee described the right as a foundation stone for every democratic society and the vehicle for the exchange and development of ideas. The Committee has recognized that this freedom includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.²

13. Ms. Shamsaei allegedly expressed her views regarding the hijab in the Islamic Republic of Iran in various ways. The source argues that expressing her opinion regarding banning the wearing of the hijab and her criticism of the Government cannot be classified as insulting or as propaganda against the Government.

14. Although the right is not absolute, the source insists that there is no arguable basis for the violation of Ms. Shamsaei's right to freedom of expression in this case. Article 19(3) of the Covenant provides that freedom of expression may be restricted only when provided by law and necessary for respect of the rights or reputations of others, for the protection of national security or of public order, or of health or morals. The Human Rights Committee has interpreted this limitation narrowly, noting that such restrictions must not jeopardize the right itself. The Committee has held that government limitations must be for one of the enumerated purposes and must meet a strict test of justification.³

15. According to the source, the Government has no legitimate grounds for restricting Ms. Shamsaei's right to freedom of expression. As an anti-hijab activist, Ms. Shamsaei peacefully expressed her views and the Government failed to meet the strict requirements of article 19(3) of the Covenant. Thus, the source alleges that the rights of Ms. Shamsaei under article 19 were violated.

ii. Category III

16. The source claims that the detention of Ms. Shamsaei by the Islamic Republic of Iran amounts to an arbitrary deprivation of liberty under category III. Due process is one of the tenets of the right to a fair trial. The minimum international standards of due process are established in the Covenant, the Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

17. Article 9(1) of the Covenant, which confirms the right to liberty and freedom from arbitrary detention, states that no one is to be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. This right is reiterated in principles 2 and 36(2) of the Body of Principles and article 9 of the Universal Declaration of Human Rights. Article 9(2) of the Covenant requires that anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest and be promptly informed of any charges. The source informs the Working Group that, both under the Constitution and under the Code of Criminal Procedure, an arrest warrant must be issued prior to any arrest.

18. In the case of Ms. Shamsaei, it is alleged that no warrant was presented to her at the time of her arrest. Hence, her rights under article 9(1) of the Covenant were violated.

19. The source states that, in accordance with article 9(3) of the Covenant, detainees must be brought promptly before a judge or other officer authorized by law to exercise judicial power to challenge the legality of their continued detention. In its general comment No. 35 (2014), the Human Rights Committee provides that a public prosecutor cannot be considered

² *Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.7.

³ *Park v. Republic of Korea* (CCPR/C/64/D/628/1995), para. 10.3.

as an officer exercising judicial power under article 9 (3). Aside from acting as a guarantee against arbitrary detention, these provisions also safeguard other related rights, such as freedom from torture. Reportedly, under the Code of Criminal Procedure an accused person can be detained for a maximum of 24 hours without a detention order, but a judge must issue a temporary detention order to detain an accused person for longer than 24 hours.

20. The source indicates that after Ms. Shamsaei's arrest on 18 June 2019, she was not brought promptly before a judge to challenge the legality of her detention. Rather, she was brought before a judge only after six months of detention. By denying Ms. Shamsaei prompt access to an unbiased judge to challenge the legality of her detention, the Islamic Republic of Iran allegedly violated article 9 (3) and 9 (4) of the Covenant, and principles 4, 11, 32 (1) and 37 of the Body of Principles.

21. Article 14 (3) (c) of the Covenant guarantees that every defendant must have the right to be tried without undue delay. As stated by the Human Rights Committee in its general comment No. 32 (2007), an important aspect of the fairness of a hearing is its expeditiousness, and in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible. In addition, this guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal. The right to be tried without undue delay is reiterated in principle 38 of the Body of Principles. Article 37 of the Code of Criminal Procedure requires that all orders for temporary detention be reasonable and based on documents, and must state the reasons for the detention and the right for the detainee to object. It also stipulates that if an extension is required, a judge must renew the court order for temporary detention after a month, stating the reasons and providing documentation; otherwise the accused must be released with proper bail.

22. The source claims that Ms. Shamsaei was arrested on 18 June 2019 but her trial did not begin for six months. There was no basis for the long delay between Ms. Shamsaei's trial and her initial hearing. As such, it alleges that the Islamic Republic of Iran violated article 14 (3) (c) of the Covenant and principle 38 of the Body of Principles.

b. Allegations in respect of Turkey

i. Category II

23. The source submits that Ms. Shamsaei has been deprived of liberty as a result of the exercise of the rights guaranteed under article 14 of the Universal Declaration of Human Rights, according to which everyone has the right to seek and to enjoy in other countries asylum from persecution.

