

Reply to the Joint Communication Sent by the Special Rapporteur on the Human Rights of Migrants

Regarding the Joint Communication dated 18 April 2023, sent to the Permanent Mission of Japan to the International Organization in Geneva from the Special Procedures, the Government of Japan replies as follows.

1 Introduction

- (1) In our immigration and residency management administration, deportation evasion by foreign nationals who have been issued written deportation orders and long-term detention resulting from such deportation evasion have been an issue.
- (2) The Amendment Act of the Immigration Control and Refugee Recognition Act, passed during the 211th Diet session (hereinafter referred to as the “Amendment Act”), aims at resolving the above issue, as well as issues observed under the current Act, including the need to establish a system to protect individuals who need protection—such as those facing humanitarian crises—in a comprehensive manner, and its provisions are appropriate as full consideration is given to the human rights of foreign nationals, as described below.
- (3) Additionally, as previously stated, if you, the Special Rapporteur on the Human Rights of Migrants and other mandate holders (collectively referred to as “you”), had provided the Government of Japan an opportunity to explain the Amendment Act, you would have understood the appropriateness of the substance of the Act, as noted below. It is therefore deeply regrettable that you decided to publish the joint communication unilaterally without seeking any inputs from the Government of Japan.

2 ATD and Detention

- (1) Firstly, your opinion pointed out that the Amendment Act maintains a system based on a presumption of detention prior to the deportation procedures and allows for indefinite detention. In Japan, however, the deportation procedures have been taking place without detention of those for whom detention is deemed not necessary after taking into account the risk of absconding and other relevant risks based on individual circumstances.

In fact, as evident from the fact that the deportation procedures are advanced without detention of approximately 70 percent of those who have been found to be liable for deportation, Japan has been taking flexible measures with consideration to the human rights of foreign nationals. Therefore, even under the current Act, detention is not presumed and there is no indefinite detention.

- (2) The Amendment Act establishes a new Alternative to Detention (ATD) system, a Sponsorship—a support system with a Sponsor—in order to avoid detention as much as possible and resolve long-term detention.

Your opinion used the term “monitoring measure” in reference to a Sponsorship; the new system, however, is not a measure to monitor persons to whom it applies,

and therefore the term is not an accurate translation of the system.

Specifically, a Sponsorship is a measure under which a Sponsor, who is not an administrative official of the Immigration Service Agency, provides guidance and support to the foreign national so that the foreign national can live in a community for the duration of the procedure without being detained.

- (3) By establishing the Sponsorship system, the Amendment Act requires that the deportation procedures be advanced without detention and with a Sponsorship under the support of a Sponsor in cases where it is appropriate to proceed without detention, after taking into account not only the risk of absconding and other relevant risks but also the disadvantage to the foreign national caused by detention.

In other words, a foreign national is to be detained only in a case where there is a need to do so, and grounds for justification of detention are to be required. Furthermore, even during detention, its necessity is to be reviewed compulsorily and periodically every three months. Moreover, even in a case where a Sponsorship is not accorded to a foreign national, provisional release is to be granted if health or humanitarian grounds for release are deemed to exist.

The Amendment Act, therefore, enables the deportation procedures to be advanced entirely without detention of a foreign national, clarifying that the procedures may be applied in a manner that is not overly restrictive, given that detention will be allowed only as the last resort in cases where a Sponsorship is not accorded and provisional release is not granted.

- (4) With respect to your point on the obligation of a Sponsor, it is inevitable to impose on Sponsors a certain level of duty to report in order to ensure that they provide appropriate guidance and support to the foreign nationals they are supporting. This obligation is imposed in light of the current alarming situation related to provisional release, such as approximately 1,400 deportation evaders (which is more than 30 percent of the approximately 4,200 deportation evaders in Japan as of the end of 2022) having absconded and gone missing during provisional release, and cases of some foreign nationals under provisional release committing serious crimes and being arrested.

However, under the Amendment Act, to reduce the burden of a Sponsor, the duty to report is appropriately limited in scope only to matters required by the supervising immigration inspectors and only when it is necessary to ensure compliance with Sponsorship and other relevant conditions.

- (5) With respect to your point on a Sponsorship system describing it as “discrimination on the ground of socio-economic status,” it is unclear to us what is meant by such a reference. However, it is evident that the Sponsorship system does not fall under any type of discrimination because a Sponsorship is accorded during the deportation procedures. That is, the foreign nationals to whom the system applies are limited to those who are suspected of being liable for deportation and are either under investigation or review for violation of the law or those who have already been issued with written deportation orders following a decision that they should be deported.

Also, with respect to your point on the enjoyment of the right to privacy by a foreign national to whom the system applies, a Sponsor is not required to periodically report on the living conditions of the foreign national concerned. Instead, as already explained in the preceding subsections, the Sponsor may be required to report only when it is necessary to ensure compliance with the Sponsorship conditions and other relevant conditions. This means that the Amendment Act gives full consideration to the right to privacy so that it will not be violated unjustifiably.

3 Judicial Review

- (1) While paragraph 4 of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court,” the provision does not require the involvement of a court prior to restraint. There are also several countries that do not have a prior judicial-review system, as is the case in Japan.
- (2) In Japan, a decision on deportation is made through careful and strict procedures under what we refer to as a “three-tiered system,” and if a foreign national to whom this system applies has a complaint on the deportation, that person may receive a judicial review subsequently by bringing an administrative lawsuit, among other proceedings.

