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**Human Rights Council  
Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary  
Detention at its seventy-fifth session,  
18-27 April 2016****Opinion No. 12/2016 concerning Phan (Sandy) Phan-Gillis  
(People's Republic of)**

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. The Human Rights Council assumed the mandate in its decision 1/102 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.

2. In accordance with its methods of work (A/HRC/30/69), on 27 January 2016 the Working Group transmitted a communication to the Government of People's Republic of China concerning Phan (Sandy) Phan-Gillis. The reply was received on 13 April 2016 while the deadline has expired on 28 March 2016. The State 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 sentence or despite an amnesty law applicable to him) (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, that aims towards or can result in ignoring the equality of human rights (category V).

## Submissions

### *Communication from the source*

4. Ms. Phan (Sandy) Phan-Gillis (hereinafter Ms. Phan-Gillis), born on April 8, 1960, is a national of the United States of America (Passport No. 505639428, issued on May 16, 2014). She is an international business consultant and the President of the Houston Shenzhen Sister City Association at the Mayor's International Trade and Development Council, located in Houston, Texas, United States of America – which is also the place of her usual residence.

5. According to the source, on March 19, 2015 Ms. Phan-Gillis was stopped for questioning in Zhuhai, Guangdong Province, China, at the international border crossing into Macau. Forces that have carried the arrest are claimed to be the Nanning State Security Bureau of Guangxi Zhuang Autonomous Region, China's Ministry of State Security.

6. The source alleges that contrary to the procedure provided for in the People's Republic of China Criminal Procedure Law, the family of Ms. Phan-Gillis never received notice of her detention from authorities, and that they were informed that she had been arrested 12 days later by the United States Consulate in Guangzhou. It is alleged that the arrest warrant for the initial detention of Ms. Phan-Gillis was never provided to her family despite repeated requests. It is therefore not known whether an arrest warrant was ever produced.

7. The source informs that since March 20, 2015 Ms. Phan-Gillis was held under residential surveillance in a designated/undisclosed location and that, six months later, on September 20, 2015, she was moved to Nanning Detention Center No. 2, a facility located in Nanning, Guangxi Zhuang Autonomous Region, China. According to the source, in Nanning Detention Center No. 2, Ms. Phan-Gillis was initially placed in solitary confinement, but currently has a cellmate.

8. The source informs that the reasons for the detention imputed by the authorities are "spying" and "stealing state secrets". No further grounds have been disclosed. It is alleged that authorities have conceded that they do not possess sufficient evidence to file formal charges against Ms. Phan-Gillis. Consequently, the authorities have not specified which of her actions violated which provisions of the domestic law and the prosecution has not filed any specific charge against Ms. Phan-Gillis. Concern is raised that the current situation could continue for up to 13 months and a half, which under the China's law, is the maximum legal time limit for authorities to file charges.

9. It is further alleged that Ms. Phan-Gillis has not been granted access to a lawyer, nor has she had any communication with her family members since September 2015. Since her arrest, the beginning of her residential surveillance in a designated/undisclosed location and her transfer to the Nanning Detention Center No. 2, Ms. Phan-Gillis has only been allowed a 30 minutes visit a month by a United States of America consular official. However, these meetings never took place at the actual location of her detention. The source further informs that Ms. Phan-Gillis has recently suffered a heart episode and was taken to a hospital for

examination. The United States Department of State has been aware of the situation of Ms. Phan-Gillis since March 2015 and has been working with Chinese authorities on her behalf.

10. The source submits that there are a number of violations of the domestic law. Firstly, given that authorities placed Ms. Phan-Gillis under the residential surveillance between March 20, 2015 and September 20, 2015 without providing the legal basis for that deprivation of liberty, they have violated Article 72 of the China's Criminal Procedure Law requiring that authorities clarify the legal basis for arrest before applying residential surveillance measures. Secondly, the source claims that Article 77 of the China's Criminal Procedure Law has also been breached. This provision states that suspects shall be released after 6 months in residential surveillance. However, Ms. Phan-Gillis has continued to be deprived of her liberty since September 20, 2015, and she is being held in a detention center inaccessible to US Consular officials, her lawyers or family. It is also submitted that the fact that authorities have never notified family members of Ms. Phan-Gillis of her detention violates the Article 83 of the Criminal Procedure Law, which provides that authorities must inform family members of an individual within 24 hours of his or her detention.

11. Moreover, the source alleges that Ms. Phan-Gillis has been arbitrarily detained in violation of Articles 9 and 10 of the Universal Declaration of Human Rights (UDHR), which provide safeguards against arbitrary arrest and detention as well as guarantee entitlement in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of individual's rights and obligations and of any criminal charges against him. The source therefore submits that the detention of Ms. Phan-Gillis falls under category III under the Working Group's mandate.

