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## Human Rights Council Working Group on Arbitrary Detention

### **Opinions adopted by the Working Group on Arbitrary Detention at its 78th session, 19-28 April 2017**

#### **Opinion No. 13/2017 concerning 12 female defectors of the Democratic People's Republic of Korea (whose names are known by the Working Group) (Republic of Korea)<sup>1</sup>**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.
2. In accordance with its methods of work (A/HRC/33/66), on 24 June 2016 the Working Group transmitted a communication to the Government of the Republic of Korea concerning the deprivation of liberty of 12 female citizens of the Democratic People's Republic of Korea. The Government replied to the communication on 22 September 2016. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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<sup>1</sup> In accordance with rule 5 of the methods of work, Seong-Phil Hong did not participate in the discussion of the present case.



(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

## **Submissions**

### *Communication from the source*

4. The 12 women, whose names are known by the Working Group, are reportedly defectors of the Democratic People's Republic of Korea. They had been working at a restaurant located in Zhejiang Province, China, before they reportedly left China on 5 April 2016 in order to go to Malaysia.

5. The source reports that the women arrived in Seoul on 7 April 2016 and were detained by the National Intelligence Service of the Republic of Korea in order to conduct an investigation on their eligibility for protection as potential defectors from the Democratic People's Republic of Korea, under article 7 of the Act on the Protection and Settlement Support of Residents Escaping from the Democratic People's Republic of Korea, which reportedly allows the National Intelligence Service to hold such defectors in custody at a centre in Siheung, Gyeonggi Province, for up to six months for interrogation in order to decide on their eligibility for protection.

6. At the time of the submission by the source, the women had been held for over two months at the centre. According to the source, detention in the facility is compulsory for all citizens of the Democratic People's Republic of Korea seeking protection. On 8 April 2016, the Ministry of Unification of the Republic of Korea made an official statement at a press conference that the 12 women had defected to the Republic of Korea.

7. The source reports that the Democratic People's Republic of Korea accused the Republic of Korea of abducting the women and called for their immediate repatriation. Their families reportedly addressed a letter of petition on 18 April 2016 to the Human Rights Council and the Office of the United Nations High Commissioner for Human Rights, stating that they also allege an abduction by the Republic of Korea.

8. The source alleges that the women have not had proper access to legal counsel. When lawyers from the organization Minbyun (Lawyers for a Democratic Society) requested access to them in order to inform them of their legal rights along with proper explanations regarding their current situation, the lawyers were reportedly rejected by the National Intelligence Service on four separate occasions (16, 24 and 27 May and 3 June 2016) stating that documents brought into the centre could contain hazardous and noxious substances that would endanger the centre. The Ministry of Unification added that the women had defected voluntarily to the Republic of Korea and had asked for protection under article 7 of the above-mentioned Act; therefore, access to family or legal counsel would not be permitted.

9. The source reports that representatives of the women filed a habeas corpus petition with the Seoul Central District Court on 24 May 2016.

10. The source informs the Working Group that, on 22 June 2016, the first hearing on the habeas corpus petition was held at the Seoul Central District Court. The hearing was closed to the public and no independent observer was allowed to attend. The women reportedly did not appear at the Court, and the National Intelligence Service alleged that they had refused to do so owing to protection concerns. The Court reportedly did not allow lawyers to take records of the case, citing the closed nature of the proceedings, and did not hear the merits but focused mainly on whether or not the attorneys had the legitimate power to represent the individuals. The lawyers reportedly filed a motion to request that the victims be present at the next hearing, but the request was dismissed and the Court

announced that it would review the cases on the merits without further hearing. The lawyers therefore requested a change of judge, citing possible infringement in the fairness of the proceedings. At the time of the submission by the source, the proceedings had been put on hold until a panel of judges had made a decision on the request by the lawyers to change the judge.

11. The source submits that the rights of the 12 women have not been guaranteed or protected while awaiting the decision on their eligibility for protection under article 7 of the Protection and Settlement Support Act, and that the procedure under that article does not conform with international human rights standards.

12. The source alleges that they were not informed either of the reason for their placement in custody or of their rights, and that such treatment does not conform with article 9 (2) of the Covenant and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which state that “[a]nyone who is arrested shall be informed at the time of arrest of the reasons for his arrest and shall promptly be informed of any charges against him”.

13. The source further alleges that the families of the women were not notified of their arrest, in violation of principle 16 of the Body of Principles, stipulating that “[p]romptly after arrest ... a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody”. Such notification “shall be made or permitted to be made without delay” unless “exceptional needs of the investigation so require”. Furthermore, the source submits that numerous surveys have showed that the majority of detainees at the centre had not been notified about the duration of and/or grounds for their detention.

