



# General Assembly

Distr.: General  
14 February 2019

Original: English

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

#### Opinion No. 76/2018 concerning Shapi Shakhshaev (Russian Federation)

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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 31 July 2018 the Working Group transmitted to the Government of the Russian Federation a communication concerning Shapi Shakhshaev. The Government submitted a late response on 3 December 2018. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his 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, 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. Mr. Shakhshaev, born in 1978 in Makhachkala, is a national of the Russian Federation, usually residing in Moscow. He is the father of three minor children. Prior to his arrest, Mr. Shakhshaev worked as a self-employed businessperson.

### Arrest and detention

5. The source reports that on the morning of 12 August 2015, Mr. Shakhshaev was invited to the Presnenskiy inter-district investigating agency, a unit of the Central Administrative district investigation department working under the main investigation department of the Investigative Committee of the Russian Federation, as a witness in relation to the disappearance of his ex-wife, Fatima Shakhshaeva, who had been missing since 13 June 2015. During his interrogation as a witness, Mr. Shakhshaev was informed that he was being arrested for the murder of his ex-wife.

6. On 14 August 2015, Mr. Shakhshaev was remanded in pretrial detention by a judge of Presnenskiy district court, who had also issued the warrant for a search of his house on 10 August 2015 and who served as the single judge appointed to conduct the trial hearings. According to the source, the decision was based on trumped-up charges and fabricated evidence. Mr. Shakhshaev's initial pretrial detention for two months was subsequently extended six times, with the last extension from 12 December 2016 to 12 February 2017.

7. On 2 February 2017, the same judge was assigned to conduct the trial hearings. The source reports that although there was a clear conflict of interest, the judge did not recuse herself from the case. On 8 February 2017, she extended Mr. Shakhshaev's detention. The trial commenced on 20 February 2017 and was completed on 14 November 2017.

8. On 14 November 2017, after almost two and a half years of pretrial detention (consisting of one and a half years of pretrial investigation and 10 months of trial hearings), the judge issued a guilty verdict, which was allegedly based on bare assumptions and planted and fake evidence, as well as evidence collected during a pretrial investigation that was conducted poorly and in a suspect manner.

9. According to the source, Mr. Shakhshaev was convicted for a crime that he had not committed and sentenced to 12 years of imprisonment, leaving his three minor children without care.

10. On 20 November 2017, the defence lawyers and Mr. Shakhshaev appealed the verdict to the Moscow city appellate court, which, on 11 April 2018, summarily dismissed the appeals, leaving the guilty verdict and sentence unchanged.

### Background

11. Referring to the country visit report of the Special Rapporteur on the independence of judges and lawyers, the source notes that the judicial system in the Russian Federation (including judges, investigators, lawyers and bailiffs) is perceived as corrupt.<sup>1</sup> Mr. Shakhshaev has allegedly fallen victim to the systemic corruption of law enforcement agencies and the judiciary. The source alleges that this miscarriage of justice was organized or ordered by one of the most influential people in the country, who is a tycoon and a lawmaker of the upper house of the parliament.

12. In December 2014, a few months before Ms. Shakhshaeva's disappearance, Mr. Shakhshaev accompanied his brother to a meeting with that individual in order to discuss the return of Makhachkala international airport, which had been illegally seized and had then been auctioned on 6 June 2014 to Doxa Investments Limited, a company with which Mr. Shakhshaev's brother was affiliated. The source reports that the meeting ended in a brawl, after the individual falsely accused Mr. Shakhshaev's brother of collaborating with the

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<sup>1</sup> A/HRC/26/32/Add.1, para. 23. The source also refers to concluding observations of the Human Rights Committee, CCPR/C/RUS/CO/7, para. 17.

French authorities and leaking information incriminating the individual in tax evasion and fraud. The influential individual threatened to eliminate both Mr. Shakhshaev and his brother and destroy the lives of their families. The source reports that it was useless to complain to the allegedly corrupt Russian authorities about the illegal actions of this individual. Mr. Shakhshaev's brother flew to France, where he has been residing for many years; out of fear for the well-being of his family, he has never returned to the Russian Federation.

