



# General Assembly

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its sixty-ninth session (22 April–1 May 2014)

#### No. 19/2014 (Thailand)

#### Communication addressed to the Government on 6 February 2014

concerning Muhamadanwar Hajiteh also known as Muhamad Anwal or Anwar

**The Government has not replied to the communication.**

#### **The State is a party to the International Covenant on Civil and Political Rights.**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

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

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

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

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

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

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

## **Submissions**

### *Communication from the source*

3. The case summarized below was reported to the Working Group on Arbitrary Detention.

4. Muhamadanwar Hajiteh also known as Muhamad Anwar or Anwar (hereinafter Mr. Anwar) is a Thai citizen, born in 1984 and living in Pattani province, Thailand. Mr. Anwar belongs to the ethnic Malay Muslim population of Pattani, which is one of the southern provinces of Thailand, along with Yala and Narathiwat. The majority of the population in the region are ethnic Malay Muslims who speak a local dialect of the Malay language.

5. The source informs the Working Group that the southern provinces were independent Muslim sultanates before being annexed by Thailand (then Siam) in 1902. Since that time, the region has experienced varying degrees of separatist activity owing to its distinctive religious, ethnic, linguistic, cultural and historical characteristics. The National Revolutionary Front (Barisan Revolusi Nasional (BRN)) is one of the many separatist groups that were formed to establish an independent homeland by casting ethnic Malay nationalism in Islamic terms. The BRN-Coordinate (Barisan Revolusi Nasional-Koordinasi) has emerged as the strongest among the various BRN factions.

6. Following the widespread resurgence of separatist violence in 2004, the southern provinces were placed under martial law in July 2005, pursuant to the enactment of the Executive Decree on Government Administration in Emergency Situations (Emergency Decree), which is still in effect. Sections 11(1) and 12 of the Emergency Decree authorize soldiers and police to search and arrest without a judicial warrant. In addition, suspects arrested under martial law may be detained for up to seven days without a charge. According to the source, the Emergency Decree does not provide guarantees of access to counsel or to contact family members, the right to challenge detention before a court, nor safeguards against torture or other cruel, inhuman or degrading treatment during the 30-day period of detention provided for in the decree. A case will only proceed under the Criminal Procedure Code upon termination of the detention period.

7. At 7.20 p.m. on 17 August 2005, six plain-clothes policemen arrested Mr. Anwar in his home, pursuant to the Emergency Decree, and without a warrant. The source reports that at the time of his arrest, Mr. Anwar was not informed of the charges against him nor of his procedural rights as an accused, in contravention of section 83(2) of the Criminal Procedure Code of Thailand and article 9, paragraph 2, of the International Covenant on Civil and Political Rights. He was reportedly told that an informant had notified the police of his involvement with the separatist movement.

8. Immediately following his arrest, Mr. Anwar was detained at Yarang Police Station in Pattani province and later transferred to the Royal Police Cadet Academy, Region 9 in Yala province. At 1.00 a.m. on 18 August 2005, he was moved to Nong Jik Police Station in Pattani province, where he was detained for 28 days. He was then transferred to Pattani Central Prison.

9. On 10 November 2005, Mr. Anwar was reportedly brought before a judge for the first time since his arrest, at which time he was informed that he was accused of membership in BRN and was charged under articles 83, 91, 113, 114, 135 (1) and (2), 209 and 210 of the Criminal Code. The source submits that the period of two months and 23 days in detention before being brought before a judge constitutes an unreasonable delay and is in contravention of section 87(3) of the Criminal Procedure Code and articles 9, paragraph 3, and 14, paragraph 3 of the International Covenant on Civil and Political Rights.

10. During the period from November 2005 to October 2006, three requests were made to release Mr. Anwar on bail, pursuant to section 88 of the Criminal Procedure Code. All were denied on the basis of section 11 of the Emergency Decree (To prevent suspects from committing an act which may cause a serious situation) and section 87(1)(3) of the Criminal Procedure Code (Necessity of interrogation). He was finally released on bail in October 2006.

