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18 October 2019

Statement Calling for the Prohibition of Arbitrary Detention in Immigration Facilities and the Improvement of Legal Measures

In the past four months, 198 detainees at immigration facilities in Japan, including asylum seekers, went on hunger strikes to protest prolonged incarceration.[1]

As the hunger strikes were intensifying, a Nigerian man (who had a Japanese child with a Japanese women) died on 24 June 2019 in a detention center in Omura, Nagasaki Prefecture. On October 1st, the Ministry of Justice officially announced that the cause of death had been identified as starvation.[2] Moreover, the Justice Minister announced that they would install a specialized committee on detention and deportation under the 7th Immigration Control Planning Meeting advisory body to start a discussion for the reform of the immigration law starting in October this year.

As of the end of June, 1,253 people have been detained in detention centers and immigration detention facilities mentioned above (hereinafter referred to as "detainees"). 679 people have been detained for over 6 months (hereinafter referred to as "long-term detention"),[3] which is more than half of the detainees,[4] and 531 people have been detained for over a year.[5]

As of the end of June, 2019, at the Higashi Nihon Immigration Center, 301 people out of the 316 detainees (95%) have been detained for more than 6 months, and 279 detained for over a year (88%). Similarly at the Omura Immigration Center, 110 out of 128 detainees have been detained for over 6 months (86%), and 92 have been detained over a year (71%).

According to the current Immigration Control and Refugee Recognition Act and its application, all foreign nationals without a residential status are to be detained in principle (i.e., mandatory detention). However, when a mandatory deportation order is issued, there is no limit on the amount of time a person can remain in detention according to the Act. Those seeking provisional release filed a group lawsuit this April due to this issue of indefinite and mandatory detention. Detainees

[1] Press Conference by the Minister of Justice (1 October 2019)

[2] Immigration Services Agency, "Report on a detainee's death at the Omura Immigration Center" (October, 2019).

[3] Cases from the Supreme Court of the United States, EU repatriation directives and German law limit detention up to 6 months. Thus, anything longer than this in Japan is defined as long term detention. The press conference of the Justice Minister on 24 Sept. 2019 states the same.

[4] Material provided to Mizuho Fukushima from the Immigration Services Agency (Home Page of Mizuho Fukushima). This number includes detention under 60 days, so there is a possibility that the rate of long term detention is higher.

[5] Data provided to Mizuho Fukushima by the Immigration Services Agency (Home Page of Mizuho Fukushima).

also started going on hunger strikes across Japan starting in May, which resulted in a death on June 24th as previously mentioned.

Even looking at the most recent years, the Committee Against Torture ("Concluding observations on the second periodic report of Japan", 28 June 2013, para. 9), the Human Rights Committee ("Concluding observations on the sixth periodic report of Japan", 20 August 2014, para. 19), and the Committee on the Elimination of Racial Discrimination ("Concluding observations on the tenth and eleventh periodic report of Japan", 30 August 2018, para. 36) have been calling on the Japanese government to set limits for the detention period and requesting that detentions be a measure of last resort to reduce their excessive use.

Looking at this dreadful situation of long-term and indefinite detentions, Human Rights Now strongly calls on the 7th Immigration Control Planning Meeting as well as the Specialized Committee on Detention and Deportation to thoughtfully consider the points below in discussing reform of the law. Furthermore, since some time is required until a new law is passed, the Ministry of Justice as well as the Immigration Services Agency should improve operations and release all the detainees that are being held, notwithstanding the international human rights treaties.

1. The use of detention should be limited and should be applied as a measure aimed at preventing escape

According to international human rights laws, arbitrary detention (as with confinement) is banned (International Covenant on Civil and Political Rights (ICCPR), Article 9(1)). No one shall be subjected to arbitrary detention without good reason, and if there are reasons such as identity verification or the prevention of escape, there should be limitations in order to pursue those reasons.[6] In Article 9(4) of the ICCPR, it is stated that anyone who is deprived of his or her liberty by detention shall be entitled to bring proceedings before a court. However, Japan violates this duty because decisions involving long term detentions are made solely by government agencies without judicial decisions.

According to the ICCPR, Japan is responsible for ensuring the rights of everyone within the jurisdiction of Japan, including foreign nationals staying in Japan without a residential status. Detentions due to foreign nationals not having a status of residence,[7] which is frequently argued by the Japanese government, violates ICCPR Article 9(1).[8]

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[6] General Comment No.35, para. 18; "On common standards and procedures in Member States for returning illegally staying third-country nationals", EU Directive 2008/115/EC, 16 Dec. 2008 ("EU deportation order"), Article 15(1); the UK case *Hardial Singh v. Governor of Durham Prison*, [1983] EWHC 1 (QB) ("Hardial Singh Principle"), the US Supreme Court case *Zadvydas v. Davis* (2001); the South Korea Supreme Court case ruling on 26 Oct. 2001.