13. According to the source, the influence of this particular individual in the Russian Federation is enormous. He has allegedly built his lucrative natural resources business through a combination of debt, an appetite for risk, and political connections. The source notes that as one of the most powerful individuals in the Russian Federation, he could easily, out of revenge, have organized and induced the law enforcement and judicial authorities to single out and persecute Mr. Shakhshaev for a crime that he had not committed.

14. The source alleges that the strong intention of the Government to put Mr. Shakhshaev behind bars at all costs is evident from the well-orchestrated propaganda of the Investigative Committee of the Russian Federation aimed at securing Mr. Shakhshaev's conviction by demonizing him through the national media as a murderer. Shortly after Mr. Shakhshaev's arrest, between August and November 2015, there had been a constant leak of details of the investigation and personal information, including photos and videos, to the media from his mobile telephones, which had been seized by the investigator. According to the source, this was a blatant violation of Mr. Shakhshaev's right to the presumption of innocence.

15. In this respect, the source adds that the 2015 media campaign related to the present case, which had placed special emphasis on unconfirmed rumours that Ms. Shakhshaeva had not joined Islamic State in Iraq and the Levant but had been killed and mutilated by her ex-husband, was very likely initiated, or even orchestrated and planned, by the above-mentioned influential individual as part of his revenge.

16. Furthermore, the source notes that the media campaign conveniently coincided with the publication of a report by Human Rights Watch on the response of the Russian Federation to the Dagestan insurgency, issued in June 2015.<sup>2</sup> At that time, efforts were being made to play down the real number of citizens of the Russian Federation, including women, from Dagestan who had joined Islamic State in Iraq and the Levant in the Syrian Arab Republic. The source notes that the Government announced the real number of citizens who had joined only in September 2015, when it launched its military operation in the Syrian Arab Republic.

#### Disappearance of Ms. Shakhshaeva

17. According to the source, the fate of Ms. Shakhshaeva remains a mystery, as the law enforcement agencies have never taken steps or made efforts to discover her whereabouts and establish exactly what happened to her. She left her house on 13 June 2015 at approximately 11.30 a.m., telling Mr. Shakhshaev that she was going with her girlfriend to Makhachkala (her home town) in Dagestan, through Grozny in Chechnya, and has not been seen since.

18. According to the source, the detailed bill for Ms. Shakhshaeva's mobile telephone showed that her last conversation was on 13 June 2015 at 12.43 a.m., for 92 minutes, with a newly acquainted male friend from Chechnya. Despite the fact that the new friend was well known to the Investigative Committee, he was never interrogated during the pretrial investigation. He was reportedly questioned for the first time during the trial hearing for half an hour, with limited opportunity provided for the defence to question him. According to the detailed bill, from 10.51 a.m. on 13 June 2015, Ms. Shakhshaeva's mobile received several telephone calls, which were left unanswered. However, according to the source, it is evident that the mobile data was in use, which might indicate that she was using her Internet-based messengers for communication, including telephone calls from her friend who picked her up on the way to Grozny.

<sup>2</sup> Human Rights Watch, "Invisible war: Russia's abusive response to the Dagestan insurgency", 18 June 2015.

19. On 14 June 2015, Mr. Shakhshaev reportedly contacted his ex-wife's mother and brother and informed them that she was not answering his telephone calls. On 17 June 2015, Mr. Shakhshaev took a flight with his baby daughter to Makhachkala to visit his two other children, who were visiting his ex-wife's parents. Once again, he brought to their attention that Ms. Shakhshaeva was missing. On 18 June 2015, Ms. Shakhshaeva's brother filed a missing person report with the police in Moscow. On 26 June 2015, another missing person report was filed with the Presnenskiy inter-district investigating agency.

Pretrial investigation from 17 July to 11 November 2015

20. On 17 July 2015, the Presnenskiy inter-district investigating agency opened a criminal investigation into the disappearance without trace of Ms. Shakhshaeva involving suspected murder, based on article 105 (1) of the Criminal Code.