11. On 25 July 2007, the Pattani Provincial Court, a court of first instance, convicted Mr. Anwar pursuant to section 114 (Making preparations or conspiring to commit the insurrection); section 135 (2)(2) (Receiving training in terrorist activities); section 209 (Being a member of a body of persons whose proceedings are secret and whose aim is to be unlawful) of the Criminal Code. Mr. Anwar was sentenced to imprisonment for a term of 12 years.

12. On 16 June 2009, the Court of Appeal overturned the decision of the court of first instance on the grounds that the Prosecutor had produced insufficient evidence to conclude that Mr. Anwar was a member of BRN.

13. On 1 May 2013, the Supreme Court overturned the decision of the appellate court and reinstated the 12-year sentence. The Supreme Court did not give any reasons for quashing the decision of the appellate court and its finding of insufficient prosecutorial evidence for a conviction. Since the date of the Supreme Court judgement, Mr. Anwar has been serving his sentence in Pattani Central Prison, where he is expected to remain until 2024.

14. The source submits that Mr. Anwar's detention may be considered arbitrary under categories III and V of the arbitrary detention categories defined by the Working Group for serious violations of his right to a fair trial and because the decision to deprive him of his liberty was motivated by discriminatory reasons, based on his ethnicity, religion and place of origin.

15. In the source's view, contrary to article 9 of the Universal Declaration of Human Rights, Mr. Anwar was taken into custody and subsequently convicted for alleged involvement with a separatist movement that has its origins in the ethnic Malay Muslim population of the southern Thai provinces, a community to which he belongs. In addition, contrary to article 10 of the Universal Declaration of Human Rights, Mr. Anwar was not entitled to a fair and public hearing by an independent and impartial tribunal, as the Court process was tainted in the following respects: the conviction was based upon the testimony of a sole witness and, contrary to the requirements of article 227 (1) of the Criminal Procedure Code of Thailand, the court failed to exercise due care in admitting that evidence, as its reliability had not been tested. Furthermore, to Mr. Anwar's detriment, the evidence presented by his defence was not given equal weight by the judiciary as none of the three levels of courts cites his defence in their judgements nor provides reasons as to why they did not find the evidence presented by his defence convincing. Lastly, the source argues that, contrary to articles 9 and 14 of the International Covenant on Civil and Political Rights, there was an unreasonable delay in the resolution of the prosecution's case against Mr. Anwar as it lasted for eight years.

*Response from the Government*

16. The Working Group sent a communication to the Government on 6 February 2014, requesting it to provide with detailed information about the current situation of Muhamadanwar Hajiteh also known as Muhamad Anwal or Anwar and to clarify the legal provisions justifying his continued detention.

17. The Working Group regrets that the Government has not responded to the allegations transmitted to it.

18. Despite the absence of any information from the Government, the Working Group considers that it is in the position to render its opinion on the detention of Mr. Anwar, in conformity with paragraph 16 of its methods of work.

**Discussion**

19. The Government has not rebutted the allegations submitted by the source.

20. The present case concerns the arrest and detention of Muhamadanwar Hajiteh also known as Muhamad Anwal or Anwar. He was arrested on 17 August 2005 and brought before a judge on 10 November 2005. He was released on bail in October 2006.

21. In July 2007, Mr. Anwar was sentenced to 12 year's imprisonment for preparing or conspiring to commit an insurrection, receiving training in terrorist activities and membership in an organization that is secret and whose aim is unlawful. His conviction was overturned on appeal in June 2009, but reinstated by the cassation court in May 2013. Mr. Anwar is currently serving his sentence and, according to the source, he is expected to remain in prison until 2024.