14. According to the source, their right to legal counsel has not been respected during the time of detention, violating principle 18 of the Body of Principles. Principle 18 further elaborates that “[a] detained or imprisoned person shall be entitled to communicate and consult with legal counsel” with “adequate time and facilities for consultations” and “without delay or censorship and in full confidentiality”. Furthermore, Principle 15 stipulates that “communication of the detained or imprisoned person with the outside world, and in particular his ... counsel, shall not be denied for more than a matter of days”.

15. The source further alleges that the freedom of expression has not been upheld, in violation of article 19 (2) of the Covenant. It specifies that this right includes “freedom to seek, receive and impart information and ideas of all kinds”. Furthermore, the source submits that the complete isolation of the women from the outside world violates their right to freedom of expression to make their voice heard about their current situation.

16. Finally, the source submits that their deprivation of liberty constitutes arbitrary detention under category III of the categories applicable to the consideration of cases submitted to the Working Group.

#### *Response from the Government*

17. On 24 June 2016, the Working Group transmitted the allegations from the source to the Government of the Republic of Korea under its regular communications procedure. The Working Group requested the Government to provide detailed information regarding the situation of the 12 women since their arrest, including any comment on the source’s allegations. The Working Group also requested the Government to clarify the facts and legal provisions justifying their continued detention, and its compatibility with the obligations of the Government under international human rights law, particularly those treaties that the Republic of Korea has ratified.

18. On 17 August 2016, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted the Government a one-month extension to submit its response.

19. In its response of 22 September 2016, the Government informed the Working Group that the women had left the centre for defectors in groups, between 8 and 11 August 2016, as they had completed the relevant assessment and education for their successful settlement

in accordance with the Protection and Settlement Support Act. They are now living in the Republic of Korea as fully pledged, ordinary citizens, without any physical restrictions, enjoying fundamental freedoms and human rights guaranteed under the Constitution of the Republic of Korea.

20. Thus, the Government of the Republic of Korea is of the view that the communication submitted to the Working Group regarding the women should be dismissed because they are now living in freedom outside the centre.

21. The Government notes that the international community has repeatedly expressed its strong concerns about the human rights situation in the Democratic People's Republic of Korea, including through resolutions adopted on an annual basis by the General Assembly and the Human Rights Council.

22. The Government indicates that defectors from the Democratic People's Republic of Korea are those who have escaped the systematic, widespread and gross human rights violations committed by the regime of the Democratic People's Republic of Korea. Thousands of people of the Democratic People's Republic of Korea defect every year at the risk of their life. The total number of such defectors who are currently living in the Republic of Korea amounts to almost 30,000.

23. According to the Government, it provides those individuals with the measures necessary to protect them from possible reprisals and attacks and to help them recover their physical and mental health, and conducts assessment at the centre pursuant to the Act. The assessments are of an administrative nature to verify relevant facts about them and are required to make an informed decision as to whether or not each of them is qualified for benefits, such as subsidies for accommodation and settlement, in accordance with the Act. It is not an investigation for the purpose of criminal justice, and the centre is not a facility for detention or confinement, but rather for an administrative assessment and protection.

24. The Government notes that some people might argue that the protection provided for the women at the centre was equivalent to an arrest or detention. However, the women entered the Republic of Korea of their free will to seek protection from the Government of the Republic of Korea and they were accommodated at the centre for an administrative assessment needed for settlement, just like any other defectors from the Democratic People's Republic of Korea. It is therefore groundless to say that they had been in a state of arrest or detention or that the women had been accommodated arbitrarily at the centre. It is also unjustifiable to say that the rights of the women guaranteed under the Covenant and the Body of Principles were not respected at the centre. The Government submits that this argument is based on a false premise that the women had been in a state of arrest or detention.

25. In order to address any possible misunderstanding that assessment and protection measures for defectors at the centre would amount to a de facto arbitrary detention, and in an effort to ensure that such measures are in conformity with international human rights standards, the Government of the Republic of Korea informs the defectors, including the women, prior to their accommodation, of the legal grounds for the assessment and protection, of the duration, purpose and contents of the assessments and of the remedies available in the event of any human rights violations.

26. Moreover, the Government also notes that, although the defectors who undergo the assessment are not necessarily entitled to access to legal counsel, which is fully recognized as a fundamental right for criminal defendants or suspects subject to investigation, the Government appointed a female judge-turned-attorney recommended by the Korean Bar Association as human rights protection officer for the defectors at the centre in order to ensure that they received legitimate assistance, including legal counsel. The officer has the authority to monitor all kinds of human rights violations that may occur in the process of assessments and have confidential one-on-one meetings with defectors who need legal support at any time.