#### *Response from the Government*

12. The Working Group regrets that the Government did not reply to the allegations within 60 days time limit for reply provided for in paragraph 15 of the Methods of work. The reply was received on 13 April 2016 while the deadline had expired on 28 March 2016.

#### **Discussion**

13. Pursuant to paragraph 16 of the WGAD Methods of work, "even if no reply has been received upon expiry of the time limit set, the Working Group may render an Opinion on the basis of all the information it has obtained". By the time of consideration of the case the Working Group had only unofficial translation of the belated reply into one of the working languages of the WGAD.

14. According to the unofficial translation, the Government informs the Working Group that Ms. Phan-Gillis was suspected of stealing state intelligence and according to Constitution and Criminal law was under residential surveillance from 20 March 2015.

15. On 20 September 2015 she was detained. This arrest was approved by the Prosecutor's office on 26 October 2015. The Government states that Ms. Phan-Gillis was charged with "assisting external parties to steal national intelligence".

16. The Government informs that the investigation is still ongoing. Ms. Phan-Gillis is detained in the Guanxi Province Detention facility. Since her arrest and until 25 March 2016 Chinese authorities have facilitated 12 consular visits by US diplomats. Her physical and psychological situation is good. She is cooperating with relevant authorities who are acting in accordance with the law.

17. It is indicated in the reply that during the time that Ms. Phan-Gillis has been under criminal compulsory measures, all her rights were legally protected. Within the limits prescribed by law, China provided her with sufficient humanitarian care.

18. The Government, however, does not rebut allegations of violation of Ms. Phan-Gillis right to legal assistance. In violation of international human rights norms, Ms. Phan-Gillis has also been deprived of her right the assistance of a legal counsel. Under the Body of Principles, a detained person shall be entitled to have the assistance of a legal counsel.<sup>1</sup> Moreover, a detained person shall be entitled to communicate and consult with his legal counsel and shall be allowed adequate time for consultations with the legal counsel.<sup>2</sup>

19. Furthermore, according to the Government's reply, the detention of Ms. Phan-Gillis has not been authorised by a judicial or other impartial and independent authority. The Working Group recalls that the Body of Principles requires that any form of detention shall be ordered by, or be subject to the effective control of, a judicial or other authority.<sup>3</sup> Furthermore, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.<sup>4</sup> Furthermore, a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention.<sup>5</sup> It is emphasised in the Body of Principles, that the words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of impartiality and independence.<sup>6</sup>

20. Contrary to these requirements, the detention of Ms. Phan-Gillis was authorised by the District People's Procuratorate, as confirmed by the Government in its reply. Indeed, the Procuratorate, which responsible for prosecutions, cannot be considered as an independent and impartial authority. Since his arrest by the Procuratorate, Ms. Phan-Gillis has never been brought before judicial or other impartial and independent authority.

21. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial and to liberty and security, established in articles 9 and 10 of the UDHR and principles 4, 11, 17, 18, and 37 of the Body of Principles in this case is of such gravity as to give the deprivation of liberty of Ms. Phan-Gillis an arbitrary character.

22. Thus, the deprivation of liberty of Ms. Phan-Gillis falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

### **Disposition**

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

The deprivation of liberty of Ms. Phan-Gillis has been arbitrary, being in contravention articles 9 and 10 of the UDHR and principles 4, 11, 17, 18, and 37 of the Body of Principles; it falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

24. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Ms. Phan-Gillis and bring it into conformity with the standards and principles set forth in the UDHR and the Body of Principles.

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<sup>1</sup> Ibid., principle 17.

<sup>2</sup> Ibid., principle 18.

<sup>3</sup> Ibid., principle 4.

<sup>4</sup> Ibid., principle 11.

<sup>5</sup> Ibid., principle 37.

<sup>6</sup> Ibid., "Use of terms", para. *f*.

25. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be:

- (a) to release of Ms. Phan-Gillis or, alternatively,
- (b) to ensure effective assistance of a legal counsel. If the case is to be moved to trial, allow her adequate time and facilities for preparation for the trial and have the trial conducted expeditiously in conformity with all guarantees of the fair trial.

26. In accordance with Article 33(a) of the Revised Methods of Work of the Working Group, the Working Group considers it appropriate to refer the allegations of torture and inhuman treatment to the Special Rapporteur on torture for appropriate action.

*[Adopted on 20 April 2016]*

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