

Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on freedom of religion or belief and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants; Working Group on Arbitrary Detention; Special Rapporteur on freedom of religion or belief and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 43/6, 42/22, 40/10 and 43/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **amendment bill to the Immigration Control and Refugee Recognition Act (the Act)**.

Concerns regarding the Act were previously raised in an Opinion of the Working Group on Arbitrary Detention. In Opinion No. 58/2020, the Working Group expressed its serious concern over the compatibility of the Immigration Control and Refugee Recognition Act with Japan's obligations under international law and the International Covenant on Civil and Political Rights (ICCPR) in particular.

According to the information received:

On 19 February 2021, the Prime Minister's Cabinet approved the amendment bill to the Immigration Control and Refugee Recognition Act and it was submitted to the National Diet for a vote sometime in April 2021. The Amendment Bill came after the Expert Committee on Detention and Deportation, an advisory body established under the 7th Immigration Policy Discussion Panel to the Ministry of Justice (MOJ), submitted its "Proposal to Solve the Issues of Deportation Evasion and Long-term Detention" in June 2020 in addition to the report prepared by the Expert Committee on the Refugee Recognition System under the 6th Immigration Policy Discussion Panel to the MOJ on the "Outline of the Revisions for Operation of the Refugee Recognition System" in December 2014.

The Amendment Bill appears to fall short of international human rights standards in several aspects of the protection of the human rights of migrants. To this end, we would like to provide some of our main observations and concerns as elaborated below.

Mandatory immigration detention and the new "monitoring measure"

We are concerned that the amendment bill is based on a presumption of detention and maintains provisions that would allow automatic application of immigration detention on migrants and asylum seekers. In addition to "provisional release" provided under article 54 of the Act, we take note that the amendment bill introduces an alternative non-custodial measure. However, we would like to express our concerns that detention remains mandatory and the new "monitoring measure"

proposed in the bill would only apply as an exception, at the discretion of a supervising immigration control officer when they consider “appropriate” not to detain a person subject to deportation until such time as the person can be repatriated (article 52-2 of the Bill).

In this regard, we would like to refer your Excellency’s Government to article 3 of the Universal Declaration of human rights which guarantees that everyone has the right to liberty. The right to liberty and freedom from arbitrary detention is also prescribed under article 9 of the ICCPR, to which Japan is a party since 1979. We further note that article 9 identifies personal liberty as the principle and the detention and restrictions upon that liberty as exceptions which requires States to uphold the principle and only in exceptional cases resort to divergence from it.

We would also like to draw the attention of your Excellency’s Government to the Revised deliberation No. 5 on deprivation of liberty of migrants issued by the Working Group on Arbitrary Detention (Annex, A/HRC/39/45), where the Working Group stressed that in the context of migration proceedings, “alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure”. Commitment by Member States to use immigration detention only as a measure of last resort and work towards alternatives to detention was reaffirmed through the adoption of the Global Compact for Safe, Orderly and Regular Migration (objective 13, A/RES/73/195), which Japan has endorsed.

Furthermore, the new “monitoring measure”, introduced through the amendment bill, requires that, if the subject is not to be detained, in addition to the payment of a deposit of not more than three million yen (equal to approximately 27,600 USD) (article 52-2-1 of the bill), a “monitor” from among relatives or supporters should be assigned to the subject, who will be obliged to monitor and report on the subject’s daily life (article 44-3 and 52-3 of the amendment bill). A fine of not exceeding 100,000 yen (equal to approximately 910 USD) is applicable in case the monitor violates the monitoring obligations provided in the present Act (articles 44-3, 52-3 and 77-2 of the bill).

We are concerned that such “monitoring measure” is overly restrictive and amounts to discrimination on the ground of socio-economic status. The requirement of a deposit and a “monitor” selected among relatives or supporters would be practically impossible for most migrants and asylum seekers to fulfil. We are equally concerned that the requirement for the assigned “monitor” to report on the “daily life” of the migrant would have a negative impact on the enjoyment of the right to privacy for both migrants and their monitors.

