

OPINION No. 35/2007 (United States of America)**Communication addressed to the Government on 8 March 2007.****Concerning Ms. Vatcharee Pronsivakulchai.****The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. (Same text as paragraph 3 of Opinion No. 15/2007.)
3. The Working Group regrets the lack of co-operation of the Government despite invitations to provide information on these cases. Yet, the Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case.
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Ms. Vatcharee Pronsivakulchai, born 12 January 1963 in Ranong, Thailand, was arrested in Thailand in October 2000 and extradited from Thailand to the United States of America on 7 May 2001 to face trial on charges of an alleged drug crime. Until 15 March 2004, she was detained at the Metropolitan Correctional Center in Chicago, IL. While held in federal custody she was offered a plea deal in which the Drug Enforcement Agency (DEA) and the Attorney proposed to assist her with her immigration case. Ms. Pronsivakulchai refused to accept the plea bargain insisting that she was innocent. However, she agreed to help in an investigation by writing letters to Thai members of organized drug gangs she had met in prison and other known gang members from her hometown. At the direction of the DEA agent, her letters falsely stated that she had won her case, that she was out of jail, and that she was interested in buying narcotics. On 15 March 2004, the Government withdrew its case against her and Judge Gottschall granted the government motion and dismissed the case against Ms. Pronsivakulchai accordingly.
5. From 15 March 2004 until present Ms. Pronsivakulchai has been held in administrative immigration custody by the Department of Homeland Security, Bureau of Immigration & Customs Enforcement (ICE), pursuant to civil immigration law powers. Ms. Pronsivakulchai is currently detained at McHenry County Detention Center in Woodstock, IL. She had been detained at Broadview Detention Facility in Broadview, IL, and at Kenosha County Detention Center, Kenosha, WI, before.
6. On 22 July 2004, Ms. Pronsivakulchai filed applications for asylum, withholding of removal, and protection under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. She seeks protection in the United States because she fears that if she is returned to Thailand, she will be killed by the gang members she contacted while serving as an informant for the DEA.

7. At the hearing before the Immigration Judge (IJ), the Government argued that Ms. Pronsivakulchai was ineligible for asylum and withholding of removal because of her criminal background, despite the fact that the criminal charges had eventually been dropped by Judge Gottschall. The Government produced as evidence a translated Thai warrant dated 21 April 2000 for the arrest of “Vatcharee last name unknown” and a corresponding cover letter by the Thai Government, which sought her return. This evidence was admitted by the IJ against her objection and her applications were dismissed. On appeal this decision was affirmed by the Board of Immigration Appeals (BIA), which functions as an administrative review panel.

8. Ms. Pronsivakulchai appealed to the United States Court of Appeals for the Seventh Circuit (hereinafter “the Court”), arguing, *inter alia*, that her due process rights were violated because the IJ refused to consider her rebuttal testimony and documentary evidence. On 29 August 2006 the Court granted Ms. Pronsivakulchai’s petition, vacated the decision of the BIA and remanded the case back to the immigration courts for proceedings consistent with the opinion of the Court (see *Pronsivakulchai v. Gonzales*, F.3d, 2006 WL 2473418 (7th Cir. 2006). The Court, while rejecting the constitutional argument put forward by Ms. Pronsivakulchai on grounds of subsidiary, held that she was denied a fair hearing because she was not afforded a reasonable opportunity to present evidence on her own behalf. The Court found it remarkable that “[a]t oral argument the government counsel conceded that Pronsivakulchai was helpful, but not helpful enough. That is, while she agreed to write letters to drug dealers back in Thailand to assist the DEA in its investigation, her assistance did not prove as fruitful as the DEA and prosecutors had hoped. Now, Pronsivakulchai’s reward for helping the DEA is to send her back to the Thai prison, where the gang members and drug traffickers that she informed on still reside.” (Id. at 10).