[7] Second Japanese government report to the Committee Against Torture ("The Second Government Report on the Japanese Government Responses of the Questions from the Committee Against Torture (provisional translation) July, 2011"), p.27.

[8] The individual complaint mechanism under the ICCPR states that "Under any circumstance, detention should not continue any longer than a state can provide lawful reasons to do so", and detention for 3-4 years are in violation of Article 9(1) on "arbitrary arrests". Also the lack of jurisdiction by courts over challenges of unlawful detentions violates Article 9(4) (*A v. Australia*, Communication No. 560/1993; *D, E and their children v. Australia*, Communication No. 1050/2002).

The government has recently been claiming that detention maintains public order and prevents recidivism,[9] but this cannot be allowed under international human rights law outside of extreme cases.[10] As stated above, detention for reasons of immigration control must be limited only to legitimate reasons such as the prevention of escape, and it cannot be based on a person's lack of residential status, for public order or preventive detention.

2. The requirement of immigration detention should only be applied if there is a risk of escape

The Immigration Control and Refugee Recognition Act, in providing reasons for detention, requires only that a deportation order has been issued (Article 52(2)) and, under "Appropriate measures of temporary release and strengthening of monitoring for receivers of the deportation decree" (Ordinance No.43, Ministry of Justice, 28 Feb. 2018), that the person does not have a visa, which allows for mandatory detention. Regardless of whether or not the reasons for detention are necessary, meaning there is a risk of detainees fleeing, authorities have been detaining persons uniformly. In the background, there has been an understanding that the Maclean Supreme Court decision (1978), which was decided before the ratification of the ICCPR (in 1979), still holds that foreigners' rights (i.e., rights under the constitution), should only be protected within the limits of the immigration control system, even after the ratification of the ICCPR long ago.

However, this "mandatory detention" clearly violates international human rights law, including ICCPR Article 9(1). In other words, the detention has to be justified by or appropriate to the goals described above.[11] When there is a need for detention—e.g., there is the possibility of detainees fleeing—the law should be reformed so that the detention is clearly limited to this.[12]

3. Limits on the Immigration Detention Center should be set based on a logical time span such as a six-month period for repatriation preparations

Current Japanese law states "if the Foreign National cannot be deported immediately, the Immigration Control Officer may detain them … until such time for deportation becomes possible" (Immigration Control and Refugee Recognition Act, Article 52(5)). However, the situation in which the Immigration Office "cannot" deport means the situation in which the office "does not" deport, and the period the office states "until they can" be deported means the period "until they

[9] Immigration Services Agency, "Investigation on evaders of deportation" (1 Oct. 2019).

[10] General Comment No. 35, para. 15. "To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases."

[11] General Comment No. 35, para. 18 (in order not to be categorized as arbitrary detention under 9(1) ICCPR, there should be "particular reasons specific to the individual, such as an individualized likelihood of absconding").

[12] Even if a detention is according to a detention order, Article 48(1) of the Immigration Bill in 1973, which the government itself issued, adds as a requirement that "there is an adequate reason to think that the person might flee." Detention according to a detention order is the same as depriving people of their freedom.

are" deported. This interpretation allows unlimited confinement. On top of that, since such orders as above are applied so strictly, it allows long term confinement which drives people into oppressive and severe situations like the recent cases.

However, these long term confinements clearly violate ICCPR Article 9(1). The deprivation of freedom should only be "a measure of last resort and for the shortest appropriate period of time",[13] and "the inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention."[14]

Therefore, there should be a law stating a logical preparation time (limit) for deportation. This has been recommended by treaty bodies including the Committee Against Torture as well. Also, if a foreigner is defined as a "refugee" by the Refugee Convention Article 1, the state cannot add any restrictions on their movement (Refugee Convention, Article 31(2)); and captivity is the most severe restriction which violates this duty. Immigration law should be reformed to set six months as the maximum time limit for the preparation period for deportations, with the further requirement that there is a threat of the detainee fleeing.[15]

4. The need for regular judicial review at the Immigration Detention Center

Current Japanese law depends solely on the Immigration Bureau, which is a government agency, on the matter of detention (Immigration Control and Refugee Recognition Act, Article 54(2)). There is no time limit or renewals for detention periods; no independent organization conducts regular re-evaluation; and courts do not have authority over detentions. Also, decisions on temporary releases can only be made by the Immigration Bureau (Immigration Control and Refugee Recognition Act, Article 54(2)).

