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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 67/2017 concerning Adilur Rahman Khan (Malaysia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.
2. In accordance with its methods of work (A/HRC/36/38), on 10 August 2017, the Working Group transmitted to the Government of Malaysia a communication concerning Adilur Rahman Khan. The Government has not replied to the communication. Malaysia is not 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. Adilur Rahman Khan is a 56-year-old Bangladeshi national who resides in Dhaka, Bangladesh. He is an advocate of the Supreme Court of Bangladesh and the Secretary of Odhikar, a human rights organization in Bangladesh with a network of partners and human rights defenders at the national and regional levels.

5. The source reports that, on 19 July 2017, Mr. Khan boarded a flight to Kuala Lumpur, Malaysia. The purpose of his trip to Malaysia was to attend the second General Assembly of the Anti-Death Penalty Asia Network, of which Odhikar is a member organization.

6. Mr. Khan arrived at Kuala Lumpur International Airport on 20 July 2017 at approximately 4.50 a.m. local time. According to the source, when Mr. Khan presented his passport at the immigration desk, an immigration officer entered his name in the database and gave him a small piece of paper with two words written on it in the Malay language. Mr. Khan later learned that the words meant “suspect”. The immigration officer returned Mr. Khan’s passport and instructed him to submit it to another officer in a nearby room for further verification. The source reports that Mr. Khan presented his passport to the second officer and was asked to wait while the immigration police made a telephone call and awaited instructions. The immigration police refused to answer any of Mr. Khan’s questions.

7. At approximately 7.30 a.m. on the same day, Mr. Khan was told to follow another officer of the immigration police. As he was escorted to the other end of the airport, Mr. Khan was able to inform his colleagues by email that the authorities were not allowing him to leave the airport and that he was possibly going to be detained. The source alleges that when Mr. Khan arrived at the designated part of the airport, the authorities took away his belongings, including his cellular phone and laptop. Mr. Khan was then locked in a large holding room that could only be opened by using an electronic password. Approximately 60 people of various nationalities were being held in the same room.

8. According to the source, the holding room was in poor condition. The only toilet facility was unhygienic and not sufficient for the number of people present in the room. The source also reports that detainees who had no money were not given food. Instead, they had to drink tap water to satisfy their hunger. The source alleges that some of the detainees could not inform their families of their location, as officials were taking money in exchange for an opportunity to make a telephone call. Furthermore, some individuals claimed that they were being deported, despite having valid visas for entry into Malaysia.

9. The source alleges that after one hour of detention in the large holding room, Mr. Khan was asked to pay RM 350 (approximately US\$80) for food. He was given two biscuits, a bottle of water, a toothbrush and toothpaste, and a bar of soap. At around noon on the same day, the police asked Mr. Khan whether he had informed anyone about his detention. When he responded in the affirmative, the police questioned Mr. Khan as to why he had taken that action.

10. Shortly after noon, another officer informed Mr. Khan that representatives of the Human Rights Commission of Malaysia had made enquiries about his status, and that the Immigration Department wanted to confirm his identity with the Commission. The officer took a photograph of Mr. Khan. One of the officials at the airport detention facility then escorted Mr. Khan to a separate small room, where he was held until 6 p.m. Mr. Khan was given a cup of tea and the lunch that he had purchased.

11. At 6 p.m., Mr. Khan was taken back to the room where he had initially been told to wait, and two representatives of the Human Rights Commission of Malaysia were allowed to meet with him. According to the source, they asked Mr. Khan whether he had been told that he was going to be detained. Mr. Khan replied that the police had not informed him that he would be detained.

12. The representatives of the Human Rights Commission of Malaysia told Mr. Khan that a lawyer had come to the airport to meet him, but had not been allowed to do so. They also informed Mr. Khan that a team from the Commission had come to the airport in the morning, but had not been allowed to meet him. The source states that while Mr. Khan was talking to

the representatives of the Commission, a police officer came and took a photograph of them. The discussion with the representatives of the Commission lasted 30 minutes.

13. The source reports that Mr. Khan was then taken to the reception area of the detention facility. At 7 p.m., he was taken to the boarding gate and put on a flight back to Dhaka. His passport was given to a member of the flight crew. When Mr. Khan arrived back in Bangladesh at 10.20 p.m. local time, a Bangladeshi officer escorted him to the immigration police office, where his passport was returned. Mr. Khan was allowed to leave the airport. According to the source, Mr. Khan does not know the reason for his detention and subsequent deportation from Malaysia.

14. The source submits that the detention of Mr. Khan was arbitrary under category II of the categories applied by the Working Group. The source argues that, while the reason for Mr. Khan's deprivation of liberty on 20 July 2017 remains unknown, there is a strong indication that the detention was related to his human rights activities at the regional level. Those activities included Mr. Khan's intention to participate in the second General Assembly of the Anti-Death Penalty Asia Network on 21 and 22 July 2017.

