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REFERENCE:

[G/SO 218/2]

2 October 2015

Dear Mr. Rasiah and Mr. Genser,

I would like to refer to the seventy-third session of the Working Group on Arbitrary Detention, during which time the Working Group adopted several Opinions on cases of deprivation of liberty submitted to it.

In accordance with paragraph 18 of the Working Group's revised methods of work, I am sending to you, attached herewith, the text of Opinion No. 22/2015 (Malaysia) adopted on 1 September 2015, regarding a case submitted by you.

In conformity with its revised methods of work, the Working Group transmits its Opinions to the source of the petitions, two weeks after having transmitted it to the relevant Government.

This Opinion will be published on the website of the Working Group and reflected in its annual report to the Human Rights Council. In the meanwhile, we would encourage you to treat the information given to you by the Working Group on this matter with discretion.

Yours sincerely,

Christophe Peschoux
Secretary a.i.

Working Group on Arbitrary Detention

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Human Rights Council
Working Group on Arbitrary Detention

ADVANCE UNEDITED VERSION

**Opinions adopted by the Working Group on Arbitrary
Detention at its seventy-third session,
31 August– 4 September 2015**

No.22/2015 (Malaysia)

Communication addressed to the Government on 25 June 2015

Concerning Anwar Ibrahim

The Government has not replied to the communication

The State is not 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/30/69), 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);

(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. Mr. Anwar Ibrahim is a 68 year old national of Malaysia. He is the founder and leading figure of the People's Justice Party (Parti Keadilan Rakyat or PKR). Mr. Ibrahim served as the Deputy Prime Minister of Malaysia from 1993 to 1998 and the Finance Minister from 1991 to 1998. After allegations of corruption and sodomy were made against Mr. Ibrahim, he was dismissed from office by the then Prime Minister.

4. In April 1999, Mr. Ibrahim was convicted of corruption and sentenced to six years of imprisonment. In July 2000, he was convicted of sodomy and sentenced to an additional nine years of imprisonment. The source notes that, during Mr. Ibrahim's time in prison, he was referred to by Amnesty International as a 'prisoner of conscience' and the fairness of his trial was questioned by Human Rights Watch. In September 2004, Mr. Ibrahim successfully appealed his sodomy conviction to the Federal Court of Malaysia and was released after six years of imprisonment.

5. After his release, Mr. Ibrahim continued to actively engage with the political opposition in Malaysia and to be an outspoken critic of the ruling party. He helped to bring together the Pakatan Rakyat (PR) coalition which contested the 2008 general elections.

6. On 15 July 2008, Mr. Ibrahim was arrested for 'unnatural offences' under section 377A and B of the Malaysian Penal Code, which is punishable by twenty years of imprisonment and whipping. An intern working in Mr. Ibrahim's political team filed a police report accusing Mr. Ibrahim of sodomy. According to the source, the intern was examined at a hospital, but the doctors did not find any injuries consistent with the allegations made against Mr. Ibrahim. Swabs taken at the hospital were kept by the police in a filing cabinet for 42 hours before being sent for analysis. Mr. Ibrahim was charged with sodomy on 7 August 2008 and released on bail.

7. The trial commenced in the High Court on 3 February 2010. The source informs that the defence petitioned to have the charges dropped for lack of medical evidence, and sought to compel the prosecution to disclose documents and witness lists. The source claims that these due process appeals were ignored throughout the trial, including when taken on appeal to higher courts.

8. On 9 January 2012, Mr. Ibrahim was acquitted of sodomy. The trial judge questioned the reliability of the prosecution evidence, finding that he could not be assured that Mr. Ibrahim was guilty of sodomy. However, the acquittal was immediately appealed. On 4 March 2014, the Court of Appeal reversed the acquittal and sentenced Mr. Ibrahim to five years' imprisonment. The Federal Court affirmed the sentence on 10 February 2015, finding the prosecution witness to be credible and that the prosecution evidence corroborated the allegations. Mr. Ibrahim was taken into custody the same day at the Federal Court. The source notes that, on 17 February 2015, Amnesty International again designated Mr. Ibrahim a 'prisoner of conscience'.

9. The source informs that, despite assurances from Malaysia's Home Minister that Mr. Ibrahim would be treated humanely, he was initially held in solitary confinement in Sungai Buloh Prison in Selangor in a bare cell, with a thin foam mattress on a low bed, a bucket for bathing and a squat toilet. The cell had insects and rodents. The cell was extremely hot and humid with no form of ventilation, forcing Mr. Ibrahim to sleep on the floor where the temperature was lower. The source claims that Mr. Ibrahim continues to suffer from a chronic back and spinal injury caused by a previous beating by the police, and sleeping on the floor resulted in Mr. Ibrahim suffering extreme and unnecessary pain.

