

Mandates of the Special Rapporteur on the situation of human rights in Belarus and the Working Group on Arbitrary Detention

Ref.: AL BLR 8/2023
(Please use this reference in your reply)

14 September 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights in Belarus and Working Group on Arbitrary Detention, pursuant to Human Rights Council resolutions 50/20 and 51/8.

In this connection, we would like to bring to the urgent attention of your Excellency's Government information we have received concerning **the use of article 411 of the Criminal Code of Belarus on Malicious disobedience to the requirements of the administration of the correctional institution executing punishment in the form of imprisonment in criminal cases against Palina Sharenda-Panasiuk and Viktoryia Kulsha.**

According to the information received:

On 9 June 2021, the Maskoŭski District Court of Brest convicted Palina Sharenda-Panasiuk and sentenced her to 24 months of imprisonment. On 7 April 2022, she was convicted by Judge [REDACTED] of the Čyhunačny District Court of Homieł and sentenced to an additional year in prison. On 8 June 2022, Judge [REDACTED] of the Homieł Regional Court upheld the verdict. A second trial under article 411 took place on 16 May 2023.

On 4 June 2021, the Zavodski District Court of Minsk convicted Viktoryia Kulsha and sentenced her to two years and six months of imprisonment. On 13 June 2022, Viktoryia Kulsha was convicted under article 411 of the Criminal Code by Judge [REDACTED] of the Čyhunačny District Court of Homieł and sentenced to an additional 12 months imprisonment. The conviction was upheld by the Homieł Regional Court on 10 August 2022. On 7 April 2023, Judge [REDACTED] convicted Viktoryia Kulsha under article 411 and sentenced her to 12 additional months of imprisonment. Palina Sharenda-Panasiuk and Viktoryia Kulsha have reportedly been held in punishment cells for months.

Article 411 provides that if a person is subjected to disciplinary punishment within a year of their sentence in the form of transfer to a cell-type room, a specialized ward, solitary confinement or transfer of prison due to malicious disobedience or other opposition to the lawful demands of the administration of a correctional institution executing punishment in the form of deprivation of liberty, they may be punished by imprisonment for a term of up to two years. Malicious disobedience to the requirements of a correctional institution executing punishment in the form of imprisonment, committed by a person convicted of a grave or especially grave crime or who has committed an especially dangerous recidivism, is punishable by imprisonment of up to two years.

As a result of the application of article 411, criminal liability is derived from a disciplinary offense. The Criminal Code does not contain a list of violations that may entail disciplinary responsibility. Under article 411, prison sentences may be imposed as a result of disciplinary sanctions imposed by officials of the Ministry of Interior in prisons and penal colonies, which may be arbitrary and disproportionate to the gravity of the offense. Further, punishment under article 411 of the Criminal Code is an additional punishment for the same offense(s) for which prisoners have already served disciplinary sanctions.

The use of article 411 by the courts in Belarus reportedly expanded significantly since the 2020 presidential elections, with at least 27 persons held on political grounds being sentenced to additional prison terms, compared to two prior to the elections.

Without prejudging the accuracy of these allegations, we would like to express our concern about the use of article 411 of the Criminal Code, which may constitute a violation of the right not to be tried or punished twice for the same offence. We are further concerned that article 411 may be used to prevent the political opposition and activists from operating in an enabling environment and carrying out their legitimate activities without fear of harassment or criminalization of any kind.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

Further, we would like to inform your Excellency's Government that after having transmitted the information contained in the present communication to the Government, the Working Group on Arbitrary Detention may also transmit the case through its regular procedure in order to render an opinion on whether the deprivation of liberty was arbitrary or not. The present communication in no way prejudices any opinion the Working Group may render. The Government is required to respond separately to the allegation letter and the regular procedure.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the legal and factual basis for the trial and convictions of Palina Sharenda-Panasiuk and Viktoryia Kulsha under article 411 of the Criminal Code and explain how is in conformity with your obligations under international human rights law.
3. Please indicate what measures have been taken to ensure that political opposition and activists can operate in an enabling environment and can carry out their legitimate activities without fear of harassment or criminalization of any kind.

We would appreciate receiving a response within 60 days. After this deadline, this communication and any response received from your Excellency's Government will be made public through the communications reporting [website](#). Please note that only the main document will be published, the annexes if any will be kept internally for the mandate holders' review. They will also be made available subsequently in the regular report to be submitted to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to prevent the re-occurrence of such alleged violation and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Anaïs Marin

Special Rapporteur on the situation of human rights in Belarus

Matthew Gillett

Vice-Chair on communications of the Working Group on Arbitrary Detention

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to remind your Excellency's Government to the International Covenant on Civil and Political Rights, ratified by Belarus on 12 Nov 1973.

Article 9 of the International Covenant on Civil and Political Rights provides that no one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. As interpreted by the Human Rights Committee in General Comment No. 35 (CCPR/C/GC/35), the notion of "arbitrariness" is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity, and proportionality (paragraph 12). In addition, Article 9 (4) of the Covenant states that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. The Working Group on Arbitrary detention has established in its jurisprudence that even if the arrest of an individual has been carried out in accordance with the provisions of article 9 of the Covenant, it does not automatically mean that the continued deprivation of liberty also complies with that provision. In other words, it is not only the initial fact of detention that must be in accordance with article 9 of the Covenant, but it is also the duty of the authorities to ensure that the continued detention respects that provision.

Article 14 of the International Covenant on Civil and Political Rights establishes that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against them. It further states that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

In its general comment no. 32 on article 14: Right to equality before courts and tribunals and to a fair trial, the Human Rights Committee found that "[t]he requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature." The General Comment further states that "a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal."

Regarding a fair and public hearing, general comment no. 32 states that "all trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings

and thus provides an important safeguard for the interest of the individual and of society at large.” While article 14 of the International Covenant on Civil and Political Rights provides that “the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”, these should be exceptional circumstances.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.