Lack of judicial review

Pursuant to the amendment bill, the chief inspector, an administrative official, would have the power to issue immigration detention orders (article 39-2 of the bill). In addition, the bill fails to foresee any judicial review of immigration detention orders, which falls short of relevant international human rights standards.

We wish to emphasize that “any form of detention, including detention in the course of migration proceedings, must be ordered and approved by a judge or other judicial authority” (Revised deliberation No.5 by the Working Group on Arbitrary Detention, Annex, A/HRC/39/45). The Working Group added that “anyone detained

in the course of migration proceedings must be brought promptly before a judicial authority, before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary” (Annex, A/HRC/39/45).

Furthermore, we would like to recall that the article 9(4) of the Covenant stipulates that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. The Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court also state that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation. It applies to all non-nationals, including immigrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty.

Lack of maximum period of immigration detention

We note with concern that the amendment bill provides that migrants and asylum seekers subject to deportation order can be detained until the time of possible deportation except where the supervising immigration inspector has made a decision to place the individual on “monitoring measure” (article 52-2-8 of the bill) or provisional release (article 54 of the Act) . In the absence of a clearly defined maximum detention period, the amendment bill may implicitly allow for indefinite detention in the context of pre-deportation.

In this regard, we would like to stress that immigration detention must be applied for the shortest period and only if justified by a legitimate purpose. The Human Rights Committee stated in its General Comment No. 35 on article 9, liberty and security of person that detention in the course of proceedings for the control of immigration “must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time”.

The Working Group on Arbitrary Detention recommended that “a maximum detention period in the course of migration proceedings must be set by legislation”; and that when deportation orders cannot be implemented due to reasons that are not attributable to the subject of the removal order, “the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary” (Annex, A/HRC/39/45). In its opinion No. 2020/58, the Working Group considered that, “de facto, the Immigration Control and Refugee Recognition Act allows for indefinite immigration detention which is arbitrary as it cannot be reconciled with the obligations of Japan under article 9 (1) of the Covenant (ICCPR)” (A/HRC/WGAD/2020/58). The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment considered that indefinite detention based solely on the migration status of the individual may amount to torture and ill-treatment (A/HRC/37/50).

Non-refoulement concerns

While we welcome the new provisions on “complementary protection” (articles 61-2-2, 61-2-3) intended to afford protections to “those who would be at risk of significant harm or human rights violations”, we note with concerns however the

restrictive criteria applied in current bill.

We are seriously concerned that article 61-2-9 of the amendment bill allows, as a general rule, for lifting of automatic suspension of the deportation procedure, including the execution of deportation itself, for individuals who have applied for refugee recognition for a third time or more and individuals who have been sentenced to three years or more of imprisonment in Japan and those suspected, in a broad sense, for having possibly involved in or facilitated terrorism, or violent, subversive or other activities, which may include first time applicants. The amendment bill further provides that a deportation order would be issued on those who refuse to leave (article 55-2-1 of the bill); penalties, including imprisonment of up to one year or a fine, would be imposed in case of non-compliance (article 72-8 of the bill).

While it is advisable to accelerate the processing of subsequent applications, we are concerned that in the absence of any appropriate procedural safeguards that explicitly require individual assessment on the circumstances and protection needs prior to deportation, lifting automatic suspension of deportation procedures for asylum seekers of the above-mentioned categories may entail high risk of refoulement. We are concerned that individuals in need of international protection may be forcibly returned or expelled to a country or territories where their lives or rights would be threatened on account of race, religion, nationality, membership of a particular social group, political opinion, etc.

In this regard, we would like to remind your Excellency's Government of the principle of non-refoulement as codified in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Japan ratified in 1999; and article 16 of the International Convention for the Protection of All Persons from Enforced Disappearances, to which Japan is a party since 2009. In addition, in its General Comment No. 20, the Human Rights Committee states that in order to fulfil the obligations under article 7 of the ICCPR, "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement." Moreover, the Revised Deliberation No. 5 of the Working Group on Arbitrary Detention on deprivation of liberty of migrants states that the principle of non-refoulement must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law.