24. Turkey allegedly held Ms. Shamsaei in detention at the Edirne removal centre on the grounds that she had entered the territory illegally, namely, without permission. Ms. Shamsaei's intention was to seek asylum and she fled to Turkey from the Islamic Republic of Iran owing to the 12-year prison sentence imposed on her. Ms. Shamsaei's administrative arrest allegedly violated her rights under article 14 of the Universal Declaration of Human Rights.

ii. Category III

25. The source states that article 14 (3) (d) of the Covenant guarantees the right to legal defence by stating that those charged with a criminal offence have the right to be tried in their presence, and to defend themselves in person or through legal assistance of their own choosing. In addition, article 14 (3) (b) of the Covenant guarantees such defendants the right to communicate with counsel of their own choosing. In its general comment No. 35, the Human Rights Committee clarified that the guarantee requires that the accused be granted prompt access to counsel, and that States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.

26. The source claims that Ms. Shamsaei was not allowed to communicate with her lawyer when she was under administrative arrest at the Edirne removal centre.

iii. Category IV

27. Finally, the source states that at the time of submission of the communication, Ms. Shamsaei was being held in administrative detention in the Edirne removal centre, and had been there since 15 November 2020. She faced prolonged detention as a refugee and was not granted any remedies. She filed a petition before domestic courts for her release from administrative detention; the first and second instance courts rejected the application. The source alleges that the prolonged administrative detention of Ms. Shamsaei violates her rights under category IV.

Response from the Government of the Islamic Republic of Iran

28. On 11 January 2021, the Working Group transmitted the allegations from the source to the Government of the Islamic Republic of Iran under its regular communications procedure. The Working Group requested the Government to provide, by 12 March 2021, detailed information about the current situation of Ms. Shamsaei and to clarify the legal provisions justifying her detention, as well as its compatibility with the State's obligations under international human rights law, in particular with regard to the treaties ratified by the State.

29. The Working Group regrets that it did not receive a response from the Government of the Islamic Republic of Iran on time. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. The Government submitted a response on 1 June 2021, after the adoption of the present opinion.

Response from the Government of Turkey

30. On 11 January 2021, the Working Group transmitted the allegations from the source to the Government of Turkey under its regular communications procedure. The Working Group requested the Government to provide, by 12 March 2021, detailed information about the current situation of Ms. Shamsaei and to clarify the legal provisions justifying her continued detention, as well as its compatibility with the State's obligations under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Ms. Shamsaei.

31. On 10 March 2021, the Government of Turkey submitted its reply. The Government explains that on 5 November 2020, Ms. Shamsaei was apprehended at the Istanbul airport on suspicion that exit stamps in her passport had been forged. In the interview conducted with her at airport security, she stated that she had entered Turkey illegally, that she had purchased a forged passport in the Islamic Republic of Iran and that she herself had forged a stamp in her passport at the airport. The relevant public prosecutor's office ordered her statement to be taken, as she was considered a suspect in relation to the offence of counterfeiting official documents.

32. Ms. Shamsaei's forged passport was confiscated and her statement was taken in the presence of an interpreter. Prior to making the statement, she was informed of her legal rights. Ms. Shamsaei did not request defence counsel and confirmed the statement she had provided at the airport.

33. On 6 November 2020, the Directorate General of Migration Management in Istanbul issued a removal decision and ordered administrative detention on the grounds that she had breached the rules of entry into and exit from Turkey, and posed a threat to public order and a risk of absconding, in accordance with the Law on Foreigners and International Protection. Ms. Shamsaei was informed of the decisions in Farsi through an interpreter. She did not appeal against the decisions. She was placed in the Edirne removal centre by the Directorate General of Migration Management in Edirne.

34. The Government states that in an interview with Ms. Shamsaei, on 15 November 2020, she specified that she had not faced any violence or ill-treatment from the authorities in Turkey. Ms. Shamsaei also has not lodged any such complaint with the relevant authorities.

She was also able to meet with and be represented by her lawyers when she was under administrative detention at the removal centre.

35. On 15 December 2020, her administrative detention was ended on the condition that she check in with the removal centre every two weeks; she currently resides in Turkey.

36. The Government considers that Ms. Shamsaei's detention was not arbitrary and was in accordance with international human rights law. The Government underlines that Ms. Shamsaei is no longer in administrative detention and was able to apply for legal remedies and benefit from legal aid. It therefore submits that the allegations put forward in the communication letter should be dismissed.