27. Against this backdrop, the Government underlines that the women were fully informed of the legal grounds under which they would be protected at the centre and of the purpose, contents and duration of the assessments. They also received necessary legal

advice through such means as face-to-face interviews with the human rights protection officer. Moreover, they were always able to have access to various media outlets, such as television and newspapers, at the centre. Realizing that so many reports were being made about their defection in the media, they reportedly became extremely concerned about the safety of their families back home and experienced psychological anxiety.

28. The Government reiterates that the women were protected temporarily at the centre in accordance with the Act, which was enacted in 1997 to provide for matters relating to the protection and support necessary to help residents of the Democratic People's Republic of Korea who escape from the area north of the Military Demarcation Line and who desire to receive protection from the Republic of Korea, as swiftly as possible to enable them to adapt to and settle in all spheres of their lives, including political, economic, social and cultural spheres, as stipulated in article 1 of the Act. The Government provides more information about the contents of the Act and an unofficial translation of the Act for the reference of the Working Group.

29. The Government notes that, while the women were staying at the centre, Minbyun filed a petition for habeas corpus on their behalf at the Seoul Central District Court on 24 May 2016. In the course of the proceedings, one of the main factors debated was whether or not the women should appear in person at the Court. However, the women expressed their strong will not to appear at the Court out of fear that they would expose their identities and also possible reprisals by the regime of the Democratic People's Republic of Korea against their families. They also refused an interview with representatives of Minbyun for the same reasons. As they possessed full legal capacities, the Government of the Republic of Korea could not force them to attend the proceedings or be interviewed by anyone against their will. However, the Government underlines that, if the women were to pursue legal proceedings, an interview with the lawyers concerned would be ensured.

30. On 9 September 2016, the Court reportedly dismissed the petition of Minbyun without further hearing on the basis that there were clear grounds for dismissal, namely, the applicants represented by Minbyun were barely acknowledged as the family members of the women and the interest in the litigation no longer existed in that the women had already left the centre.<sup>2</sup>

31. The Government notes that the finding of the Court was made by a judge whose full independence and neutrality is safeguarded by the Constitution of the Republic of Korea, on the basis of relevant laws and rules of procedures. The Constitution and its subsidiary laws are in full conformity with the principles and standards of international human rights law.

32. The Government reiterates that the assessment and protection at the centre had not been designed or implemented to deprive the 12 women of their personal liberty. As such, claims that the assessment and protection for them at the centre had constituted arbitrary detention are groundless and unfounded. Taking into account the predictability of administrative measures conducted according to the Act and all due process, it is also unjustifiable to say that the protective measures for the women had been arbitrary. To the contrary, the protection had been provided on the basis of statutory provisions.

33. Moreover, the decision by the women not to appear at the Court and not to see lawyers of Minbyun was made of their free will as they had been deeply concerned about exposure of their identities and the safety of their families living in the Democratic People's Republic of Korea. The allegation that they had been denied their right to a fair trial under the terms of the Universal Declaration of Human Rights and the Covenant, and that their accommodation at the centre had amounted to arbitrary detention, under category III, are just unreasonable.

<sup>2</sup> Under the Republic of Korea Habeas Corpus Act, article 10 (1), a court shall appoint a date for examination of a petition for habeas corpus and summon the relevant habeas corpus petitioner and inmate on the date so appointed, except in cases where such petition is dismissed.

34. Most importantly, the women are now living in the Republic of Korea as fully pledged, ordinary citizens without any physical restrictions, enjoying fundamental freedoms and human rights, as they had wished.

*Further comments from the source*

35. The response from the Government was transmitted to the source for comments on 29 September 2016. In its comments, the source notes that the Working Group reserves the right to render an opinion as to the arbitrariness of the deprivation of liberty, notwithstanding the release of the persons concerned. It also highlights the legal nature of the deprivation of liberty within the centre for defectors and the applicable international norms related to such detention. In addition, the source reiterates its concerns in relation to violations of the rights to legal counsel; of access to information; and to a fair trial by an impartial tribunal.

**Disposition**

36. The Working Group was informed by the Government and this was confirmed by the source that the 12 women are now living in the Republic of Korea as ordinary citizens without any physical restrictions.

37. In the light of the foregoing, the Working Group decides to file the case, in accordance with paragraph 17 (a) of its methods of work.

[Adopted on 20 April 2017]

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