Article 9(1) of ICCPR bans arbitrary detention. In addition, Article 9(4) states that everyone has a right to bring challenges to a court, and if the detention is found unlawful, they have a right to demand the court vacate the decision.

Because detentions deprive people of their freedom, it is desirable to have a system in which a warrant issued by a court is required,[16] and, in accordance with ICCPR Article 9(4), a system where requests for regular judicial review can at least be made, even if they are not applied.[17] Even on this point, Japan's system violates the ICCPR. The law should be rewritten so that detentions should be renewed regularly and re-evaluated.

5. There should be investigations into whether refugees or persons whose family life needs to be protected are confined for long terms

Lastly, long term confinement cannot be solved only by deportations. The reality is that most people who received deportation orders (98% of them, excepting repatriations based on Article 59

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[13] General Comment No. 35, para. 19.

[14] Id., para. 18. Individual communication case No. 2094/2011, *F.K.A.G v.Australia*, para. 9.3.

[15] Article 15(5) and (6) of the EU Return Policy and Article 62(4) of the German Residence Act allow a maximum period of six months, with an additional twelve months provided if the period needs to be extended beyond the initial six months under special circumstances. Refer to the previous US Supreme Court case.

[16] Article 62(1) of the German Residence Act.

[17] General comment No. 35, para. 18 states that the decision to detain "must be subject to periodic re-evaluation and judicial review"; *Baban v. Australia*, Communication No. 1014/2001, para. 7.2; *Bakhtiyari v. Australia*, Communication No.1069/2002, para. 9.2-9.3.

and transportation based on the International Convention for the Transfer of Prisoners) voluntary leave the country with their own money.[18] On the other hand, while uncommon, repatriations also still happen by charter flights paid for by the state.

People who do not go back to their country in such situations may have family in Japan or have a reason why they cannot go back to their country. ICCPR Article 23(1) states "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." Article 17 provides the right to freedom from being subjected to arbitrary interference with one's privacy, family, or home. The ICCPR applies to every individual within the jurisdiction of the state. Also, the Convention on the Rights of the Child Article 3(1) requires that all approaches taken by the state towards a child should be in "the best interest of the child."

The Justice Minister can grant special residence permits for foreigners without a visa status if they fall within a statutorily defined circumstance, and if they have family or a child in Japan, the minister should consider the grant of a permit with international human rights standards in mind. Nevertheless, the special permit rate[19] was 85% in 2006 and fell to 60% in 2016.[20] Not only is the number of cases a problem, but those who should receive protection of their family life are not being properly treated.[21] On the other hand, the rate of Japan's recognition of refugee status is unbelievably low, and the quality of judgments is clearly lacking.[22] As a result, there are people who have requested refugee protection multiple times.[23]

In summary, subjecting someone to deportation because they do not have a visa and confining them for a long term violates ICCPR articles prohibiting arbitrary and illegal interference with the family (Article 17) and guaranteeing protection of the family by society and the state (Article 23(1)). Also, if the person falls in the category of a refugee under the Refugee Convention, the detention will violate article 31(2) prohibiting unnecessary restrictions on movement; and sending them back to their country where there is a possibility of persecution violates the principle of *non-refoulement*.

We request an investigation and improvements on above problems to the Ministry of Justice, the Immigration Bureau, the Immigration Control Planning Group Meeting and the Specialized Committee on Detention and Deportation.

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[18] *White Paper on Immigration Control 2018*, Part 1, p.58.

[19] The special permit rate indicates objections without reasons.

[20] *Immigration Control 2007* and *Immigration Control 2017*.

[21] *Winata v. Australia*, Communication No.930/2000. Recently, the Human Rights Committee stated that deportation interfered with family (ICCPR, Article 17) in several individual complaint cases, such as *Husseini v. Denmark* (CCPR/C/112/D/2243/2013). It should be judged under the principle of proportionality whether such interferences can be justified. In both of these cases, deportation was considered to violate ICCPR Article 17.

[22] Ministry of Justice, "Recognition of Refugee Status 2018", 27 March 2019.

[23] Between 2005 and 2009, 22 people have been recognized as refugees through resubmission of requests according to the "Response to the questions concerning Japan's recognition of refugee status submitted by the 176th member of the House of Representative Koichi Yamauchi" (October 2010).