21. The investigator of the Presnenskiy inter-district investigating agency conducted the investigation from 17 July to 11 November 2015. During those four months, he conducted and completed all the necessary investigative action, including searching Mr. Shakhshaev's house and vehicle; requesting and reviewing the detailed billing of all mobile numbers used by Mr. Shakhshaev and Ms. Shakhshaeva; requesting and reviewing the closed-circuit television recording of their apartment building from the "Safe City" central database storage; requesting 11 forensic laboratory tests to identify biological traces on the objects seized during the house and vehicle search; reviewing the results of the forensic laboratory tests, obtained on 25 September 2015; and questioning approximately 20 people who knew Ms. Shakhshaeva and her family.

22. The source reports that the defence lawyers and Mr. Shakhshaev alleged a lack of due diligence by the investigator in handling the case and accused him of being used to plant fake evidence during the house and vehicle search on 12 August 2015. The poor quality of the investigation conducted by the investigator was reportedly evident and recognized by the trial judge, who, after issuing a guilty verdict based on evidence collected by the investigator, rendered a special ruling requesting his supervisors to discipline him for lack of due diligence and the poor quality of his work.

Alleged abuses during the search of apartment and vehicle

23. The source reports that Mr. Shakhshaev's apartment and vehicle were subjected to three searches. Two searches were conducted, on 18 June and 8 July 2015. During the first search, which was conducted without a court warrant but with the agreement of Mr. Shakhshaev, by an investigator, a forensic expert and several police officers, no suspicious traces or objects were found. On 8 July 2015, a senior investigator of the Presnenskiy inter-district investigating agency together with a forensic expert and the same police officers again conducted a search without a court warrant, but with Mr. Shakhshaev's consent and cooperation. The search lasted for more than three hours. On both occasions, the forensic experts used special ultraviolet equipment to discover possible traces of blood in Mr. Shakhshaev's apartment and vehicle, but no such traces were found.

24. On 10 August 2015, almost one month after opening the criminal investigation and two months after Ms. Shakhshaeva's disappearance, the investigator obtained a search warrant from Presnenskiy district court to search Mr. Shakhshaev's apartment and vehicle for a third time. On 12 August 2015, after Mr. Shakhshaev's interrogation as a witness, the investigator, a forensic expert and the same police officers who had been involved in the two previous house searches took Mr. Shakhshaev to his apartment.

25. During the third house search, the investigator suddenly discovered visible blood traces, which were found on the surface of one adhesive tape roll and on the yellow lid of a tool box, as well as many other pieces of "evidence of murder", which were in fact reportedly the traces of biological and habitual activity in the apartment. According to the house search record, the investigator discovered the alleged traces of blood in the kitchen, bathroom and Mr. Shakhshaev's bedroom.

26. In the presence of witnesses, the forensic expert sprayed Bluestar, a forensic chemical reagent, to highlight possible blood stains. As soon as the special ultraviolet equipment was applied, the entire apartment illuminated. The witnesses were not properly informed by the

forensic expert that Bluestar illuminated both blood traces and chemicals like bleach: they were told that if anything was illuminated, then it was blood. The expert also failed to explain that there was a substantial difference in the longevity (blood illuminates for as long as two minutes and bleach for only 15 to 30 seconds) and colour (in the case of blood, a bright blue colour, and in the case of bleach, a greenish colour) of the illumination. Subsequently, the house-search witnesses stated during the trial hearing that the illumination had been very short (10 to 15 seconds) and of a greenish colour.

27. According to the source, it is highly unlikely that the expert could not have known that a short greenish illumination indicates that there are no blood traces. The witnesses were thus intentionally misled, in order to put on record that many traces of blood were found all over the apartment. This is also evident from the fact that despite the availability of a camera, neither the forensic expert nor the investigator took any photographs of the illuminated false blood stains. Instead, the investigator started to remove samples of the walls, parquet and tiling in order to send them for forensic laboratory testing, which confirmed on 25 September 2015 that there were no blood traces.