10. On 2 March 2015, the prison authorities moved Mr. Ibrahim to the medical wing of the prison, as a result of public pressure. However, the source informs that Mr. Ibrahim's health has not improved and that he has lost weight. He suffers from high blood pressure, a shoulder tear, and a condition indicative of intestinal bleeding. On 2-5 June 2015, Mr. Ibrahim was admitted to hospital, four weeks after the prison doctor had requested approval from the Home Minister for the transfer. He was diagnosed with a polyp growth on his kidney, but the doctors found no "acute" disease. Mr. Ibrahim's family requested that a doctor of his choice examine him while he was in the hospital, but they did not receive a response.

11. According to the source, Mr. Ibrahim continues to be held in solitary confinement, and the prison guards around his cell have been instructed not to talk to him. The source alleges that Mr. Ibrahim has faced constant psychological torture while in prison, including harassment every few hours by prison guards who come by his cell to take pictures of him. It is unknown where or to whom these pictures are sent. Mr. Ibrahim was initially denied writing materials. His lawyers are only allowed to visit twice weekly and their files are searched, which makes the handling of Mr. Ibrahim's legal matters much more difficult. Requests to allow Mr. Ibrahim's family to see him have been repeatedly denied, and when his family is allowed to visit, it is usually once every three weeks.

12. On 16 March 2015, Mr. Ibrahim's request for a royal pardon was denied and he officially lost his seat in parliament. On 30 April 2015, he filed an application in the Federal Court requesting that a new panel of judges review his sodomy conviction and five-year sentence on the grounds of injustice. On 6 May 2015, Mr. Ibrahim filed an originating summons in response to statements by the Election Commission Chairman that he was not eligible to vote in a by-election because he was in prison, contrary to article 119 of the Malaysian Constitution which entitles a person to vote regardless of his or her imprisonment.

13. According to the source, Mr. Ibrahim's detention resulted from his exercise of the rights to freedom of opinion and expression, and the right of political participation, as guaranteed by articles 19 and 21 of the UDHR.

14. The source argues that freedom of expression includes the right to express a dissenting political opinion, and alleges that the charge of sodomy brought against Mr. Ibrahim was a pretext to discredit and silence him as an opposition leader. Mr. Ibrahim has openly and repeatedly voiced serious concerns about undemocratic practices in Malaysia, and specifically about the current Prime Minister and his ruling United Malays National Organisation (UMNO) party. Between 2006 and 2012, Mr. Ibrahim participated in a number of political activities, including criticising government policy, helping to organise a mass rally against corruption in the electoral system, and commenting publicly about the Malaysian Government and UMNO.

15. The source claims that a pattern of targeting and persecuting Mr. Ibrahim can be seen in his first sodomy trial, and in his current trial and detention. Further, the source refers to statements made by international human rights organisations and observers

criticising the most recent trial of Mr. Ibrahim, and noting its negative effect on human rights in Malaysia.

16. In addition, the source claims that Mr. Ibrahim's detention was in response to his continued exercise of the right to take part in government, as a member and leader of the opposition PR coalition. The source points to the significant ongoing influence of Mr. Ibrahim, as evidenced in the 2013 general election when the opposition won a majority of the popular vote, and argues that the Malaysian Government sees Mr. Ibrahim as a threat because of his political success.

17. The source submits that the Government violated numerous procedural requirements during Mr. Ibrahim's most recent sodomy trial, in violation of articles 10 and 11 of the UDHR. The source argues that the Malaysian judiciary (consisting of the High Court, Court of Appeal and Federal Court) repeatedly demonstrated a lack of independence and impartiality during the trial.

18. The source points to the failure of the courts to take into account two meetings between the Prime Minister and a senior police officer (who had been involved in the earlier sodomy trial) and the intern who made the complaint against Mr. Ibrahim. It was not until after these two meetings that the intern went to the hospital and filed a police report alleging that Mr. Ibrahim sodomised him. According to the source, the timing of these meetings suggest that the intern was influenced or coerced into making the allegations against Mr. Ibrahim, and this should have been taken into consideration in assessing the credibility of the intern.

19. Further, the source referred to a relationship which allegedly occurred between the intern and a female junior prosecutor involved in Mr. Ibrahim's trial. Mr. Ibrahim's lawyers filed a police complaint requesting an investigation as to whether the intern and prosecutor had exchanged confidential prosecution material, and sought to have the sodomy charge dismissed on the basis that the trial had been compromised. The trial judge in the High Court dismissed the application, accepting without question that the junior prosecutor did not have access to key documents and that the intern had no influence over her actions. The Court of Appeal and Federal Court both refused to hear appeals on this issue.