Further comments from the source

37. The reply of the Government of Turkey was transmitted to the source for further comments, which it submitted on 22 March 2021. The source confirms that Ms. Shamsaei was released on 15 December 2020, but argues that immigration detention should be gradually abolished as migrants in an irregular situation have not committed any crime. Hence, Ms. Shamsaei as a migrant in an irregular situation did not commit any crime by how she entered Turkey, and should not have been detained.

38. The source also contests the decision of the Government to order administrative detention in this case on the grounds that she had breached the rules of entry into and exit from Turkey and posed a threat to public order and a risk of absconding, in accordance with the Law on Foreigners and International Protection. The source submits that if there must be administrative detention, the principle of proportionality requires it to be the last resort, and strict legal limitations must be observed and judicial safeguards provided. According to the source, the Government failed to show how the principle of proportionality was met with respect to the administrative detention of Ms. Shamsaei between 15 November and 15 December 2020. The fact that Ms. Shamsaei was released from administrative detention after one month does not preclude the Working Group from rendering an opinion as to whether the administrative detention was arbitrary or not.

39. The source reiterates that Ms. Shamsaei was sentenced to 12 years of imprisonment in the Islamic Republic of Iran and therefore fled to Turkey as a step towards seeking asylum in another country in Europe. However, despite the fact that she is facing 12 years of imprisonment, the Government of Turkey issued a decision of removal on the grounds that she allegedly posed a threat to public order and a risk of absconding, under the Law on Foreigners and International Protection. The decision of removal is the result of Ms. Shamsaei's exercise of the right to seek asylum, as she had fled to Turkey in an attempt to seek asylum in another country in Europe. The source submits that the right to seek asylum is a human right under article 14 of the Universal Declaration of Human Rights. Owing to its decision of removal and by not allowing her to leave Turkey to seek asylum in other countries, the Government of Turkey has allegedly violated Ms. Shamsaei's rights under article 12 (1) and (2) of the Covenant and article 14 of the Universal Declaration of Human Rights. Ms. Shamsaei reportedly did not apply for asylum protection in Turkey because Turkey is not safe for her, as many Iranians who have fled to Turkey have been deported back to the Islamic Republic of Iran.

40. The source further argues that the principle of non-refoulement, prohibiting the return of a refugee to a territory where his or her life or freedom is threatened, is considered a rule of customary international law. As such it is binding on all States, regardless of whether they have acceded to the Convention Relating to the Status of Refugees or the Protocol relating to the Status of Refugees. A refugee seeking protection must not be prevented from entering a country, as this would amount to refoulement.

41. Turning to the Government's claim that Ms. Shamsaei was granted a lawyer and that she did not claim any remedy, the source insists that it is incumbent on the Government to submit evidence proving that the right to a lawyer was granted. The source also highlights that the Government failed to submit evidence proving that Ms. Shamsaei did not claim any remedy.

42. The source concludes by requesting the Working Group to find a violation of the rights referred to in the submission, including article 12 of the Covenant, and that it conclude that Ms. Shamsaei must be released immediately and unconditionally and must be allowed to leave Turkey.

Discussion

43. Before proceeding to examine the allegations in relation to the two States, the Working Group must address a preliminary issue, noting that Ms. Shamsaei is no longer being detained following her release from administrative detention in Turkey on 15 December 2020.

44. The Working Group considers that the application raises serious allegations concerning the arrest, detention, trial and treatment of Ms. Shamsaei in the Islamic Republic of Iran. Given the lengthy imprisonment she would face there, the Working Group has no doubt that Ms. Shamsaei would be detained should she return. Therefore, it will proceed to consider the case vis-à-vis the Islamic Republic of Iran in accordance with paragraph 17 (a) of its methods of work.

45. Equally, although Ms. Shamsaei has been released, she was nevertheless detained in Turkey and the allegations raised by the source are serious. The Working Group therefore will proceed to consider the case also vis-à-vis Turkey, in accordance with paragraph 17 (a) of its methods of work.

Allegations in respect of the Islamic Republic of Iran

46. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

47. In determining whether Ms. Shamsaei's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁴ In the present case, the Government of the Islamic Republic of Iran has chosen not to challenge the prima facie credible allegations made by the source.