28. As to the visible blood traces that were found on the surface of the tape roll and the toolbox lid, the defence lawyers and Mr. Shakhshaev claimed that they were fabricated and lacked credibility because they had been planted by the investigator or by the police officers who had been present during all three house searches. In addition, there were substantial violations of procedural law as those pieces of alleged evidence were collected and recorded. In particular, it was confirmed by the statements of the two witnesses during the trial hearing that they had not seen how the toolbox lid and tape roll had been found. Furthermore, the record of the house search indicates that only one roll of adhesive tape was collected and sealed, whereas the forensic laboratory test result reported on two rolls of adhesive tape, black and grey, in the sealed container. With regard to the toolbox lid, the sizeable blood stain was completely scraped off, while the DNA test showed only that the blood belonged to a female relative of Ms. Shakhshaeva's mother. Despite numerous requests from the defence lawyers, a test had never been completed to check if the DNA from the blood stain also matched the DNA of Ms. Shakhshaeva's father.

29. On 13 August 2015, the investigator brought charges and informed Mr. Shakhshaev about the initial charges against him. According to the source, the investigator wrote that it was allegedly established that "on 13 June 2015, at his apartment, when his daughter was sleeping, from 2.10 a.m. to 10.15 a.m., due to suddenly occurred personal hatred towards Ms. Shakhshaeva, while having malice aforethought, Mr. Shakhshaev inflicted several bodily injuries to Ms. Shakhshaeva that caused her death". According to the source, these charges were brought in the absence of any confirmed laboratory test results, eyewitnesses, murder weapon, the body or parts of it.

30. The source notes that while the forensic laboratory results were obtained by the investigator on 25 September 2015, it was almost one year later, on 15 June 2016, that the investigator informed Mr. Shakhshaev and his defence lawyers about the results.

#### Pretrial investigation from 19 November 2015 to 10 January 2017

31. The source reports that effectively from October 2015 until the trial began on 2 February 2017, no investigative action was taken to discover and secure new evidence. All forensic laboratory tests were thus completed by October 2015. Due to the lack of credible evidence of Mr. Shakhshaev's guilt, the case was reportedly taken over by another investigator from 19 November 2015 to 10 January 2017, who was from the first investigating agency, a unit of the Investigative Committee's investigation department responsible for the most important cases in Moscow.

32. According to the source, the new investigator did not undertake any investigative action that might have resulted in discovering or securing any substantive evidence. She only collected a number of medical reports about Ms. Shakhshaeva's health. In June 2016, the investigator requested a forensic laboratory test of several soil samples to identify any biological traces of a decaying corpse. She collected these samples in the locations where Mr. Shakhshaev could have visited before his arrest in August 2015. The source alleges that this was obviously a desperate attempt by the Investigative Committee of the Russian Federation

to keep Mr. Shakhshaev in custody by pretending that an investigation that was falling apart was in fact ongoing, and the results of the laboratory tests were negative.

#### Pretrial investigation from 10 to 17 January 2017

33. The source refers to article 162 of the Code of Criminal Procedure, whereby an investigation cannot exceed 12 months from the moment when the case was initiated. Further extension of the pretrial investigation can be allowed exceptionally by the Head of the Investigative Committee of the Russian Federation. When the total period of the criminal investigation against Mr. Shakhshaev was approaching 18 months, the indictment was drawn up by the investigator and submitted for approval to the Moscow city prosecutor's office. According to the source, the prosecutor apparently refused to approve the indictment and transmit the case to the court. The source adds that this forced the Investigative Committee to reassign the case down to the district level of the Investigative Committee.

34. From 10 to 17 January 2017, the investigation was conducted by another investigator, who was from the home affairs agency of the Central Administrative district investigation department of the Investigative Committee, and who was allegedly used to bypass normal procedure to refer the case to the court. She signed the indictment, secured the approval from the district-level prosecutor and transmitted it to the court. The source alleges that the manipulations of the Investigative Committee with the reassignments of investigators demonstrate that the entire case was fraudulent. The source also alleges that the judiciary turned a blind eye to such fraudulent conduct of the investigation and prosecution authorities.

#### Trial and appeal hearings

35. On 2 February 2017, the trial judge announced that the first hearing of the case would be held on 8 February 2017. On that day, she admitted the case for her consideration and extended Mr. Shakhshaev's pretrial detention pending completion of the trial. The trial commenced on 20 February 2017 and was completed on 14 November 2017, when Mr. Shakhshaev was found guilty of committing murder, convicted and sentenced to 12 years of imprisonment.