9. Despite the fact that no criminal charges against her have ever been substantiated and no charges are currently pending, Ms. Pronsivakulchai remains in administrative detention without review awaiting further proceedings before the IJ. On 31 August 2006 her counsel made an oral request for parole, which was denied by an ICE official on 8 September 2006. On 15 September 2006, Ms. Pronsivakulchai’s counsel submitted a letter to the ICE District Director seeking renewed consideration of the parole request. To date no answer has been provided.

10. The source argues that since Ms. Pronsivakulchai has not been convicted of any of the offences enumerated in section 236 (c) of the Immigration and Nationality Act, she is not subject to mandatory detention. ICE’s refusal to release her is owed to a mere legal technicality, because she had entered the United States as an “arriving alien”. Under United States laws and regulations ICE is competent to detain an arriving alien for the duration of proceedings and may exercise discretion to release arriving aliens who are applying for asylum. Where ICE declines the release of an arriving alien in removal proceedings, the IJ has no authority to re-determine conditions of custody or to release such alien on bond.

11. Ms. Pronsivakulchai experienced harassment of a sexual, physical and verbal nature by criminal co-inmates while in custody at Kenosha County Detention Center. She requested the prison guards to intervene on at least three occasions, however, to no avail. On 31 December 2005, an inmate assaulted Ms. Pronsivakulchai leaving her arm severely bruised. On 1 January 2006 she was

taken to hospital and required to wear a sling for several days. The harassment continued after the incident. Afraid to report further abuse and unable to speak to her lawyer in private, Ms. Pronsivakulchai wrote a letter to the American Bar Association requesting assistance, which was forwarded to the Office of Civil Rights and Civil Liberties (OCRCL) of the Department of Homeland Security. OCRCL agreed to review her complaint and initiated an investigation.

12. In March, Ms. Pronsivakulchai had an opportunity to speak privately with her attorney at Kenosha County Detention Center and reported the abuse. Counsel detailed the incidents to ICE officials and requested a transfer to another detention facility. The request was granted and Ms. Pronsivakulchai was transferred to McHenry County Jail, where she remains in a mixed population with both criminally charged and immigration detainees as it had already been the case at Kenosha County Detention Center. The Department of Homeland Security subcontracts the detention of immigrants to designated state county detention facilities in the Midwestern region around Chicago. The source argues that these detention facilities are only designed for short-term custody of state criminal offenders rather than for long-term custody, since they are lacking access to outdoor recreational facilities, educational opportunities or proper medical treatment.

13. Ms. Pronsivakulchai has developed several health problems after more than five years in detention in the United States. Her vision has deteriorated. Counsel attempted to arrange for a pro bono eye exam and donated eyeglasses, however, Kenosha County jail officials refused access to Ms. Pronsivakulchai for the necessary examination. She further developed skin problems, but did not receive proper medical treatment. Ms. Pronsivakulchai dentures broke in early 2005, but ICE officers declined a replacement arguing that only the front teeth were broken and the others remain intact. While harassment ceased at McHenry County Jail, she continues to suffer from health problems, including depressions, stomach and knee pain, however, has never been allowed to see a doctor, only a nurse.”

14. The source argues that Ms. Pronsivakulchai continued detention for more than five years is arbitrary because of an infringement of the principle of proportionality. It also argues that Ms. Pronsivakulchai does not have access to effective review of the circumstances of her detention in contravention of article 9, paragraph 4 of the International Covenant on Civil and Political Rights.

15. Article 31 of the Convention Relating to the Status of Refugees (hereinafter “the 1951 Refugee Convention”), applies to refugees who enter or are present illegally in a country, coming directly from a territory where their life or freedom was threatened, and requires that governments shall not punish these refugees and “shall not apply to the movements of such refugees restrictions other than those which are necessary.” The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has extended this right to be free from arbitrary and punitive detention to all asylum seekers. In its Conclusion No. 44 (XXXVII) (1986) the Executive Committee has made clear that detention of refugees and asylum-seekers should only occur subject to four limited circumstances: “If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used

fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order.”