Response from the Government

15. On 10 August 2017, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide detailed information by 10 October 2017 about the deprivation of liberty of Mr. Khan, as well as any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify the deprivation of liberty of Mr. Khan, and their compatibility with international human rights norms.

16. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the methods of work of the Working Group's methods of work.

Discussion

17. The Working Group welcomes the fact that Mr. Khan was released from the custody of the Malaysian authorities and was able to return to Bangladesh on 20 July 2017.

18. According to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on a case-by-case basis on whether a deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. The Working Group considers that it is important to render an opinion, given that the present case involves allegations that a human rights defender was arbitrarily deprived of his liberty in order to prevent him from peacefully exercising his rights and carrying out legitimate human rights activities in Malaysia. The case also involves alleged deprivation of liberty at the point of entry to a country, which is a general trend of increasing concern to the Working Group. Moreover, according to paragraph 15 of its methods of work, the Working Group may proceed with an opinion even if it has not received a response from the Government to the allegations made by the source.

19. The Working Group notes that Mr. Khan was held during a period of approximately 14 hours, at a holding facility at Kuala Lumpur International Airport. Neither of these factors prevents the Working Group from determining that Mr. Khan was deprived of his liberty. As the Working Group clarified in its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law:

“Any confinement or retention of an individual accompanied by restriction on his or her freedom of movement, even if of relatively short duration, may amount to de facto deprivation of liberty... Placing individuals in temporary custody in stations, ports and airports or any other facilities where they remain under constant surveillance may

not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty.”¹

20. Furthermore, the Working Group recently stated that “deprivation of liberty is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave, then all the appropriate safeguards that are in place to guard against arbitrary detention must be respected”.² In the present case, the facts presented by the source, which the Government has not contested, demonstrate that Mr. Khan was kept under constant surveillance by various immigration and police officers who escorted him throughout the airport facilities, and also took two photographs of him. Mr. Khan’s only means of contacting the outside world (i.e. his cellular phone and his laptop), as well as his passport, were confiscated. The authorities prevented him from meeting with a lawyer and a Human Rights Commission of Malaysia team that had attempted to make contact with him earlier in the day. Moreover, the authorities locked Mr. Khan with other individuals who were being detained and awaiting deportation in a large holding room which could only be opened by using an electronic password. The Working Group finds that Mr. Khan was unable to leave the airport and was therefore deprived of his liberty.

21. In determining whether Mr. Khan’s deprivation of liberty was arbitrary, the Working Group had 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 requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see 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.

22. The Government provided no clarification of the legal provisions that it relied upon under Malaysian law to justify Mr. Khan’s deprivation of liberty. It appears from the information submitted by the source that Mr. Khan was considered by the Government to be a “suspect”, given that he was handed a note in Malay with that word written on it when he arrived at the airport. However, there is no evidence that Mr. Khan had entered Malaysia for any criminal purpose; on the contrary, he had been invited to participate in a human rights meeting aimed at putting an end to the death penalty. Mr. Khan was not told by the authorities that he was being detained, nor why he was being detained, even when he asked questions of the immigration police at the airport. At the very least, the Government owed Mr. Khan and the organizers of the meeting an explanation of its reasons for detaining and deporting Mr. Khan, but none was forthcoming in the present case. In these circumstances, the Working Group finds that there was no legal basis for Mr. Khan’s deprivation of liberty, which was arbitrary according to article 9 of the Universal Declaration of Human Rights and falls within category I of the categories applied by the Working Group.

23. In addition, the Government did not provide any information or evidence to refute the source’s allegations that Mr. Khan’s deprivation of liberty was related to his human rights activities at the regional level, including his attendance and participation in the second General Assembly of the Anti-Death Penalty Asia Network on 21 and 22 July 2017. Given that Mr. Khan was detained and quickly deported the day before the meeting, the Working Group can only conclude that he was deprived of his liberty to prevent him from attending the meeting.

24. According to 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 fundamental

¹ See the Working Group’s deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44, paras. 55 and 59). See also European Court of Human Rights, *Belchev v. Bulgaria* (application No. 39270/98), judgment of 8 April 2004, para. 82, in which the court stated that “justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities”.

² See A/HRC/36/37, para. 56.

freedoms at the national and international levels.”³ It is stated in article 5 of the Declaration that this includes the right to meet or assemble peacefully and to communicate with non-governmental organizations. Mr. Khan was clearly attempting to peacefully exercise those rights by participating in the meeting in Kuala Lumpur. He was also exercising his rights to freedom of movement, freedom of expression, and freedom of peaceful assembly and association, under articles 13, 19 and 20 of the Universal Declaration of Human Rights. Moreover, the Working Group has determined that targeting persons for detention on the basis of their activities as human rights defenders violates the rights to equality before the law and equal protection of the law under articles 2 and 7 of the Universal Declaration of Human Rights (see, for example, opinions Nos. 16/2017 and 45/2016).