36. During the trial hearings, the judge reportedly dismissed all petitions by the defence to undertake additional measures to secure exculpatory evidence, including to restore and study Ms. Shakhshaeva's WhatsApp account, which she might have used to communicate on the day of her disappearance, and her mobile SIM card, which was retrieved by her friends but then mysteriously disappeared, and to call defence witnesses. She also dismissed the defence lawyers' petition to declare inadmissible all evidence collected during the search of the apartment on 12 August 2015, which was allegedly conducted in violation of the Code of Criminal Procedure, in particular that the evidence was not properly collected, placed in the containers or sealed in the immediate presence of the two search witnesses. According to the source, the judge was obviously biased as she was granting all requests by the prosecution to collect and examine new evidence, which was never shared with the defence lawyers or Mr. Shakhshaev during the pretrial investigation.

37. On 14 November 2017, the judge issued her guilty verdict, according to which she had established that Mr. Shakhshaev had murdered his ex-wife due to his personal hatred caused by her behaviour. The crime had taken place on 13 June 2015 at his apartment where they had lived together. While committing the murder, Mr. Shakhshaev had inflicted on Ms. Shakhshaeva bodily injuries that had caused serious harm to her health and had eventually led to her death. After that, in order to hide the traces of the crime, Mr. Shakhshaev had mutilated Ms. Shakhshaeva's body with an unknown tool and disposed of the mutilated body parts in an unknown location.

38. According to the source, there was no material evidence that could have proved that Ms. Shakhshaeva's murder had taken place and, if it had happened, that it had taken place in Mr. Shakhshaev's apartment on the date and in the manner claimed by the prosecution.

39. The source adds that while delivering the sentence, the judge ignored the petitions of the defence that there was no material evidence to establish beyond reasonable doubt that Ms. Shakhshaeva was dead, that a murder occurred and, if it did occur, that it occurred in Mr.

Shakhshaev's apartment and that it was intentional or unintentional. There was reportedly no evidence that incriminated Mr. Shakhshaev in the alleged murder or linked him to it.

40. On 20 November 2017, the defence lawyers and Mr. Shakhshaev appealed the verdict to Moscow city appellate court. In their appeal, they pointed out that the judge had abused her power as a trial judge not only because she had shown her bias and full support of the prosecutor's stance and requests, but also because she had on many occasions acted as the prosecutor and thus failed to appear to be an impartial and independent arbiter in adjudicating the case. In particular, she had granted all the petitions of the prosecutor and summarily dismissed the petitions of the defence. Allegedly, during her annual leave for several weeks, she had also ordered several investigative actions by the police to locate an additional witness for the prosecution who had never been known to the defence and to bring in that witness after she had returned from her leave.

41. According to the source, the judge violated a number of Mr. Shakhshaev's fundamental and due-process rights, including the right to be tried by an impartial and independent court, the right to equality of arms during the adversarial hearing, the right to be tried within a reasonable amount of time, the right to be tried without undue delay, the right to be presumed innocent, the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and the right not be arbitrarily deprived of his liberty.

42. In their appeal, the defence also underlined that the factual circumstances of the alleged crime, including the *mens rea* and *actus reus*, were not established or proven beyond reasonable doubt. There was thus a clear case of miscarriage of justice. In particular, the judge did not substantiate her verdict, as she completely failed to discover and establish beyond reasonable doubt the elements of the alleged crime, including the crime scene, the body or parts of it, reliable and credible evidence of the traces of the alleged murder at the purported crime scene or vehicle, the murder weapon, the modality of how the murder was committed and the alleged location where the body or parts of it could have been disposed of or hidden. Additionally, the judge completely failed to establish beyond reasonable doubt the motive of the murder and malice aforethought.

43. On 11 April 2018, Moscow city appellate court summarily dismissed the appeals made by the defence. The appellate court's hearing reportedly lasted for only one hour, and 95 per cent of that time was granted to the prosecutor. The defence team were not allowed to have their arguments heard by the panel of three judges. When the defence lawyers took the floor, the judges were not listening to them, but were allegedly playing and laughing at YouTube videos on their smartphones that were irrelevant to the case.

