

**Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention and the Special Rapporteur on freedom of religion or belief**

Ref.: OL JPN 1/2023  
(Please use this reference in your reply)

18 April 2023

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 and Special Rapporteur on freedom of religion or belief, pursuant to Human Rights Council resolutions 43/6, 51/8 and 49/5.

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

Japan's Immigration Control and Refugee Recognition Act was already the object of the opinion no. 58/2020 of the Working Group on Arbitrary Detention, which questioned the compatibility of the Act with Japan's obligations under international law and the International Covenant on Civil and Political Rights (ICCPR) in particular, as considered the Act allowed for indefinite immigration detention.

In 2021, the government of Japan attempted to amend the Immigration Act. This amendment bill of 2021 was subject to a previous communication (OL JPN 3/2021), transmitted to your Excellency's Government on 31 March 2021 by several mandates of the Special Procedures. This letter explained how the proposed amendments to the Immigration Act, as the former amendment bill appeared to fall short of international human rights standards in several aspects of the protection of the human rights of migrants. We are grateful for the response received to this letter on 17 June 2021, and welcome that the amendment bill of 2021 was finally withdrawn. This new communication concerns the new amendment bill to the Immigration Act, whose draft was approved the Japanese Parliament on 7 March 2023, which will be discussed in the Diet in mid-April 2023.

According to the information received, the new bill still needs to address some of the aspects raised in previous OL JPN 3/2021:

The new amendment bill would maintain a system based on a presumption of detention. In this regard, we note the changes introduced to articles 39 and 52 of the former bill, as drafted in 2021, which no longer establish the "monitoring measure" as an exception. However, detention would still prevail whenever a "monitoring measure" is not applied. In this connection, we also note that the bill does not include provisions to ensure that detention measures are only used as a last resort. Furthermore, the decision to impose a "monitoring measure" or detain a person subject to deportation until such time as the person can be repatriated would fall under the discretion of the supervising immigration inspector, an administrative official.

In this connection, we would like to stress that in the context of migration governance, the presumption of liberty applies. As highlighted in OL JPN 3/2021,

according to international human rights standards, detention for immigration purposes should be a measure of last resort, only permissible for adults and for the shortest period of time and when no less restrictive measure is available. If not justified as reasonable, necessary, legitimate and proportional, the use of this measure could lead to arbitrary detention, prohibited by article 9 of the of the Universal Declaration of Human Rights and article 9 of the ICCPR, to which Japan is a party since 1979. Article 9 of the ICCPR identifies personal liberty as the principle and the detention and restrictions upon that liberty as exceptions which require States to uphold the principle and only in exceptional cases resort to divergence from it. We further note that the enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of States parties but “must also be available to all individuals, regardless of their nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (ICCPR/C/21/Rev.1/Add.13 (2004), para. 10).

In addition, the Committee against Torture found that detention based solely on migration status, may amount to torture, particularly where it is intentionally imposed or perpetuated for such purposes as deterring, intimidating or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation, providing information or fingerprints, or with a view to extorting money or sexual acts, or for reasons based on discrimination of any kind, including discrimination based on immigration status. In these conditions, the detention of migrants would contravene articles 1, 2, and 16 of the Convention Against Torture (UNCAT), acceded by Japan on 29 June 1999, and of article 7 of the ICCPR.

We would also like to recall 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.

We also wish to refer to the report on return and reintegration of migrants of the Special Rapporteur on the human rights of migrants (A/HRC/38/4), which highlights that “experience has shown that detention does not deter irregular migration, nor does it increase the effectiveness of removal procedures; it only increases the suffering of migrants, and may have a long-term detrimental impact on their mental health. Furthermore, detention has no influence on the choice of destination country, nor does it lead to a reduction in the number of irregular arrivals” (para. 40).

Concerning the conditions for the application of the “monitoring measure,” we welcome that the payment of a deposit of not more than three million yen would, in principle, no longer be a requirement to apply such a measure under the new amendment bill. However, we note that this condition could still be imposed by the supervising immigration inspector, when they find it necessary to prevent the absconding or engagement in illegal work of the person subject to monitoring measures (articles 44-2-2-6 and 52-2-2-5 of the new bill). Similarly, although the

reporting obligation of the designated “monitor” appears to be reduced as compared to the former bill, we note with concern that the new bill can still impose the obligation of the assigned “monitor” to report on the subject’s daily life, if the supervising immigration inspector requests so (articles 44-3-5 and 52-3-5). A fine of not exceeding 100,000 yen would still be applicable in case the monitor violates such monitoring obligations.

While we welcome the introduction of an alternative non-custodial measure to detention and the modifications for its implementation under the new bill, such changes would not be sufficient to address matters included in OL JPN 3/2021, as the above-mentioned conditions could still be applied whenever the supervising immigration inspector deems it necessary. In practice, the application of the “monitoring measure” would remain overly restrictive and could amount to discrimination on the ground of socio-economic status, as well as negatively impact on the enjoyment of the right to privacy, for both migrants and their monitors. In addition, the requirement of assigning a “monitor” among their contacts for the application of “monitoring measures”, could be particularly challenging for most migrants and asylum seekers and could entail a risk of exploitation. In this regard, we wish to stress that States are required to provide non-custodial alternatives to detention that fully protect the human rights of migrants. Importantly, alternatives to detention must not be provided when there is no justification for detention in the first place. In such cases, migrants should be released.