20. The source claims that Mr. Ibrahim's defence team was repeatedly denied access to important prosecution evidence, including witness lists, medical evidence, samples, notes by the doctors who examined the intern, and the intern's statement to police. According to the source, the courts denied Mr. Ibrahim the right to prepare a defence by refusing to provide him with the information necessary for his case.

21. The source alleges that the trial judge demonstrated bias against Mr. Ibrahim by allowing the trial to proceed without any corroborating medical evidence. The source also states that the trial judge refused to hold the ruling party-owned newspaper in contempt of court when, in defiance of a court order, it published pictures of the location where the act of sodomy allegedly took place, and made improper statements about the trial. According to the source, the trial judge also made intimidating remarks to one of the defence lawyers when he raised concerns about the fairness of the trial. Mr. Ibrahim's defence team was concerned about the independence of the trial judge and made multiple requests for him to recuse himself from the trial, which were refused by both the trial judge and by the Court of Appeal.

22. The source claims that the appointment of a Chief Prosecutor with connections to the ruling party and to a key prosecution witness reveals a conflict of interest and bias against Mr. Ibrahim. The source alleges that the Chief Prosecutor is the personal confidante of the Prime Minister and lead counsel for the UMNO, and was the Chairman of an inquiry which found the key prosecution witness to be an unreliable witness in another case. Mr. Ibrahim's lawyers raised concerns about this conflict of interest and bias, but the

petitions were dismissed as an abuse of process intended to delay the Government's appeal against the acquittal of Mr. Ibrahim on sodomy charges in January 2012.

23. In addition, the source refers to numerous violations of due process in the Court of Appeal's reversal of the acquittal of Mr. Ibrahim. The source claims that the timing of the appeal hearing in Mr. Ibrahim's case was brought forward by one month, which interfered with the preparation of a defence by Mr. Ibrahim's lawyers, and ensured that Mr. Ibrahim, if found guilty, would not be eligible to contest a by-election held at the time. The source also pointed to the haste with which the appeal was heard, noting that the deliberations on the second day of the appeal lasted only 90 minutes before the Court of Appeal handed down a unanimous decision in a complicated trial which had been ongoing for nearly six years. Further, the source noted the Court of Appeal's insistence on completing the sentencing in one day, rather than adjourning to allow Mr. Ibrahim's lawyers time to obtain a medical report for use in sentencing. His lawyers had requested an adjournment of one week but were given one hour to prepare, and important medical information relating to Mr. Ibrahim was not taken into account by the Court of Appeal. The source suggests that these decisions demonstrate that the Court was influenced by political pressure and was not acting as a fair, impartial and independent tribunal.

24. The source notes that, a few moments after the final appeal was dismissed by the Federal Court, the Prime Minister's Office released a statement asking for "all parties to respect the legal process and judgment" and that "Malaysia has an independent judiciary and there have been many rulings against senior government figures". The source argues that the Prime Minister's Office must have known the outcome of the case before the judgment was released.

25. The source alleges that there were several instances of interference with defence witness testimony, including harassment of alibi witnesses by the police, and refusal by the trial judge to compel testimony from available witnesses such as the current Prime Minister.

26. Finally, the source claims that there was an overwhelming lack of credible evidence against Mr. Ibrahim, and a fair and impartial judiciary could not have concluded that he was guilty beyond a reasonable doubt. While the source notes that the Working Group will not substitute itself for a domestic tribunal in assessing the facts in each case, the source argues that the fact that the prosecution and the courts reached their conclusions on the basis of unreliable physical evidence, indicates that there was a miscarriage of justice that amounts to an unfair trial.

27. The source submits that the detention of Mr. Ibrahim is arbitrary and falls under category II and III of the Working Group's categories of arbitrary detention.

Response from the Government

28. The Working Group transmitted the allegations from the source to the Government of Malaysia on 25 June 2015 under its regular communication procedure, requesting the Government to provide detailed information by 26 August 2015 about the current situation of Mr. Ibrahim, and to clarify the legal provisions justifying his continued detention. The Working Group regrets that it has not received a response from the Government to this communication.

Discussion

29. In the absence of a response from the Government, the Working Group has decided to render its Opinion on the detention of Mr. Ibrahim in conformity with paragraph 15 of its revised methods of work.

30. In its jurisprudence, the Working Group has established the ways in which it deals with evidentiary issues.¹ 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 given allegations. Where the Government has not responded to a request from the Working Group for information, the Working Group may base its Opinion on the information provided by the source. In the case of Mr. Ibrahim, the Working Group considers that the source has established a credible *prima facie* case.