44. The source thus submits that both the trial judge and the appellate court judges failed to ensure equality of arms during the adversarial proceedings. In addition, in violation of the right to presumption of innocence, both courts reached their verdicts by reasoning that Mr. Shakhshaev had failed to prove that he had not committed the crime.

#### Analysis of violations

45. The source submits that Mr. Shakhshaev's deprivation of liberty is arbitrary and falls within category III due to the total non-observance by the Russian Federation of the international norms relating to the right to a fair trial and due process. In particular:

(a) The investigation and trial hearings were biased and ignored any other possible scenarios of what might have happened to Ms. Shakhshaeva. Such an obvious miscarriage of justice could have been induced by the influential individual referred to above;

(b) The Investigative Committee blatantly violated Mr. Shakhshaev's right to the presumption of innocence by orchestrating and inducing a media campaign that demonized him;

(c) The trial judge was manifestly lacking in impartiality and independence. The judge is allegedly well known for handing down prison sentences to a number of political opponents of the current Government. Also, she was the same judge who had issued the decisions to conduct the third house search on 10 August 2015 and to remand Mr. Shakhshaev in pretrial detention pending trial on 14 August 2015, and did not recuse herself from

conducting his trial, despite having been heavily involved in the pretrial proceedings resulting in a clear conflict of interest;

(d) The deprivation of liberty of Mr. Shakhshaev before and after his conviction was based on evidence that was allegedly fabricated and planted by the police and purportedly found during the third search of his apartment;

(e) Mr. Shakhshaev's right to be tried promptly was violated, as the pretrial investigation and trial hearings were protracted and delayed, and the investigators and the judge did not act with due diligence;

(f) The trial judge dismissed all petitions by the defence to provide access to several forensic laboratory reports. The source alleges that only those reports deemed to conveniently fit the storyline of the prosecution were available for the defence. In addition, all petitions related to admissibility of evidence collected during the three searches were dismissed by the judge, including the evidence that was allegedly planted and fabricated by the police and investigator. In this respect, the source recalls that the trial judge issued a ruling requesting that the investigators, forensic experts and police officers be disciplined for lack of due diligence and for doing a poor job that apparently caused the prolongation of the trial hearing;

(g) In addition, the investigators and the trial judge refused to examine exculpatory evidence, including the possibility that Ms. Shakhshaeva might have communicated with her potential kidnappers using WhatsApp;

(h) A number of forensic laboratory tests that had been conducted during 2015 were not included in the case file or made available for the defence to study, despite petitions made to the investigators and the trial judge. The defence was thus deprived of its right to have access to the exculpatory evidence.

#### *Response from the Government*

46. On 31 July 2018, the Working Group transmitted the allegations from the source to the Government of the Russian Federation under its regular communications procedure. The Working Group requested the Government to provide, by 1 October 2018, detailed information about the current situation of Mr. Shakhshaev and to clarify the legal provisions justifying his continued detention and its compatibility with the State's obligations under international human rights law, in particular with regard to the treaties that it has ratified. Moreover, the Working Group called upon the Government to ensure his physical and mental integrity.

47. On 3 December 2018, the Working Group received a reply from the Government of the Russian Federation. The reply was over two months late, arriving after the Working Group had adopted the present opinion. The Working Group notes that 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 response in the present case is therefore considered late and, given the failure by the Government to request a time extension, the Working Group cannot accept the reply as if it were presented within the time limit.

#### *Further information from the source*

48. On 22 October 2018, the source informed the Working Group that the conviction and sentence of Mr. Shakhshaev had been confirmed by the final appellate body.

#### **Discussion**

49. 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.

50. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established 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 (A/HRC/19/57,



para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

51. The source has made a number of allegations (see para. 45 above), which in its view render the detention of Mr. Shakhshaev arbitrary under category III.

52. The Working Group notes with regret that the Government has chosen not to address these very serious allegations. The Working Group shall proceed to examine the allegations made.

53. The source has submitted that the trial judge was manifestly lacking in impartiality and independence since she was the same judge who had issued the decisions to conduct the third house search on 10 August 2015 and to remand Mr. Shakhshaev in pretrial detention pending trial on 14 August 2015. In the view of the source, there was a clear conflict of interest and the judge was thus not impartial. Moreover, according to the source, this judge is well known for handing down prison sentences to a number of political opponents of the current Government.