16. The detention of asylum seekers that does not comply with the requirements contained in UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers is in principle arbitrary under international law. The source’s argument is that Ms. Pronsivakulchai’s continued detention violates the Guidelines in various respects. Her identity is known to the Government, she has a credible fear of persecution recognized by the Court, there is no evidence that she poses a threat to national security or is a danger to the community, and the length and condition of detention is not proportional to the Government’s objective to deport her.

17. In applying these standards of proportionality, the source argues that Ms. Pronsivakulchai’s continued detention for more than 30 months is not proportional to the purported interest of the Government in protecting society and ensuring that she does not abscond. That is so, as the source alleges, because Ms. Pronsivakulchai has neither been convicted of nor is she presently charged with any crime. Furthermore, she poses no threat to national security or public safety and is not likely to abscond.

18. The source further argues that Ms. Pronsivakulchai has remained in custody for more than 30 months without access to effective review of her detention and due process of law. More particularly, there is no statutory authority for mandatory detention of asylum applicants like Ms. Pronsivakulchai in the laws of the United States. In a seminal case, comparable to that of Ms. Pronsivakulchai, the United States Supreme Court addressed the prolonged and indefinite detention of two aliens. The Supreme Court held that six months of detention is considered to be prolonged when there is “no significant likelihood of removal in the reasonably foreseeable future, see *Zadvydas v. Davis*, 533 U.S. 678 (2001), at 701. Likewise, in *Demore v. Kim*, 538 U.S. 510 (2003), at 513, the Supreme Court, while upholding a mandatory detention statute for criminal aliens during removal proceedings, recognized that the detention of the criminal aliens on average lasted only between 47 days and four months. Ms. Pronsivakulchai has now been detained for a much longer period of time and prospects of a speedy settlement of her case are slim. In Chicago the average waiting period for detained asylum seekers to obtain a hearing on the merits is six months. If the IJ denies Ms. Pronsivakulchai’s petition in the case remanded by the Court the appeal process will begin anew.

19. Judicial review of a custody determination must be effective, so the source argues, citing the views expressed by the Human Rights Committee in *A. v. Australia*, Communication No. 560/1993 (A/52/40, Vol. II): “In the Committee’s opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal.” (para. 9.5). Furthermore, “the drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.” (see *Van Alphen v. The Netherlands*, Communication No. 305/1988 (A/46/40, Vol. II)).

20. Since Ms. Pronsivakulchai's detention is inappropriate, disproportionate, and unjust and the only predictable quality of her prolonged custody is its indefinite nature, the source concludes that her detention is arbitrary.

21. Finally, according to the source, Ms. Pronsivakulchai's detention is in variance of Principles 11 and 32 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereinafter "the Body of Principles"), because of her inability to challenge the lawfulness of her detention. Moreover, the conditions of her detention violate Principles 1 and 6 of the Body of Principles, since Ms. Pronsivakulchai has received only substandard medical treatment and experienced physical, verbal, and sexual harassment.

22. Following a request for additional information from the Working Group, the source sent recent documents obtained by Ms. Pronsivakulchai's Counsel. These documents include a Thai arrest warrant issued on 21 April 2000, concerning a drug trafficking charge, for a woman bearing the first name "Vatcharee" whose last name is unknown with a detailed physical description of the woman attached to the warrant; a letter dated 20 April 2001, addressed to the Attorney General of Thailand from the Office of the Secretariat of the Cabinet of Thailand, stating that the extradition of Ms. Vatcharee Pronsivakulchai will be conducted under the condition that the United States Government will send Ms. Vatcharee Pronsivakulchai back to the Thai Government immediately after she has completed her trials and punishments under the United States laws so the Thai Government will be able to conduct further legal proceedings under the Thai laws; a Note Verbale, dated 24 April 2001, from the Embassy of the United States of America in Bangkok addressed to the Ministry of Foreign Affairs of the Thai Government stating that Ms. Pronsivakulchai will be deported back to Thailand in accordance with Immigration law following the adjudication of her case in the United States; and a letter dated 24 June 2004, addressed to the United States Immigration Court from the Office of the Attorney General of Thailand confirming that there is an outstanding warrant for the arrest of Vatcharee Pronsivakulchai or Pronsivakulchai for narcotics violations committed in Thailand.