48. The source has argued that the arrest and detention of Ms. Shamsaei was arbitrary and falls under categories II and III of the Working Group. The Working Group shall examine these allegations in turn.

a. Category I

49. While the source has not made submissions under category I, the Working Group observes that Ms. Shamsaei was arrested on 18 June 2019 and that no arrest warrant was presented to her. Upon arrest, she was taken to an undisclosed location where she was charged, although it is unclear as to which authority was charging her. The Government has chosen not to contest these allegations.

50. The Working Group recalls that a detention is considered arbitrary under category I if it lacks legal basis. As it has previously stated, for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law that might authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.⁵ Indeed, international law protecting against arbitrary deprivation of liberty includes the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary detention under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of

⁴ A/HRC/19/57, para. 68.

⁵ See opinions No. 46/2017, No. 66/2017, No. 75/2017, No. 79/2018 and No. 35/2018.

Detention or Imprisonment.⁶ Detention and any form of imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles. In the present case, Ms. Shamsaei was arrested without a warrant, in clear violation of her rights under article 9 (1) and (2) of the Covenant.

51. The Working Group notes the uncontested submissions that upon her arrest, Ms. Shamsaei was taken to an unknown location and that subsequently her family did not know of her whereabouts (see para. 7 above).

52. The Working Group considers that this amounted to incommunicado detention. It recalls its consistent jurisprudence confirming that holding persons incommunicado violates their right to be brought before a court under article 9 (3) of the Covenant and to challenge the lawfulness of their detention before a court under article 9 (4) of the Covenant.⁷ This view is consistent with that of the Human Rights Committee, which, in paragraph 35 of its general comment No. 35, stated that incommunicado detention that prevented prompt presentation before a judge inherently violated article 9 (3). The Working Group recalls that judicial oversight of detention is a fundamental safeguard of personal liberty⁸ and is essential in ensuring that detention has a legal basis. Given that Ms. Shamsaei was unable to contact anyone, including her lawyer, which is an essential safeguard to ensure the ability of any detainee to personally challenge his or her detention, her right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

53. Ms. Shamsaei was allegedly charged at the undisclosed location, although it is unclear by which authority. Under no circumstances can the Working Group accept that all these events constituted a properly executed arrest whereby the legal safeguards to ensure Ms. Shamsaei's right not to be subjected to arbitrary detention as stipulated in article 9 (1) and (2) of the Covenant were observed. The Working Group therefore concludes that her detention violated articles 9(1) and (2) of the Covenant.

54. Furthermore, in accordance with article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge must be brought promptly before a judge or other officer authorized by law to exercise judicial power. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorized by law following an arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.⁹

55. Furthermore, any detainee has the right to challenge the lawfulness of his or her detention before a court, as provided for in article 9(4) of the Covenant. The Working Group wishes to recall that the right to challenge the lawfulness of detention before a court is a self-standing human right that is essential to preserve legality in a democratic society.¹⁰ This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,¹¹ including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.¹² Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any

⁶ Opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39.

⁷ See, e.g., opinions No. 79/2017, No. 45/2017, No. 46/2017, No. 11/2018 and No. 35/2018.

⁸ A/HRC/30/37, para. 3.

⁹ Human Rights Committee, general comment No. 35, paras. 32–33.

¹⁰ A/HRC/30/37, paras. 2–3.

¹¹ *Ibid.*, para. 11.

¹² United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, para. 47 (a).

form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.¹³

56. In the present case, the Working Group notes the uncontested allegations that Ms. Shamsaei was arrested on 18 June 2019 but was not presented before the judicial authority until some months later, when her trial commenced in August 2019. The Government had the opportunity to explain reasons for such a delay, but it has chosen not to do so. In these circumstances the Working Group finds that the detention of Ms. Shamsaei violated articles 9 (3) and (4) of the Covenant. It also violated her rights under article 8 of the Universal Declaration and article 2 (3) of the Covenant as she was denied an effective remedy.

57. Noting all the above, the Working Group concludes that the detention of Ms. Shamsaei is arbitrary under category I, as lacking a legal basis.

b. Category II

58. The source has submitted, and the Government has not contested, that Ms. Shamsaei was arrested, detained, tried, and sentenced to 12 years of imprisonment purely for exercising her freedom of opinion and expression.

59. The Working Group recalls that freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and constitute the foundation stone for every free and democratic society.¹⁴ The Human Rights Committee has further stated that the freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers. That right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.¹⁵

60. In the present case, the Government had the opportunity to explain the detention and subsequent charges against Ms. Shamsaei, but has chosen not to do so. The source, on the other hand, has explained her arrest and detention as being based on her activities as a women's rights activist, taking active part in expressing her opinion against the compulsory use of the hijab in the Islamic Republic of Iran. There is no evidence that her activities have been anything but peaceful nor is there any evidence of her inciting others to violence.