54. The Working Group is unable to make any observations in relation to the latter allegation, noting its general nature. However, in relation to the former, that the trial judge of Mr. Shakhshaev was the same judge who both authorized the third search warrant and ordered him to be remanded in pretrial detention, the Working Group observes a *prima facie* breach of article 14 (1) of the Covenant.

55. In this regard, the Working Group recalls that the Human Rights Committee, in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, stated that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) was an absolute right that was not subject to any exception (para. 19). The Committee further observed (para. 21) that the requirement of impartiality had two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified could not normally be considered to be impartial.

56. In the present case, the trial judge was heavily involved in the case of Mr. Shakhshaev from the outset. She was the same judge who had authorized the search warrant for the third search, during which the key evidence had allegedly been located in Mr. Shakhshaev's apartment. She was also the judge who had presided over the decision on whether Mr. Shakhshaev should be kept in pretrial detention. In the view of the Working Group, the involvement of this judge in the preliminary proceedings was such as to allow her to form an opinion on the case prior to the trial. This knowledge was necessarily related to the charges against Mr. Shakhshaev and the evaluation of these charges. Therefore, the involvement of this judge in the trial proceedings was incompatible with the requirement of impartiality under article 14 (1) of the Covenant.<sup>3</sup> In coming to this conclusion, the Working Group is particularly mindful of various *de facto* investigative actions that the judge in question took, as described by the source in paragraph 40 above, which are incompatible with the requirement of impartiality of judges under article 14 (1).

57. The source has further alleged that Mr. Shakhshaev's right to be tried promptly was violated, as the pretrial investigation and trial hearings were protracted and delayed and the investigators and the judge did not act with due diligence. The Working Group notes that Mr. Shakhshaev was arrested on 12 August 2015, that his trial commenced on 20 February 2017 and that he was sentenced on 14 November 2017. During this time, his pretrial detention was periodically reviewed and extended, but overall Mr. Shakhshaev spent some 18 months in pretrial detention until the start of his trial and then a further 9 months during his trial. Mr. Shakhshaev therefore spent some 27 months in pretrial detention overall, which is a lengthy period.

<sup>3</sup> See *Larrañaga v. Philippines* (CCPR/C/87/D/1421/2005).

58. The Working Group recalls that the right of the accused to be tried without undue delay, provided for by article 14 (3) (c) of the Covenant, is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.<sup>4</sup>

59. The Working Group is mindful of the string of serious irregularities in the investigation that have been submitted by the source (see paras. 20–22 above) which, according to the source, led the judge to request disciplinary action against the investigator (see para. 22). None of these submissions has received a response from the Government.

60. The Working Group is also mindful of the behaviour of Mr. Shakhshaev, who consented to two searches without a warrant (see paras. 23–24 above) and appeared when summoned as a witness at the Presnenskiy inter-district investigating agency. These are indications of cooperative behaviour by the accused, which leads the Working Group to believe that the lengthy proceedings could not be attributed to him.

61. The Working Group agrees with the Human Rights Committee that in cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.<sup>5</sup> This did not happen in the case of Mr. Shakhshaev, and the Working Group therefore finds a violation of article 14 (3) (c) of the Covenant.

62. The source has further alleged that the conviction of Mr. Shakhshaev was based on evidence that was allegedly fabricated and planted by the police, and purportedly found during the third search of his apartment; that the trial judge dismissed all petitions by the defence to provide access to several forensic laboratory reports; and that a number of forensic laboratory tests that had been conducted during 2015 were not included in the case file or made available for the defence to study, despite petitions made to the investigators and the trial judge. In addition, the source has argued that the investigators and the trial judge refused to examine exculpatory evidence, including the possibility that Ms. Shakhshaeva might have communicated with her potential kidnappers using WhatsApp.

