United Nations A/HRC/30/36/Add.4

General Assembly

Distr.: General
15 September 2015

English only

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on Arbitrary Detention

Addendum

Follow-up mission to Germany: comments by the State on the report of the Working Group on Arbitrary Detention*

* Reproduced as received.

GE.15-15603(E)

Comments of Germany on the report of the Working Group on Arbitrary Detention on its visit to Germany (12–14 November 2014)

1. The Federal Government wishes to thank the Working Group on Arbitrary Detention for the opportunity to comment on the Report on its visit.

2. At the outset, the Federal Government wishes to observe that it had been agreed between the Working Group and the Government that the official discussions during the visit should, due to the short notice of the visit, focus on the question of preventive detention and the reforms in this area since 2011. All information about other areas of law contained in the Report are therefore based on information received by the Working Group from other sources and do not represent the outcome of any substantive discussions with the Federal Government.

3. Many of the observations made in the report reiterate the observations made by the Working Group on the occasion of its visit in 2011 rather than containing new information.

4. As far as the Federal Government is aware, there are no figures to support the Working Group's presumption that there is a disproportionate application of pre-trial detention with regard to foreign nationals and Roma. Nor has there been any systematic evaluation of this question by the Working Group. The Federal Government therefore does not share the conclusion made in para 11.

5. The Federal Government considers the statements made in para 25 and 26 as at least incomplete since they are based on the former legislation and do not take the amendments made sufficiently into account. As properly mentioned in the conclusions para 68, normative and practical changes have been made to address the concerns with regard to international law. After these changes, there remain – restrictive – possibilities to extend detention on preventive grounds after the completion of penalties which have been considered as compatible with the European Convention on Human Rights by the European Court of Human Rights, including preventive detention as regulated by the judgment of the Federal Constitutional Court or reserved preventive detention (see M v. Germany, decision of 10 February 2015, Application No. 264/13). For clarification it appears therefore necessary to extend the findings made in para 25 and 26 and insert the following conclusion as termed in para 68: "These concerns have been addressed by legislation and the corresponding changes in the detention regime".

6. The Federal Government finds no basis in fact for the allegations in para 31 that Germany made "wide use of prisons" for pre-removal detainees and in para 33 that offences under Section 95 (1) of the Residence Act were subject to "harsh sentencing". As far as the Government is aware, proceedings for such offences are in practice either discontinued or they end with only mild sentences.

7. Para 35 seems to be somewhat misleading. Under German law, detention prior to deportation may only be ordered to secure the actual execution of the deportation order. This is only possible if identity and nationality of the person to be deported have been established. German law does therefore not provide for detention in order to establish the identity of a foreign national.

8. Recommendation g) (after para 35) is also unclear. Foreigners undergoing an asylum procedure in Germany are under no circumstances forced to return to their country of origin, i.e. the potential country of persecution. Perhaps this misrepresentation stems from the fact that the report in many instances uses the term "asylum seekers" in the meaning of rejected asylum seekers, i.e. persons required to leave the country. This should be clarified.

9. With regard to para 36, the Federal Government wishes to note that the situation of particularly vulnerable groups is already taken into account when deciding upon pre-deportation detention. Detention of minors occurs extremely rarely in practice and – like any detention under German law - by order of a judge only..

10. Para 37 seems to imply that there is no right to court review with regard to deportation orders. This is not the case; German law does provide for the right to court review of deportation orders. We would like to see this rectified.

11. The statement in para 43 that several thousand asylum seekers (maybe the report means asylum seekers whose application has been finally rejected and who are enforceably required to leave the country) are sent to "Länder detention facilities immediately upon arrival" is simply wrong in fact and should be deleted.

12. With regard to detention prior to deportation, the Law on Residence and the related General Administrative Rules already provide for alternative measures. Authorities are required to examine whether less severe means are sufficient, which is also mentioned in Section 62 (1) of the Residence Act, for example. The same holds true for the recommendation in para 35 to reduce the length of detention to the period of time strictly necessary. This, too, is required according to Section 62 (1), second sentence, of the Residence Act. The use of detention as ultima ratio follows already from the principle of proportionality which stems directly from the constitution. It is particularly unfortunate that the draft report does not sufficiently recognize this constitutional dimension of the principle of proportionality in German law.