61. It is therefore clear to the Working Group that the basis for the arrest and subsequent detention of Ms. Shamsaei was her freedom of opinion and expression. While freedom of expression is not an absolute right, the Human Rights Committee has stated in its general comment No. 34 that when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Moreover, it stipulates that article 19 (3) may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. The permitted restrictions on the right may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. In the same general comment, the Committee stipulates that restrictions are not allowed on grounds not specified in article 19 (3), even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

62. The Working Group also considers that Ms. Shamsaei was arrested, detained, tried, and sentenced to 12 years of imprisonment for peacefully exercising her rights under articles 18 and 25 of the Covenant, namely, freedom of conscience and the right to take part in public affairs. Although the right to freedom of conscience also is not absolute, the Working Group notes that the permitted exceptions to the restrictions are the same as those under article 19 (3) of the Covenant. Article 25, however, does not permit any unreasonable restrictions on the right to participate in public affairs.

¹³ Ibid., para. 47 (b).

¹⁴ Human Rights Committee, general comment No. 34, para. 2.

¹⁵ Ibid., para. 11.

63. In accordance with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and to draw public attention to the observance of human rights.¹⁶ The source has demonstrated that Ms. Shamsaei was detained for the exercise of her rights under that Declaration. The Working Group has in the past concluded that being a human rights defender is a status protected by article 26 of the Covenant.¹⁷

64. The Working Group wishes to express its concern over the types of crimes that Ms. Shamsaei was charged with and appears to have been ultimately sentenced for, which included such vaguely formulated offences as “insulting the sanctities of Islamic society”, “colluding against national security”, “collaborating with dissident networks” and “propaganda activity against the Government”.

65. The Working Group reiterates that the principle of legality requires that laws be formulated with sufficient precision so that individuals may have access to and understand the law and regulate their conduct accordingly.¹⁸ The Working Group further notes that laws that are vaguely and broadly worded may have a deterrent effect on the exercise of the rights to freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, as they have the potential for abuse, including the arbitrary deprivation of liberty.¹⁹ In the present case, the vaguely formulated offences of “insulting the sanctities of Islamic society”, “colluding against national security”, “collaborating with dissident networks” and “propaganda activity against the Government” were used to stifle the freedom of expression legitimately exercised by Ms. Shamsaei.

66. The Working Group consequently finds that the detention of Ms. Shamsaei resulted from her legitimate exercise of freedom of thought and conscience, opinion and expression, and her participation in public affairs, as protected by articles 18, 19 and 25 of the Covenant, and was therefore arbitrary, falling under category II. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

c. Category III

67. Given its finding that the deprivation of liberty of Ms. Shamsaei was arbitrary under category II, the Working Group wishes to emphasize that her trial should not have taken place. However, the trial did take place, Ms. Shamsaei was sentenced to 12 years of imprisonment and the source has made numerous allegations concerning violations of her fair trial rights, none of which are contested by the Government.

68. The Working Group initially notes the circumstances of Ms. Shamsaei’s arrest, which involved numerous officials who blindfolded her and took her to an undisclosed location, following which she was transferred to solitary confinement in Evin Prison. While in solitary confinement, she was subjected to repeated daily interrogations and psychological pressure and harassment. The interrogations took place in the absence of Ms. Shamsaei’s lawyer and her family members were not informed of her whereabouts. The Working Group notes the absence of response from the Government to any of these allegations.

69. The Working Group recalls that the right to legal assistance must be ensured from the moment of deprivation of liberty and, in the context of the criminal justice setting, prior to questioning by the authorities.²⁰ Ms. Shamsaei’s right to legal assistance under article 14 (3) (b) of the Covenant was thus violated, as she was repeatedly interrogated in the absence of

¹⁶ Articles 1 and 6 (c). See also General Assembly resolution 74/146, para. 12.

¹⁷ See, e.g., opinions No. 48/2017, No. 50/2017, No. 88/2017, No. 19/2018 and No. 36/2020, and A/HRC/36/37, para. 49.

¹⁸ See, e.g., opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59.

¹⁹ Opinion No. 10/2018, para. 55.