The new amendment bill does not foresee any judicial review of immigration detention orders, and the power to issue immigration detention orders falls under the competence of an administrative authority (article 39-2 of the new bill). Although we take note of new article 52-8 which provides that the supervising immigration inspector will consider whether a monitoring measure is necessary every three months after the detention, we stress that this would not constitute a judicial review. As stated in OL JPN 3/2021, international standards require 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). Moreover, 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).

We would also like to recall that article 9(4) of the ICCPR 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 migrants regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty.

The new bill does not provide for a maximum period of detention, nor does it provide for the periodical judicial review of continued detention. This was also highlighted in OL JPN 3/2021, considering that the absence of a clearly defined maximum detention period, the amendment bill could implicitly allow for indefinite detention in the context of pre-deportation. Migrants and asylum seekers subject to a deportation order would remain detained until the time of the deportation unless the supervising immigration inspector considers appropriate to apply “monitoring measures” (Article 52-8-2, -3, -4 and -5 of the new bill) or has made a decision on provisional release (article 54 of the Act).

We stress that the indefinite detention of individuals during migration proceedings cannot be justified, and it is considered arbitrary. We further note that 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 the already mentioned 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). Migrants’ detention should be subject to the same criteria as those applicable to nationals, including the requirements of legality, necessity, proportionality and, in the exceptional cases warranting administrative or preventative detention, periodic review (A/HRC/37/50, para.73).

Regarding the lack of child-sensitive safeguards, the new amendment bill still does not include an explicit prohibition of immigration detention of children, including unaccompanied and separated children and children with their families.

Therefore, as expressed in OL JPN 3/2021, we once again 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. Furthermore, we underline that the detention of any child for reasons related to their, their parents’ or their legal guardians’ immigration status never responds to the best interests of the child and always constitutes a violation of the rights of the child in accordance with the international human rights standards: 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<sup>1</sup>. This position has been affirmed by joint general comment 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. Moreover, we wish to stress that unaccompanied migrant and

<sup>1</sup> Report of the 2012 day of general discussion, Committee on the Rights of the Child, para 32: <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>

asylum-seeking children should have access to the same mainstream child-care system as national children and enjoy all relevant safeguards with regard to the protection of children.

Finally, article 61-2-9 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, 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 new bill has also kept articles 55-2-1 and 72-8, providing that a deportation order would be issued on those who refuse to leave and maintaining penalties proposed in the previous bill of 2021, including imprisonment of up to one year or a fine, to be imposed in case of non-compliance (article 72-8 of the bill).

Similarly, provisions under articles 61-2-2 and 61-2-3 have not been modified in the new amendment bill, therefore keeping the restrictive criteria applied in regard to “complementary protection”.

As expressed in our previous communication, the absence of appropriate procedural safeguards that explicitly require individual assessment on the circumstances and protection needs prior to deportation, legislative proposals lifting automatic suspension of deportation procedures for asylum seekers of the above-mentioned categories would undermine international human rights law and the principle of *non-refoulement*.

In this connection, we wish to remind your Excellency’s Government that the principle of *non-refoulement* forms an essential and non-derogable protection under international human rights, refugee, humanitarian and customary law. This principle is codified in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Japan acceded to 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. While non-refoulement protection under refugee law extends only to persons entitled to refugee status and allows for exceptions based on considerations of national or public security, no such limitation or exception is permissible where deportation would expose a person to a real risk of torture or ill-treatment. The prohibition against refoulement, as an inherent element of the prohibition of torture and other forms of ill-treatment, is thus absolute and not subject to any exception or derogation. 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.

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. In addition, article 33 of the Convention relating to the Status of Refugees, to which Japan is a party since 1981, 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.”

In sum, despite some modifications to the former bill of 2021, proposed provisions remain fundamentally unchanged, and would fall short of international human rights standards. We reiterate that 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. Human rights apply to everyone, including all migrants notwithstanding their nationality, age, gender, migratory status, or other attribute. States’ obligations under all the core international human rights treaties relating to their migration governance measures require that human rights be at the centre of their efforts to address migration in all its phases, ensuring that border governance measures respect, *inter alia*, the prohibition of collective expulsions, the principle of equality and non-discrimination, the principle of *non-refoulement*, the right to seek asylum, the right to life, the prohibition of torture, the promotion of gender equality, and the rights and best interests of the child.

Therefore, **we urge your Excellency’s Government to thoroughly review the amendment bill to bring domestic legislation in line with Japan’s obligations under international human rights law.** Particularly, as highlighted in OL JPN 3/2021, we encourage your Excellency’s Government to amend legislation to establish a presumption against detention in law and to ensure that immigration detention for adults is only used as a measure of last resort, subject to judicial authorization and judicial review; to clearly define a maximum detention period in the course of migration proceedings in law; and 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. We finally 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.

We look forward to receiving further information on the issues mentioned in this letter, and we stand ready to cooperate with your Excellency’s Government to enhance the protection of the human rights of all migrants, asylum seekers and refugees in Japan.

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

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned observations.

2. Please provide information on any consultation(s) on the amendment bill of 2023 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 mentioned in this letter.
3. Please indicate any consideration to thoroughly review the amendment bill and the Immigration Control and Refugee Recognition Act to address questions 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, the principle of non-refoulement, the rights of the child, and other aspects mentioned in the present communication. Kindly specify any measures planned to amend domestic 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.
4. Please provide information on measures taken or to be taken by your Government towards ending immigration detention of children and their families, as well as efforts made to provide effective protection, adequate care and non-custodial reception for migrant children.

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.

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

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Matthew Gillett  
Vice-Chair on Communications of the Working Group on Arbitrary Detention

Nazila Ghanea  
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