

Mandates of the Special Rapporteur on the human rights of migrants and the Working Group on Arbitrary Detention

REFERENCE: OL SRB 2/2016:

20 June 2016

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants and Working Group on Arbitrary Detention, pursuant to Human Rights Council resolutions 16/19 and 24/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received **concerning the draft legislation on asylum law foreseeing restriction of movement and detention of migrants.**

The new legislation on asylum and temporary protection shall prescribe the principles, conditions and procedures for the granting and cessation of asylum or temporary protection, as well as the status, the rights, and obligations of asylum seekers and persons granted the right to asylum or temporary protection. We welcome the intention by your Excellency's Government of drafting a new law on asylum and temporary protection, bringing it in line with international standards. Nevertheless, we remain concerned over certain provisions in the draft law, which appear to unduly limit the rights to liberty and to freedom of movement of migrants in the Republic of Serbia.

In a spirit of co-operation and dialogue, and in line with the mandate entrusted to us by the Human Rights Council, we wish to submit the following comments on some of the provisions of the draft legislation and respectfully share these concerns with your Excellency's Government;

- Part IV of the draft law entitled "Asylum Procedure", establishes in article 41 the procedures at border crossings or in transit zones. It provides that as part of deciding on the application at a border crossing or in the transit zone, the entire procedure shall be conducted at the border crossing or in the transit zone, or in a special accommodation facility inside the territory of the Republic of Serbia designated for that purpose.
- Part VIII of the draft law entitled "Restriction of Movement", provides in article 78 the grounds for restriction of movement. These grounds are based on the necessity of the Asylum Office, which will take the decision to restrict the movement, to: (1) establish identity or nationality; (2) implement the procedure at the border, in the transit zone or in the special accommodation facility; (3) establish material facts and circumstances underlying the asylum application, which cannot be established without the restriction of movement, particularly if there is a risk of absconding; (4) ensure the presence of the foreigner in the course of the asylum procedure, if there are reasonable

grounds to believe that the asylum application was lodged with a view to avoiding deportation; (5) protect national security and public order.

- article 79 describes provides details on the measures for restriction of movement, which shall include: imposing a ban on leaving a particular address or Asylum Centre; regular reporting at police stations; ordering accommodation at the Reception Centre of Foreigners (or social protection institutions in case of minors) under intensified police supervision. The restriction shall last for as long as the grounds apply and for a maximum of three months, which, in some cases, could be extended.
- article 80 foresees the order of an applicant to stay at the Reception centre for foreigners, if he or she has violated the ban referred to in article 79.
- article 81 provides the need to assess the appropriateness of the accommodation in case of people requiring special procedural and reception guarantees. It also establishes that an unaccompanied minor may be ordered to stay in a social protection institution for minors with intensified supervision.

We are particularly concerned that the provisions of articles 41, 78, 79, 80 and 81 will disproportionately affect the rights of liberty and freedom of movement of migrants and asylum seekers in the Republic of Serbia and that this impediment will impact on their personal security and enjoyment of basic human rights.

We are further concerned that the restriction of movement in transit areas for persons at the border crossings and in transit zones could involve children, who are not explicitly excluded from those provisions and whose detention would constitute a violation of their rights.

In addition, we are concerned that accommodation in social protection institutions for minors under intensified supervision does not include the necessary provisions to protect the best interest of the child.

In light of the above-named concerns, we would like to draw your Excellency's Government's attention to article 9.1 of the International Covenant on Civil and Political Rights (ICCPR), succeeded by your Excellency's Government on 12 March 2001, which provides that everyone has the right to liberty and security of person. 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 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" (CCPR/C/21/Rev.1/Add. 13 (2004), para. 10). The detention of migrants and asylum seekers should thus be a measure of last resort. The ICCPR further stipulates that all persons deprived of their liberty be ensured the right without delay to control by a court of the lawfulness of the detention (art. 9 (4)). For a more detailed overview of the international human rights standards governing the detention of migrants, including the obligation of States to always resort to alternatives to detention first, we would like to draw your attention to the

Special Rapporteur on the human rights of migrants ‘ report to the Human Rights Council (A/HRC/20/24).

As stated in the report, detention for immigration purposes should never be mandatory or automatic. According to international human rights standards, it should be a measure of last resort, only permissible for the shortest period of time and when no less restrictive measure is available.

Furthermore the United Nations Human Rights Committee has found that detention in the course of proceedings for the control of immigration is not per se arbitrary but that the detention must be justified as “reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time.” Detaining migrants and asylum seekers who have entered unlawfully onto a State party’s territory for more than a “brief initial period” while their claims are being resolved is “arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.” The decision must “consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category”.¹ The Committee has for these reasons considered mandatory detention to be inherently arbitrary and therefore contrary to the International Covenant on Civil and Political Rights (ICCPR).

With regards to provisions in article 79 on “measures for restriction of movement”, Paragraph 4 of the draft law, we would like to refer your Excellency’s Government to the Convention on the Rights of the Child, succeeded by your Excellency’s Government on 12 March 2001. In particular, article 20 reads: “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.” Article 37 foresees that detention should be always used as a measure of last resort and we strongly urge your Excellency’s Government to consider alternatives to the restriction of movement of children and codify these provisions accordingly into national law.

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 information on measures taken, or to be taken, to ensure the compliance of the draft legislation, with Serbia’s obligations under international human rights law, particularly with regards to the right to freedom of movement.
2. Please provide detailed information about the measures taken, or intended to be taken, to ensure that the human rights and fundamental freedoms of migrants and asylum seekers residing in the territory of the Republic of Serbia are respected and protected, including avoidance of unnecessary detention and safe conditions in the mentioned facilities.

¹ CCPR/C/107/R.3, para 18

3. Please provide detailed information about the measures taken, or intended to be taken, to ensure that the best interest of the child is protected.

We would appreciate receiving a response within 60 days. Should the legislation move forward, we are likely to issue a public comment discouraging its adoption and would advise your Excellency's Government in advance of that occurrence.

While awaiting a reply, we urge all relevant authorities in Serbia to take all necessary measures to ensure the full compliance of domestic legislation with international human rights norms and standards, in particular with the prohibition of restriction of movement. We would like to take this opportunity to express our interest and availability to discuss the draft legislation in more detail with your Excellency's Government at your convenience and provide further assessment towards its revision.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

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

François Crépeau
Special Rapporteur on the human rights of migrants

Sètondji Roland Adjovi
Chair-Rapporteur of the Working Group on Arbitrary Detention