²⁰ A/HRC/45/16, para. 51.

her lawyer. This right was further violated, as were her rights under article 14 (3) (d), when she was also denied legal assistance during her trial before Branch 28 of the Islamic Revolutionary Court in August 2019.

70. Furthermore, the treatment of Ms. Shamsaei during and following her arrest gives rise to concern over the compliance of the Islamic Republic of Iran with article 7 of the Covenant. The Working Group therefore refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

71. The source alleges that Ms. Shamsaei was held in solitary confinement for 15 days following her arrest. In accordance with rule 45 of the Nelson Mandela Rules, the imposition of solitary confinement must be accompanied by certain safeguards. Solitary confinement must be used only in exceptional cases as a last resort, for as short a time as possible, subject to independent review, and authorized by a competent authority. These conditions do not appear to have been observed in the present case. The Working Group also recalls that prolonged solitary confinement in excess of 15 consecutive days is prohibited under rules 43 (1) (b) and 44 of the Nelson Mandela Rules.²¹

72. The Working Group further finds that the failure by the authorities to allow Ms. Shamsaei to notify her family of her whereabouts is a violation of principles 16(1) and 19 of the Body of Principles. Although the source has not submitted that the trial was conducted behind closed doors, the Working Group also notes that Ms. Shamsaei's family was not allowed to be present at her trial and the Government has not provided any explanation for this. The Working Group reminds the Government that article 14(1) of the Covenant requires trials to be conducted in public.

73. Finally, the Working Group considers that Ms. Shamsaei was not afforded the right to be tried without undue delay, given that some six months elapsed between her arrest and trial. The reasonableness of any delay in bringing a case to trial must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the authorities.²² The delay in bringing Ms. Shamsaei to trial was unacceptably long, given the Working Group's findings under category II above, and therefore in violation of articles 9 (3) and 14 (3) (c) of the Covenant. As noted, it is clear that Ms. Shamsaei should never have been detained for the peaceful exercise of her rights under international human rights law, and the delay in trying her was unacceptable.²³

74. Noting all the above, the Working Group concludes that the detention of Ms. Shamsaei also falls under category III.

d. Category V

75. Finally, the Working Group recalls that the deprivation of liberty is regarded as arbitrary under category V when it constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings. It also recalls that it applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or where human rights defenders are involved.²⁴

²¹ See also opinions No. 52/2018, para. 79 (d) and No. 61/2020, para. 85.

²² Human Rights Committee, general comment No. 35, para. 37; and general comment No. 32, para. 35.

²³ Compare with opinion No. 46/2019, para. 63, in which the Working Group was not convinced that there was a category II violation and was unable to find that a 16-month delay before the trial was unreasonable. See also opinions No. 15/2020 and No. 16/2020.

²⁴ Opinions No. 64/2011, para. 20, No. 54/2012, para. 29; No. 62/2012, para. 39; No. 41/2017, para. 95; No. 57/2017, para. 46; and No. 88/2017, para. 25. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (opinion No. 39/2012, para. 45). See also the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 9 (3).

76. The present case concerns a prominent women's right activist in the Islamic Republic of Iran who has actively engaged in many public campaigns and displays of her opposition to the compulsory wearing of the hijab in the Islamic Republic of Iran since at least 2016. Her activism was not welcomed by the authorities and in fact resulted in her being sentenced to 12 years of imprisonment for what the Working Group has established above was merely the peaceful exercise of her rights under articles 18, 19 and 25 of the Covenant. The Working Group also established that she had been detained owing to her status as a human rights defender, in violation of her rights under article 26 of the Covenant.

77. Furthermore, the Working Group also finds that Ms. Shamsaei was detained because of her gender. As a women's rights activist, she engaged in a gender-specific type of protest by taking off her hijab in public places.

78. Noting all of the above, the Working Group finds that the detention of Ms. Shamsaei was due to her gender, the expression of her opinions and her status as a human rights defender, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Her deprivation of liberty is arbitrary according to category V. The Working Group refers the case to the Special Rapporteur on the situation of human rights defenders and the Working Group on discrimination against women and girls for appropriate action.

e. Final remarks

79. In its 30-year history, the Working Group has found the Islamic Republic of Iran in violation of its international human rights obligations in over 40 cases.²⁵ The Working Group is concerned that this indicates a widespread or systemic arbitrary detention in the country, which amounts to a serious violation of international law. The duty to comply with international human rights standards rests with all State organs, officers and agents. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.²⁶

80. The Working Group considers that the present case involves serious human rights violations and has decided to refer the present case to the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran for appropriate action.