23. The Working Group shares the reading of the criterion established in Guideline 2 of UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers which reaffirms that, "[a]s to general principle asylum-seekers should not be detained." Guidelines 3, 5 and 7 make clear that governments should detain asylum seekers only in exceptional circumstances, after all alternatives to detention have been considered. Detention should be for the minimum period of time necessary and proportional to the reasons for the detention. Procedural safeguards, such as the effective possibility of judicial review, should be available to detainees to challenge the legality of their detention.

24. The Working Group reiterates its doctrine on the determination of arbitrariness of the detention of asylum seekers and immigrants developed in its annual reports for the years 1997 (E/CN.4/1998/44) and 1998 (E/CN.4/1999/63) and adopted as Deliberation No. 5 in Annex II to the annual report for the 1999 (E/CN.4/2000/4). Namely Principle 7, stating the necessity to set a maximum period by law, and Principle 8, requiring, *inter alia*, the notification of the asylum seeker or immigrant of the conditions under which they are able to apply for a remedy before a judicial authority. It should also be mentioned the observations and recommendations of the Working Group in the respective reports on its country visits to the United Kingdom

(E/CN.4/1999/63/Add.3) and Australia (E/CN.4/2003/8/Add.2), which exclusively dealt with issues of detention pursuant to immigration powers and raised the concern of the Working Group.

25. Nevertheless, even if as a general principle the Working Group considers that asylum seekers should not be detained, there are in the present case, special circumstances which may justify Ms. Pronsivakulchai's detention pending deportation.

26. As mentioned above, Ms. Pronsivakulchai was arrested in Thailand in October 2000 and extradited from Thailand to the United States to face trial on charges of alleged drug crimes. Her extradition to the United States was granted by the Royal Thai Government authorities under the express condition that she should be returned to Thailand immediately after she had completed her trials and punishments under United States law, in order to make face to charges submitted by the Thai authorities. Once in the United States she collaborated with the DEA in their investigations involving drug trafficking from Thailand to the United States.

27. On 15 March 2004 following the withdrawal of the charges by the Government, the criminal case against Ms. Pronsivakulchai was dismissed by Judge Gottschall. In application of the extradition agreement between the United States and the Thai authorities she should be deported to Thailand. Ms. Pronsivakulchai is currently being held in administrative detention, ordered by the Department of Homeland Security Bureau of Immigration, waiting for her agreed return to Thailand, as settled upon in the extradition agreement. Being afraid of returning to Thailand because of possible reprisals by people against whom she has acted while cooperating with the DEA she has applied to the United States immigration for asylum.

28. The Working Group considers that Ms. Pronsivakulchai is being detained in order to be deported to her country, in application of an extradition agreement between the United States and the Royal Thai Governments. She has been called to respond to drug charges brought against her in Thailand, as showed in the correspondence between the Thai and the U.S. authorities submitted to the Working Group.

29. The Working Group also considers that although Ms. Pronsivakulchai was able to challenge the decisions concerning her request for asylum, inter alia, through her recourse brought before the United States Court of Appeals for the Seven Circuit, she has not been provided with an adequate possibility to challenge the administrative detention orders. The regrettable length of her detention seems to be due, among other things, to her legitimate exercise of all possible recourses and appeals in regards to her request for asylum.

30. In the light of the foregoing, the Working Group cannot conclude that the deprivation of liberty of Ms. Vatcharee Pronsivakulchai is arbitrary.

Adopted on 30 November 2006