63. The Working Group recalls that the right to have adequate time and facilities for the preparation of a defence, as encapsulated in article 14 (3) (b) of the Covenant, must include access to documents and other evidence. Such access must include all material that the prosecution plans to offer in court against the accused, or that is exculpatory, which should be understood to include not only material establishing innocence but also other evidence that could assist the defence.<sup>6</sup> The Government has provided no explanation as to why the defence was denied access to forensic laboratory reports. Moreover, the Working Group notes that according to the source, the judge was obviously biased as she was granting all requests by the prosecution to collect and examine new evidence, which was never shared with the defence lawyers or Mr. Shakhshaev during the pretrial investigation. The Working Group therefore concludes that there has been a breach of article 14 (3) (b).

64. Equally, there is no explanation as to why other possibly exculpatory evidence against Mr. Shakhshaev was not examined by the judge, revealing a further *prima facie* breach of article 14 (1) of the Covenant as denial of the right to a fair hearing.

65. In relation to the appeals trial, the Working Group notes the submissions made by the source (see para. 43 above) that the appellate court summarily dismissed the appeals made by the defence, that it granted most of the trial time to the prosecutor and that the judges did not even listen to the defence but rather allegedly played on their smartphones. The Working Group is appalled by such a blatant denial of justice and denial of equality of arms, which in its view is a serious breach of article 14 (1) of the Covenant.

<sup>4</sup> Human Rights Committee, general comment No. 32, para. 35.

<sup>5</sup> *Ibid.*; see also *Sextus v. Trinidad and Tobago* (CCPR/C/72/D/818/1998), para. 7.2.

<sup>6</sup> Human Rights Committee, general comment No. 32, para. 33; see also CCPR/C/CAN/CO/5, para. 13.

66. Moreover, it is also a breach of article 14 (5) of the Covenant, under which anyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a higher tribunal, as that right imposes on States parties a duty substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law.<sup>7</sup> This requirement cannot be satisfied by an appellate court which summarily dismisses the arguments presented by the defence and by appellate judges who play on their smartphones during the appeal. The Working Group recalls that the requirements of independence and impartiality of the tribunal embodied in article 14 (1) also apply to the appeal process and therefore concludes that there has been a violation of article 14 (5) of the Covenant in the present case.

67. Lastly, the source has submitted that the Investigative Committee blatantly violated Mr. Shakhshaev's right to the presumption of innocence by orchestrating a media campaign that demonized him, another allegation to which the Government has chosen not to respond.

68. The Working Group concurs with the view expressed by the Human Rights Committee in its general comment No. 32 that it is a duty for all public authorities to refrain from prejudging the outcome of a trial, such as by abstaining from making public statements affirming the guilt of the accused, and that the media should avoid news coverage undermining the presumption of innocence (para. 30). The Working Group considers that the media campaign alluded to by the source in paragraph 14 above could only have emanated from the investigative authorities. This is a serious breach of Mr. Shakhshaev's right to the presumption of innocence, and the Working Group therefore finds a violation of article 14 (2) of the Covenant.

69. Noting all the above, the Working Group concludes that the detention of Mr. Shakhshaev has resulted from a trial scattered with 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 Government. This non-observance is of such gravity as to give Mr. Shakhshaev's deprivation of liberty an arbitrary character, falling within category III.

70. The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers.

### **Disposition**

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

The deprivation of liberty of Shapi Shakhshaev, being in contravention of article 10 of the Universal Declaration of Human Rights and article 14 (1), (2), (3) (b) and (c) and (5) of the International Covenant on Civil and Political Rights, is arbitrary and falls within category III.

72. The Working Group requests the Government of the Russian Federation to take the steps necessary to remedy the situation of Mr. Shakhshaev 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.

73. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Shakhshaev immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

74. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Shakhshaev and to take appropriate measures against those responsible for the violation of his rights.

<sup>7</sup> *Bandajevsky v. Belarus* (CCPR/C/86/D/1100/2002), para. 10.13.

75. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

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

#### **Follow-up procedure**

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

- (a) Whether Mr. Shakhshaev has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Shakhshaev;
- (c) Whether an investigation has been conducted into the violation of Mr. Shakhshaev's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Russian Federation with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

78. 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.

79. 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.

80. 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.<sup>8</sup>

*[Adopted on 21 November 2018]*

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<sup>8</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.