Additionally, the Amendment Act stipulates a mechanism under which a decision on whether to apply a Sponsorship or to resort to detention is to be made after taking into account not only the risk of absconding and other relevant risks but also the disadvantage to the foreign national caused by detention. Furthermore, even in cases of detention, the Amended Act sets forth a periodic and compulsory review mechanism, under which the supervising immigration inspector is to review the need for detention every three months and the Commissioner of the Immigration Services Agency is to check the appropriateness of the decision on detention.

- (3) Therefore, due process is fully ensured through the abovementioned mechanisms even without a prior judicial review by a court.

4 Defined Maximum Detention Period

- (1) Article 9 of the ICCPR does not stipulate definition of a maximum detention period, and there are several countries which do not define the maximum detention period.
- (2) While your communication encourages us to clearly define the maximum length of detention in the legislation, in the first place, for foreign nationals subjected to the deportation procedure in 2019 in Japan, the average duration of detention was approximately 65 days as of the end of the same year, and approximately 88 percent of detainees were detained for less than one month, which demonstrates that there is no unreasonably long-term detention or indefinite detention.
- (3) If a maximum detention period was to be introduced, all detainees including those with a high risk of absconding would have to be released after they evade

deportation until the expiration of the maximum detention period, which makes it impossible to implement secure and prompt deportation. Therefore, it is inappropriate to define a maximum detention period.

Moreover, while the purpose of setting a maximum detention period is considered to avoid unnecessary detention and prevent long-term detention, the Amendment Act intends to realize the same purpose by deporting deportation evaders from Japan promptly and surely before detention is prolonged and by according a Sponsorship in order to move the deportation procedures forward without detention.

- (4) Additionally, the Amendment Act expands the scope of foreign nationals subject to departure orders who are expected to be deported from Japan without detention, which, in return, is expected to significantly reduce the number of detainees among those subject to the deportation procedures. Moreover, the Amended Act intends to avoid unnecessary detention and prevent long-term detention by introducing the compulsory review mechanism mentioned in 3 (2) above that will evaluate the necessity of detention every three months.

5 Detention of Children

- (1) Under the current Act, in principle, children are not to be detained; investigations into violation are carried out without detention.

Even in cases where detention of a child is inevitable, humanitarian consideration is given to the interests of the child by keeping detention to the minimum necessary, for example by provisionally releasing the child on the first day of detention.

The Amendment Act sets up a Sponsorship system, which is an alternative to detention, by giving further consideration to reducing detention of foreign nationals, including children.

- (2) Moreover, with respect to determination of special permission to stay in Japan, while such determination has been made after taking into account the interests of children and other various circumstances affecting each case even under the current Act, the Amendment Act clearly specifies that “family relationships” and other circumstances must be taken into account, with the interests of children considered as part of “family relationships” or “necessity of humanitarian consideration.”
- (3) Therefore, in Japan, status of residence is granted with consideration for the best interests of children, and even in the case of deporting a child, detention is an extremely exceptional case.

6 Principle of *Non-Refoulement*

- (1) On your point that exceptions to the suspensive effect on deportation in the Amendment Act would undermine the principle of *non-refoulement*, the suspensive effect on deportation was, in the first place, established to stabilize the legal status of applicants for refugee recognition.

Foreign nationals who fall under such exceptions include those who have been punished by imprisonment for a definite term of not less than three years and foreign terrorists, who have considerably serious criminal responsibility and indicate strong

anti-sociality or threaten the social safety of Japan, which means that it is not necessary to stabilize their legal status. It is therefore reasonable enough to include them in the exceptions.

- (2) Moreover, foreign nationals applying for refugee status for three or more times are not eligible for suspensive effect on deportation, because they have been denied applications twice or more after full examinations by a panel of three refugee examination counselors, who are external experts, which means that it is not necessary to stabilize their legal status.

However, given that there may be cases in which such persons should be properly recognized as refugees, or as having other status, the Amendment Act stipulates that persons who submit materials that demonstrate reasonable grounds for the person's recognition as a refugee, or as having other status, be included in the scope of persons subject to the suspensive effect on deportation.

- (3) Paragraph 3 Article 53, of the Immigration Act prohibits deportation to territories of countries prescribed in paragraph 1 of Article 33 of the Refugee Convention and other similar countries, for not only persons recognized as refugees but also all persons subject to the deportation procedures; therefore, the Act adheres to the principle of *non-refoulement*.

In other words, even for those who fall under the exceptions to the suspensive effect on deportation, their deportation destinations are determined based on Article 53 of the Immigration Act, and the same will apply after the amendment of the Act. Therefore, even after the amendment of the Act, countries listed in paragraph 3 of Article 53 of the Immigration Act will not be selected as deportation destinations, and deportations will not be enforced contrary to the principle of *non-refoulement*. Thus, your point that exceptions to the suspensive effect on deportation would undermine the principle of *non-refoulement* is not correct.

7 Conclusion

The 2023 Amendment bill was re-submitted after a series of discussions with international organizations such as UNHCR, as well as the Japan Federation of Bar Associations, taking into account various concerns expressed subsequent to the discard of the 2021 Amendment bill for the Immigration Act in the Diet and correcting points that should be corrected.

We will continuously strive to provide explanations in a sincere manner so that the provisions of the Amendment Act and their appropriateness will be widely understood.