The prohibition of refoulement under international human rights law applies to any form of removal or transfer of persons, regardless of their status, where there are substantial grounds for believing that the returnee would be at risk of irreparable harm upon return on account of torture, ill-treatment or other serious breaches of human rights obligations. As an inherent element of the prohibition of torture and other forms of ill-treatment, the principle of non-refoulement is characterised by its absolute nature without any exception. Heightened consideration must also be given to children in the context of non-refoulement, whereby actions of the State must be taken in accordance with the best interests of the child. In particular, a child should not be returned if such return would result in the violation of their fundamental human rights.

Since 1981, Japan is also a state party to the Convention relating to the Status of Refugees (1951 Refugee Convention). Article 33 provides that "No Contracting

State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Lack of child-sensitive safeguards

We note with regret that the amendment bill lacks an explicit prohibition of immigration detention of children, including unaccompanied and separated children and children with their families. In this regard, we would like to stress that every migrant child, regardless of his or her migration status, should be considered as a child first and foremost. All migrant children should be entitled in law and in practice to all the rights enshrined in the Convention on the Rights of the Child, to which Japan is a party since 1994. The Committee on the Rights of the Child has clearly stated that immigration detention of any child is a violation of children's rights and always contravenes the principle of the best interest of the child. (para. 32, Report of the 2012 day of general discussion, Committee on the Rights of the Child, Available at

<https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf> .) This position has been affirmed by joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. Several special procedures mandate holders have also stressed that immigration detention of children should be prohibited (para. 11, Annex, A/HRC/39/45; para. 73, A/HRC/37/50; and para. 46, A/HRC/30/37). In its Revised Deliberation No. 5 on deprivation of liberty of migrants, the Working Group on Arbitrary Detention stresses that the deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.

In his report on "ending immigration detention of children and providing adequate care and reception for them" (A/75/183), the Special Rapporteur on the human rights of migrants urges States to "ensure that the child's best interest is the guiding principle in the design and implementation of migration policies and a primary consideration in all actions and decisions that concern each migrant child, including decision-making on migration procedures and the consideration of alternative care and reception solutions".

Based on the above-mentioned observations, we urge your Excellency's Government to seize the opportunity of legislative review to bring domestic law in line with international human rights standards and enhance the protection of the human rights of migrants, asylum seekers and refugees. Any migration governance measures, including those aimed at addressing irregular migration, shall not adversely affect the enjoyment of the human rights and dignity of migrants.

More specifically, we would like to stress that in the context of migration governance, the presumption of liberty applies. We call on your Excellency's Government to amend legislation to establish a presumption against detention in law and to ensure that immigration detention is used as a measure of last resort, subject to judicial authorization and judicial review. A maximum detention period in

immigration related proceedings should be set in law. We urge your Excellency's Government to prescribe in law human rights compliant alternatives to immigration detention of adults. A clear distinction should be made between adults and children. Every migrant child, regardless of his or her migration status, should be considered as a child first and foremost. We encourage your Excellency's Government to include in domestic legislation an explicit prohibition of immigration detention against children based on their or their parents' migration status. We further call on your Excellency's Government to provide human rights based, non-custodial, community based reception and care for all migrant children, under the age of 18, and their families.

Furthermore, we remind your Excellency's Government of your obligations under international human rights law to respect the principle of non-refoulement and to refrain from transferring any individual to a country where he or she would be at risk of irreparable harm on account of torture, ill-treatment, religious persecutions or other serious breaches of human rights obligations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comments you may have on the above-mentioned observations.
2. Please provide information on any consultation(s) on the amendment bill with civil society, and other relevant stakeholders including lawyers' associations and representatives of migrants, asylum seekers and refugees and the outcome of such consultation(s), including issues of concerns raised.
3. Please indicate any consideration to thoroughly review the amendment bill and the Immigration Control and Refugee Recognition Act to address the concerns raised by civil society and legal experts, as well as to bring the Act in line with relevant standards under international human rights and refugee law, particularly with regard to the right to liberty, right to be free from torture, the principle of non-refoulement and other aspects mentioned in the present communication.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration.

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