United Nations A/HRC/WGAD/2012/36

General Assembly

Distr.: General
23 November 2012

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-fourth session, 27–31 August 2012

No. 36/2012 (China)

Communication addressed to the Government on 23 April 2012

Concerning Qi Chonghuai

The Government did not reply to the communication.

The State is not a 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. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

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

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

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

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

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

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

Submissions

Communication from the source

3. Qi Chonghuai is a self-taught writer and journalist. In his writings Qi Chonghuai has referred to instances of alleged corruption and cases of social injustice. Over the years, he has been threatened, ill-treated and imprisoned as a result of his work. He is currently incarcerated at Zaozhuang city prison in Shandong province, China.

4. Qi Chonghuai's writings have appeared in domestic and foreign media. He was briefly the director of *Fazhi Zaobao* (Legal System Morning News) and later worked for the *Weekend* edition of the *Legal System Daily* and the *Jizhe Guancha* (Journalist Observer). Qi Chonghuai has also published articles in *Shandong Zhoukan* (Shandong Weekly), *Renmin Gong'an Bao* (People's Public Security News) and *Zhongguo Anquan Shengchan Bao* (China Work Safety News).

5. On 8 June 2007, the *Epoch Times* published a story by Qi Chonghuai on a local party cadre who had allegedly beaten a woman for being late to work. On 14 June 2007, the website of the official news agency of China published a story by Qi Chonghuai exposing corruption of Tengzhou city government in Shandong province, in particular the use of tax money to construct the Haohua Government Office Building in Tengzhou. Following the appearance of these publications, on the night of 25 June 2007, Qi Chonghuai was arrested at his home in Jinan city by police officers from Tengzhou city. The police confiscated his press card, computer and other digital equipment.

6. Following his arrest on 25 June 2007, Qi Chonghuai was first informed that he was being detained on suspicion of "deception" for allegedly misrepresenting himself as a journalist. On 2 August 2007, he was formally charged with "extortion and blackmail". For the first two months of his detention, Qi Chonghuai was held incommunicado. His family did not receive a notice of his detention.

7. From 2 August to 2 November 2007, Qi Chonghuai remained in pretrial detention at the Tengzhou city detention centre while awaiting formal arrest pending investigation by the Tengzhou People's Procuratorate. In February 2008, Qi Chonghuai's case was given back to the police for further investigation.

8. On 13 May 2008, Qi Chonghuai was sentenced to four years' imprisonment on charges of "extortion and blackmail". His trial lasted 12 hours. Access to the trial was strictly controlled and no media were allowed to attend the proceedings. It is alleged that, during a recess of the trial proceedings, Qi Chonghuai was beaten by the guards. Similar allegations of ill-treatment are made with regard to Qi Chonghuai's detention before and after the trial. He was also allegedly forced to hard labour while in prison.

9. On 8 August 2008, Qi Chonghuai was placed in Tengzhou prison, Shandong province, China. In June 2009, he was transferred to Zaozhuang prison, Shandong province, China. His family was not informed about the relocation. Reportedly, it was not until April

2010 that any family member could visit Qi Chonghuai. Similarly, his legal counsel was denied access in 2010.

10. On 27 April 2011, the Tengzhou police interrogated Qi Chonghuai and told him that they would seek to keep him in prison, charging him with "extortion and blackmail" and "embezzlement". On 4 May 2011, Qi Chonghuai was again interrogated and denied access to his legal counsel. On 9 May 2011, Qi Chonghuai called his wife to request legal counsel. Although he was facing the same charges as those that had been brought shortly after his arrest, the Tengzhou police sent his case to the Procuratorate on 27 May 2011. The latter forwarded it to the Court, reportedly without any analysis or investigation. Qi Chonghuai's lawyers were given 12 days to prepare his defence before a new trial.

11. Qi Chonghuai was supposed to be released on 25 June 2011 after having served his four-year prison term with deduction of the 12 months spent in the Tengzhou city detention centre. However, on 9 June 2011, he was convicted and sentenced by the Tengzhou City Court to an additional period of eight years on charges of "extortion and blackmail" and "embezzlement" that were brought against him shortly after his arrest. Qi Chonghuai had pleaded not guilty to the charges of "extortion and blackmail" and "embezzlement" and stated that he was being punished for continuing to write during his time in prison. The Zaozhuang Intermediate Court upheld the sentence on 26 July 2011.

12. Qi Chonghuai's conviction, which gave rise to an additional period of detention, is based on four incidents taking place prior to 2007 during which he allegedly received money while on assignment. He had allegedly been forced to confess to these incidents under torture during a police interrogation conducted in 2007. However, the Procuratorate did not indict him on the basis of this confession when he was first prosecuted for "extortion and blackmail" in 2008.

13. The source maintains that Qi Chonghuai's detention is directly related to his journalistic work and in particular publications exposing instances of corruption by local authorities. According to the source, the detention is arbitrary as it results from Qi Chonghuai's peaceful exercise of the right to freedom of opinion and expression as contained in article 19 of the Universal Declaration of Human Rights.