22. The source submits that Mr. Anwar's detention for the period of two months and 23 days without him being informed about the charges against him or brought before a judge constitutes an unreasonable delay in contravention of section 87(3) of the Criminal Procedure Code and article 9, paragraph 3, and article 14, paragraph 3, of the International Covenant on Civil and Political Rights. The source has pointed to the Emergency Decree of 2005, under which suspects can be detained for up to seven days without a charge and held for 30 days in detention before the case proceeds under the Criminal Procedure Act.

23. The Working Group reiterates that States derogating from procedures set out in article 9 of the Covenant in circumstances of armed conflict or other public emergency must ensure that such derogation does not go beyond those strictly required by the exigencies of the actual situation and that they reflect the principle of proportionality, which is common to derogation and limitation powers. This becomes even more relevant the longer the duration of the derogation, which, in any case, must never approach a normal or permanent state. The Working Group builds on the practice of the Human Rights Committee and its own constant jurisprudence, which have established these requirements as customary international law.

24. The Working Group refers to the concern expressed by the Human Rights Committee that the Emergency Decree of 2005 does not place sufficient limits on the derogation from the rights protected by the International Covenant on Civil and Political Rights that may be made in emergencies, nor does it guarantee full implementation of article 4 of the Covenant. The Human Rights Committee stated that detention without external safeguards beyond 48 hours should be prohibited and recommended that:

The State party should ensure that all the requirements of article 4 of the Covenant are complied with in its law and practice, including the prohibition of derogation

from the rights listed in its paragraph 2. In this regard, the Committee draws the attention of the State party to its general comment No. 29.<sup>1</sup>

25. Furthermore, the principle of legality requires compliance with the rights under the emergency legislation. That requirement has not been met in the present case, as Mr. Anwar was not promptly informed about the charge against him and brought before a judge, contrary to the rights provided for in the Emergency Decree of 2005 and in the International Covenant on Civil and Political Rights.

26. The Working Group concludes that the detention of Mr. Anwar for a period of two months and 23 days, without being informed about the charge against him and brought before a judge, constitutes a breach of article 9, paragraph 3, of the Covenant.

27. The source also asserts that there were serious violations of Mr. Anwar's right to a fair trial. The Working Group notes the source's submission that the evidence presented by Mr. Anwar's defence was not given equal weight by the courts and that the courts relied on police evidence presented by the prosecution in convicting and sentencing Mr. Anwar. The Working Group underlines that evidence presented by the prosecution must be open to challenge or review by courts and the source's submission clearly indicates that the evidence was not subject to proper examination by the courts in the present case.

28. In fact, the court of appeal overturned the decision of the court of the first instance on the ground of insufficient evidence. Then, without giving any reasons, the Supreme Court quashed the decision of the appellate court and its finding of insufficient prosecutorial evidence for a conviction and reinstated the sentence. No matter what national law stipulates, international law requires that where an accused person is charged with membership in a prohibited organization or wide incitement or inchoate offences, evidence must be subject to robust challenge and reasons reflecting that must be provided in the judgement of the court.

29. The Working Group thus holds that Mr. Anwar's detention is in grave breach of article 9 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. The Working Group has established that Mr. Anwar's detention is in violation of international law and that he has an enforceable right to compensation pursuant to article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

### **Disposition**

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

The deprivation of liberty of Muhamadanwar Hajiteh also known as Muhamad Anwal or Anwar is arbitrary and constitutes a breach of article 9 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights. Mr. Anwar's detention falls within category III of the arbitrary detention categories to which the Working Group refers when considering cases submitted to it.

31. Consequent upon the opinion rendered, the Working Group requests the Government of Thailand to remedy the situation of Mr. Anwar and to bring it into conformity with the standards and principles set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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<sup>1</sup> CCPR/CO/84/THA, para. 13.

32. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to immediately release Mr. Anwar and to provide him with adequate reparation. The duty to provide Mr. Anwar with compensation for the violations of his rights rests upon the State and should be enforceable before the national courts.

*[Adopted on 1 May 2014]*

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