25. For these reasons, the Working Group finds that Mr. Khan’s deprivation of liberty was a direct consequence of the peaceful exercise of his rights and fundamental freedoms, and was contrary to articles 2 and 7 of the Universal Declaration of Human Rights. It was therefore arbitrary according to category II of the categories applied by the Working Group.

26. The Working Group notes that Mr. Khan was denied access to a lawyer who had come to the airport to meet with him, as well as to the Human Rights Commission of Malaysia team that had attempted to meet with him earlier in the day on 20 July 2017. It was only after 13 hours of being detained that he was permitted to meet with the Commission’s representatives. In addition, when officers of the immigration police learned that Mr. Khan had notified a colleague about his detention, they questioned Mr. Khan as if he should not have taken that action. The Working Group regards restrictions on access to the outside world as serious, in particular limited access to a lawyer, which is a violation of the right to legal assistance. As the Working Group has recently stated, the right to legal assistance applies to all persons deprived of their liberty at any time during their detention, including immediately after the detention takes place.⁴ While Mr. Khan is an advocate of the Supreme Court of Bangladesh and a former Deputy Attorney-General of Bangladesh⁵ and is certainly able to understand his legal rights, he might have benefited from the assistance of a Malaysian lawyer who could speak Malay to clarify the reasons for his detention. However, although the violation of the right to legal assistance in this case was serious, the Working Group does not consider that this violation alone is of such gravity as to render Mr. Khan’s deprivation of liberty arbitrary under category III.

27. Further, the Working Group considers that Mr. Khan was targeted not only for his human rights activities, but because of his status as a human rights defender. The source asserted that there is a strong indication that Mr. Khan’s detention was related to his human rights profile at the regional level. In the absence of an explanation from the Government for Mr. Khan’s detention, the Working Group finds this submission to be *prima facie* credible.

28. As the Secretary of Odhikar, and a member of the World Organization Against Torture and the International Federation for Human Rights,⁶ among other roles, Mr. Khan is internationally recognized and has a significant profile as a human rights defender in the Asia-Pacific region. It is very unlikely that he would have been detained had he not been a high-profile human rights defender. Furthermore, Mr. Khan appears to be the only participant travelling to the meeting from abroad who was detained and prevented from remaining in Malaysia.

³ Also known as the Declaration on Human Rights Defenders. See General Assembly resolution 53/144, annex (art. 1). See also resolution 70/161, para. 8, in which the Assembly “calls upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in this regard strongly urges the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms”.

⁴ See the 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, principle 9 (A/HRC/30/37, annex, para. 12).

⁵ See the Working Group’s opinion No. 37/2013, para. 4.

⁶ *Ibid.*

29. This is also not the first time that Mr. Khan has been targeted, as a high-profile human rights defender in the region.⁷ In its opinion No. 37/2013, the Working Group found (in a case unrelated to the present case) that Mr. Khan's deprivation of liberty by the Bangladeshi authorities in 2013 was arbitrary. In reaching that conclusion, the Working Group considered that Mr. Khan's profile as a prominent human rights activist and holder of important responsibilities in a number of civil society organizations at both the national and the international levels was a contributing factor in the deprivation of his liberty (see para. 20).

30. For these reasons, the Working Group finds that Mr. Khan was deprived of his liberty on discriminatory grounds, that is, due to his status as a human rights defender. His deprivation of liberty was therefore arbitrary according to category V of the categories applied by the Working Group.⁸

31. Finally, the Working Group would welcome the opportunity to work constructively with the Government to address the Working Group's serious concerns in relation to arbitrary deprivation of liberty in Malaysia. In April 2015, the Working Group sent a request to the Government to undertake a country visit, as a follow-up to its earlier visit to Malaysia in 2010, and awaits a positive response. Given that the human rights record of Malaysia will be subject to review during the third cycle of the universal periodic review, in November 2018, an opportunity exists for the Government to enhance its cooperation with the special procedures.

Disposition

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

The deprivation of liberty of Adilur Rahman Khan, being in contravention of articles 2, 3, 7, 9, 13, 19 and 20 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II and V.

33. The Working Group requests the Government of Malaysia to take the steps necessary to remedy the situation of Mr. Khan without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group also urges the Government to accede to the Covenant.

34. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord Mr. Khan an enforceable right to compensation and other reparations for the period in which he was deprived of his liberty, in accordance with international law.

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

36. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders, for appropriate action. The Working Group also encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.⁹

⁷ There have been several communications sent by special procedure mandate holders in relation to Mr. Khan and Odhikar. See

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=14106>.

⁸ The Working Group reached a similar conclusion in its opinion No. 50/2017, paras. 72–74.

⁹ The model law was developed in consultation with more than 500 human rights defenders from around the world and with 27 human rights experts. It is available at www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

Follow-up procedure

37. 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 compensation or other reparations have been made to Mr. Khan;
- (b) Whether an investigation has been conducted into the violation of Mr. Khan'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 Malaysia with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

38. 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.

39. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

40. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.¹⁰

[Adopted on 20 November 2017]

¹⁰ See Human Rights Council resolution 33/30, paras. 3 and 7.