14. The source further points to a number of procedural irregularities while in pretrial detention. At the time of his arrest, Qi Chonghuai was not shown a warrant for his detention in violation of article 64 of the Chinese Criminal Procedure Law. At the time of his arrest, the police officers searched his home and confiscated several articles without Qi Chonghuai or his family being given a receipt of the articles confiscated, in alleged violation of article 115 of the Chinese Criminal Procedure Law. Furthermore, Qi Chonghuai's family did not receive a detention notice with information on where he was being held nor for what reason, in purported violation of article 71 of the Chinese Criminal Procedure Law. In addition, Qi Chonghuai was, on a number of occasions, refused access to his legal counsel and had his family visitations restricted.

15. Moreover, the source maintains that Qi Chonghuai's right to a fair trial was not respected and as a result renders his detention arbitrary. To support this contention, the source indicates that the charge for Qi Chonghuai's prior conviction in 2008 was "extortion and blackmail", as specified in article 274 of the Criminal Law and is exactly the same as the new charge levied against Qi Chonghuai in 2011.

16. The charge of "extortion and blackmail" brought against Qi Chonghuai is based on three main accusations. First, in 2005, Qi Chonghuai and others pretended to act as journalists. They came to Xintai city's Shuang'gao coal mine, Shandong province and took interviews about a case of worker's injury. They then threatened the local officials that they would write critical stories and publish them unless they were paid 30,000 yuan. Second, in April 2006, Qi Chonghuai and others passed themselves off as journalists. They came to

Xinxu starch factory, Dongguo County, Tengzhou city. They conducted interviews about the corn storage tank explosion that had resulted in deaths. They then threatened the local officials that they would write critical stories and publish them unless they were paid 4,000 yuan. Third, in November 2006, Qi Chonghuai and others passed themselves off as journalists. They came to Shandong province's Ji'ning city's Jiaxiang county hospital. They interviewed the hospital employees on a medical dispute that had taken place there and afterwards allegedly threatened the officials that they would write critical stories and publish them unless paid 15,000 yuan.

17. The secondary charge brought against Qi Chonghuai was that of "embezzlement" under article 271 of the Chinese Criminal Code. Reportedly, in January 2005, during the period that the defendant was working at the "China production safety newspaper" office in Shandong province as a deputy Bureau Chief, he forged house rental release contracts and receipts, and defrauded the office for 180,800 yuan. Except the expenses of 20,000 yuan on employees' salary and 10,000 yuan on house rental, the remaining amount was allegedly spent on the purchase of a car for personal use.

18. However, as the charge of "extortion and blackmail" had already been levied upon Qi Chonghuai in 2008, the same charge for the same set of facts could not be applicable in the conviction leading to his sentencing in 2011 by Tengzhou City Court and its confirmation by the Zaozhuang Intermediate Court. This, according to the source, is in violation of the quintessential principle of *ne bis in idem*, as contained in international human rights law. In the source's view, such a double jeopardy should render the verdict void.

Response from the Government

19. The Working Group regrets that the Government did not provide a response to the allegations from the source within the 60-day period prescribed in paragraph 15 of the Working Group's methods of work.

20. Despite the absence of the Government's response, the Working Group is in a position to render its Opinion on the detention of Qi Chonghuai, in conformity with paragraph 16 of its methods of work.

Discussion

21. The Government did not challenge the allegations by the source that Qi Chonghuai, after having served his prison term, was convicted and sentenced by the Tengzhou City Court on 9 June 2011 to an additional period of eight years on the same charges of "extortion and blackmail" that were brought against him in 2008 and in relation to exactly the same facts for which he had already served his sentence.

22. The Working Group considers that the new conviction of Qi Chonghuai, based on the same set of facts and charges, gravely violates the right to fair trial, more particularly the principle of *ne bis in idem*, according to which no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. The Working Group finds that the principle of *ne bis in idem* is so widely recognized across national jurisdictions that it can be regarded as a general principle of international law or as part and parcel of customary international law. Not only is such a principle is contained in article 14, paragraph 7, of the International Covenant on Civil and Political Rights but it also finds expression in many national constitutions. In the Working Group's view, the principle of *ne bis in idem* constitutes one of the essential guarantees in criminal justice proceedings, an imperative of a public and fair trial. The breach of this quintessential principle in the case of Qi Chonghuai leads the Working Group to conclude that his rights not be deprived

arbitrarily from his liberty and to a fair trial under articles 9, 10 and 11 of the Universal Declaration of Human Rights have been impaired.

Disposition

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

> The deprivation of liberty of Qi Chonghuai ongoing since June 2011 is arbitrary, being in contravention of articles 9, 10, and 11 of the Universal Declaration of Human Rights. Qi Chonghuai's detention falls under category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

24. The Working Group requests the Government to take the necessary steps to remedy the situation, which, under the specific circumstances of this case, are the immediate release of and adequate compensation to Qi Chonghuai.

[Adopted on 30 August 2012]