Allegations in respect of Turkey

81. The Working Group thanks the source and the Government of Turkey for their submissions.

82. In determining whether Ms. Shamsaei's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by either of the Government

²⁵ See decisions No. 1/1992, No. 28/1994 and No. 14/1996; and opinions No. 39/2000, No. 30/2001, No. 8/2003, No. 14/2006, No. 19/2006, No. 26/2006, No. 4/2008, No. 34/2008, No. 39/2008, No. 6/2009, No. 2/2010, No. 8/2010, No. 20/2011, No. 21/2011, No. 58/2011, No. 30/2012, No. 48/2012, No. 54/2012, No. 18/2013, No. 28/2013, No. 52/2013, No. 55/2013, No. 16/2015, No. 44/2015, No. 1/2016, No. 2/2016, No. 25/2016, No. 28/2016, No. 50/2016, No. 7/2017, No. 9/2017, No. 48/2017, No. 49/2017, No. 92/2017, No. 19/2018, No. 52/2018, No. 83/2018, No. 32/2019, No. 33/2019; No. 51/2019 and No. 83/2020.

²⁶ A/HRC/13/42, para. 30; and opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 50/2012, para. 27; No. 60/2012, para. 21; No. 9/2013, para. 40; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 34/2014, para. 34; No. 35/2014, para. 19; No. 36/2014, para. 21; No. 44/2016, para. 37; No. 60/2016, para. 27; No. 32/2017, para. 40; No. 33/2017, para. 102; No. 36/2017, para. 110; No. 51/2017, para. 57; and No. 56/2017, para. 72.

that lawful procedures have been followed are not sufficient to rebut the source's allegations.²⁷

83. The source alleges that the administrative detention of Ms. Shamsaei by the Turkish authorities from 15 November to 15 December 2020 was arbitrary, falling under categories II, III and IV.

84. In relation to allegations under category II, the source submits that Ms. Shamsaei was detained due to her legitimate exercise of the right to seek asylum. The Government however denies this and explains that Ms. Shamsaei was arrested because she presented a passport with forged exit stamps in it. When questioned about this by the authorities at the Istanbul airport, Ms. Shamsaei admitted to having entered Turkey illegally, with the help of people smugglers, to purchasing a forged passport and to forging the requisite exit stamps herself, which prompted her detention as required by the law. The source contests this and argues that the detention of Ms. Shamsaei was disproportionate in the circumstances.

85. The Working Group recalls that article 14 of the Universal Declaration of Human Rights vests everyone with the right to seek asylum. However, Ms. Shamsaei was not seeking asylum in Turkey and indeed, was not detained for seeking to do so. By the source's own account, Ms. Shamsaei was detained because she presented a forged passport and, following that, she was detained for one month before being released. In these circumstances, the Working Group considers that the Turkish authorities did not detain Ms. Shamsaei because of her legitimate exercise of the rights protected by international law but rather on the basis of a reasonable suspicion that she had violated the law by forging a passport. Her detention consequently does not raise an issue under category II.

86. The source has further submitted that the detention of Ms. Shamsaei falls under category III as during her administrative detention she was denied legal assistance. The Working Group notes that the Government has addressed these allegations specifically and explained the circumstances of her detention at the Istanbul airport. The Government stipulated that an interpreter was called to assist Ms. Shamsaei, that her legal rights were explained to her with the assistance of an interpreter and that only following her declining legal assistance was her statement taken with the assistance of an interpreter. Thereafter the Government also contends that on 6 November 2020, when the deportation decision was taken, it was explained to her with the assistance of an interpreter and subsequently she was able to meet with and be represented by her lawyers when she was under administrative detention at Edirne removal centre. In its further comments the source does not contest any of this detailed submission but merely points out a lack of evidence from the Government substantiating the material it had provided.

87. In these circumstances, noting the discrepancies between the submissions, the Working Group is unable to reach a conclusion concerning allegations in relation to Turkey under category III.

88. Finally, in relation to category IV, the source has also argued that this was administrative detention of a migrant in an irregular situation and, as such, should have been a measure of last resort. In the view of the source, the Government failed to act proportionately by detaining Ms. Shamsaei. The Government however denies this and reiterates that Ms. Shamsaei presented a forged passport at the Istanbul airport and freely admitted to having entered Turkey illegally, having engaged people smugglers to assist her, purchasing a forged passport and forging the requisite exit stamps.