31. The Working Group considers that the information presented by the source discloses a violation of Mr. Ibrahim's right to a fair trial, particularly the right to a fair hearing by an independent and impartial tribunal under article 10 of the UDHR, and the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence under article 11(1) of the UDHR. In particular, the Working Group refers to the allegations made by the source, which were not refuted by the Government, in relation to the bias of judges involved in the trial and appeal process, the denial of access to prosecution evidence, interference with defence witnesses, and the haste with which the appeal and sentencing were conducted.

32. In addition, principle 21 of the Basic Principles on the Role of Lawyers requires competent authorities to ensure that lawyers have access to appropriate information, files and documents in their possession or control in sufficient time to enable the lawyers to provide effective legal assistance. The allegations made by the source disclose violations of principles 1, 5(1), 6, 18, 19, 24 and 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

33. The Working Group concludes that the breaches of articles 10 and 11 of the UDHR in the case of Mr. Ibrahim are of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III of the categories applicable to the consideration of cases submitted to the Working Group.

34. The alleged actions and conduct of the prosecution contravene the duty to ensure due process as set forth in guidelines 12, 13 and 14 of the Guidelines on the Role of Prosecutors. Guideline 12 requires prosecutors to perform their duties fairly, and to respect and protect human dignity and uphold human rights, thus contributing to ensuring due process. Guideline 13(a) and (b) requires prosecutors to carry out their functions impartially and to avoid discrimination, including on political grounds, and to act with objectivity and take proper account of the position of the suspect and victim. The alleged actions and conduct of the High Court, Court of Appeal, and Federal Court contravenes the duty to decide matters impartially and fairly in accordance with principles 2 and 6 of the Basic Principles on the Independence of the Judiciary. The Government has contravened principles 1 and 4 by failing to provide an independent and impartial tribunal to Mr. Ibrahim.

35. Turning to the source's claims in relation to category II, the Working Group has analysed: (i) the information provided by the source, (ii) the history of the proceedings brought against Mr. Ibrahim, particularly the pattern of persecution of Mr. Ibrahim in previous proceedings on sodomy charges which were later overturned on appeal, and (iii) the statements issued by prominent and respected human rights organisations in relation to Mr. Ibrahim's most recent trial, including the Office of the UN High Commissioner for Human Rights. Taken together, these factors provide a persuasive body of evidence, which

¹ See, for example, Report of the Working Group, A/HRC/19/57, paragraph 68, 26 December 2011, and Opinion No. 52/2014.

was not contested by the Government, that Mr. Ibrahim has been specifically targeted by the Malaysian authorities. Further, the violations of Mr. Ibrahim's right to a fair trial discussed above are so serious as to lead the Working Group to conclude that the current sodomy charges against Mr. Ibrahim were politically motivated.

36. The Working Group considers that the detention of Mr. Ibrahim was related to his activities as a political opposition leader. In particular, the Working Group takes note of the fact that, as a result of his imprisonment, Mr. Ibrahim has been barred from parliament and can no longer serve as a Member of Parliament and Leader of the Opposition. He is also prevented from undertaking his former advocacy roles in relation to human rights issues, such as free and fair elections and corruption.²

37. The Working Group concludes that there is a violation of Mr. Ibrahim's right to freedom of opinion and expression and his right to take part in government under articles 19 and 21 of the UDHR, and that the case falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

38. The Working Group wishes to record its concern about Mr. Ibrahim's physical and psychological integrity while serving the five years of imprisonment imposed in February 2015. In particular, the Working Group refers to the allegations made by the source that Mr. Ibrahim is being held in solitary confinement. The Working Group reminds the Government that efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.³

39. The Working Group considers that the treatment of Mr. Ibrahim during his detention, which was not contested by the Government, may have violated the prohibition of torture or other cruel, inhuman or degrading treatment under article 5 of the UDHR. The Working Group will therefore refer the matter to the relevant Special Rapporteur for further consideration of the circumstances of this case and, if necessary, appropriate action.

Disposition

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

The deprivation of liberty of Mr. Ibrahim is arbitrary, being in contravention of articles 10, 11, 19 and 21 of the UDHR, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

41. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Ibrahim without delay and bring it into conformity with the standards and principles in the UDHR. The Working Group also encourages the Government to accede to the ICCPR.

42. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to release Mr. Ibrahim immediately, and ensure that his political rights that were removed based on his arbitrary detention be reinstated.

43. In accordance with paragraph 33(a) of its revised methods of work, the Working Group considers it appropriate to refer the allegations regarding the treatment of Mr.

² Mr. Ibrahim's right to strive for the promotion of human rights is protected by 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, also known as the UN Declaration on Human Rights Defenders, in particular articles 1, 5, 6, 7, 8, 9 and 12.

³ Principle 7, Basic Principles for the Treatment of Prisoners.

Ibrahim during his term of imprisonment to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

[Adopted on 1 September 2015]