89. As the Working Group has explained in its revised deliberation No. 5, any form of administrative detention or custody in the context of migration must be applied as an exceptional measure of last resort, for the shortest period and only if justified by a legitimate purpose, such as documenting entry and recording claims or initial verification of identity if in doubt.²⁸

²⁷ A/HRC/19/57, para. 68.

²⁸ A/HRC/39/45, annex, para. 12.

90. This echoes the views of the Human Rights Committee, which stated the following in paragraph 18 of its general comment No. 35 on liberty and security of person:

Asylumseekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of a particular reason specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.

91. In the present case, Ms. Shamsaei was first detained after having presented a forged passport to the authorities at Istanbul airport and thereupon admitting to having entered Turkey illegally, having engaged people smugglers to assist her, purchasing the said forged passport and forging the requisite exit stamps herself. Thereafter, from 15 November to 15 December 2021 she was detained administratively as a migrant in an irregular situation before being released on a condition of fortnightly reporting. The source has confirmed that Ms. Shamsaei has been released.

92. The Working Group recalls that category IV applies to cases of prolonged administrative detention of migrants without the possibility of administrative or judicial review. In the present case, the Working Group considers that the Turkish authorities did not act disproportionately by detaining her, as the true nature of her being smuggled into the country and her stay in Turkey, including the full picture of the surrounding circumstances, had to be established.

93. Moreover, the decision to administratively detain Ms. Shamsaei was reviewed, as she was released after a month of administrative detention, a period that cannot be described as prolonged. Although it was submitted by the source and confirmed by the Government that during this time a deportation order was issued, the Working Group observes that it was never executed. Instead, Ms. Shamsaei was released. While it could be argued that such a release may have been enacted more speedily, for the Working Group to make such an assessment would require it to trespass into the sovereign domain of domestic authorities, which it has consistently refrained from doing. The Working Group therefore considers that the detention of Ms. Shamsaei does not raise an issue under category IV.

94. The Working Group wishes to take this opportunity to remind the Government of Turkey of the absolute prohibition of non-refoulement. In the present case, noting the findings of the Working Group above clearly establishing that Ms. Shamsaei was subjected to arbitrary detention in the Islamic Republic of Iran, it is the duty of the Government not to return Ms. Shamsaei there. Indeed, doing otherwise would constitute a clear violation of the absolute prohibition of non-refoulement. The Working Group urges the Government to consider positively the wish of Ms. Shamsaei to leave Turkey for another State in Europe. The Working Group refers the case to the Special Rapporteur on the human rights of migrants for appropriate action.

95. The Working Group also recalls that article 10 of the Covenant requires that all persons deprived of their liberty be treated with respect for their human dignity and that this applies also to those held in the context of migration. As the Working Group stated in its revised deliberation No. 5, all detained migrants must be treated humanely and with respect for their inherent dignity. The conditions of their detention must be humane, appropriate and respectful, noting the non-punitive character of the detention in the course of migration proceedings.²⁹

Disposition

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

Regarding the Islamic Republic of Iran:

The deprivation of liberty of Nasibe Shamsaei, being in contravention of articles 2, 3, 7, 8, 9, 10, 11 and 19 of the Universal Declaration of Human Rights and articles 2 (1)

²⁹ Ibid., para. 38.

and (3), 9, 14, 18, 19, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

In relation to Turkey:

The detention of Ms. Nasibe Shamsaei in Turkey did not amount to arbitrary detention.

97. The Working Group requests the Government of the Islamic Republic of Iran to take the steps necessary to remedy the situation of Ms. Shamsaei without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

98. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to cease all proceedings against Ms. Shamsaei, quash her existing convictions and expunge her criminal record, if such exists, and accord her an enforceable right to compensation and other reparations, in accordance with international law.

99. The Working Group urges the Government of the Islamic Republic of Iran to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Shamsaei and to take appropriate measures against those responsible for the violation of her rights.

100. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on the human rights of migrants; (b) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; (c) the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; (d) the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran; (e) the Special Rapporteur on the situation of human rights defenders; and (f) the Working Group on discrimination against women and girls, for appropriate action.

101. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

102. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government of the Islamic Republic of Iran to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether compensation or other reparations have been made to Ms. Shamsaei;
- (b) Whether an investigation has been conducted into the violation of Ms. Shamsaei's rights and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Islamic Republic of Iran with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

103. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

104. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

105. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views

and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³⁰

[Adopted on 7 May 2021]

³⁰ Human Rights Council resolution 42/22, paras. 3 and 7.