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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019

Opinion No. 50/2019 concerning Mohammed Alashram (France)

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 4 January 2019, the Working Group transmitted to the Government of France a communication concerning Mohammed Alashram. The Government has replied to the communication. 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);
 - (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

(a) Background

4. Mohammed Alashram is a Palestinian citizen, born on 11 May 1967 in Al-Burayj, Palestine. Mr. Alashram has no profession.

5. According to the source, Mr. Alashram arrived in France in 2005 and was granted refugee status in 2008. Mr. Alashram was then asked to deliver sermons in Arabic in mosques in the city where he lived.

6. The source explains that, on 15 January 2015, Mr. Alashram received a notice, dated 9 January 2015, to appear at deportation proceedings initiated by the prefect of Bas-Rhin. The prefect informed him that he was due to appear on 12 February 2015 before the Deportation Commission, located at Bas-Rhin police headquarters. Such deportation proceedings are based on article L521-1 of the Code on the Entry and Stay of Aliens and the Right of Asylum, which provides that: “Subject to the provisions of articles L521-2, L521-3 and L521-4, deportation may be ordered if the presence in France of an alien constitutes a serious threat to public order.”

7. The source indicates that Mr. Alashram is accused of having made, in sermons given in several mosques in Strasbourg between 2010 and 2014, “remarks constituting obsessive anti-Semitic hate speech, which could be perceived as a genuine incitement to hatred and violence against persons of the Jewish faith”, and also of having “contributed to radicalizing certain young Muslims by inciting them to armed jihad”. These charges leading to the deportation procedure are based exclusively on two *notes blanches* (briefing memos), documents drafted by the French intelligence services containing information that a person is said to represent a threat to national security, used to justify the application of administrative control measures such as compulsory residence orders.

8. According to the source, on 12 February 2015, Mr. Alashram was heard by the Deportation Commission. He submitted depositions from presidents and leaders of various mosques where he has officiated and a petition signed by persons who heard his sermons that attests to his showing respect for others and the law. The Commission advised against deportation, as it considered that Mr. Alashram had produced sufficient evidence to contest the allegations made in the briefing memos. It concluded that “evidence of the dangerousness of Mr. Alashram for public order has not been established”.

9. The source then explains that, despite the Commission’s adverse opinion, on 26 May 2015, the prefect of Bas-Rhin issued a prefectural deportation order against Mr. Alashram. The grounds are a summary of the two briefing memos and are based mainly on the remarks allegedly made by the person concerned in sermons delivered between 2010 and 2015, and also on the decisive role he is supposed to have played in the radicalization of several young Muslims.

10. The source reports that, the following day, the prefect of Deux-Sèvres issued a compulsory residence order against Mr. Alashram, based on article L523-3 of the Code on the Entry and Stay of Foreigners and the Right of Asylum. The prefect notes that Mr. Alashram, having refugee status, is not currently in a position to leave the French territory, but that, “given the nature and gravity of the acts committed by Mr. [...] Alashram that led to the deportation order, there is good reason to issue an order requiring him to reside within a limited radius, far from his usual place of residence, to oblige him to report several times a day to the gendarmerie services, and to set out core hours during which he must remain at home”. This compulsory residence order – and any other such measures subsequently imposed – is to be valid “until it is possible for him to comply with the deportation order to which he is subject”.

11. The source explains that this first order compelled Mr. Alashram to reside in the town of Parthenay. He could not leave this town at any point without first obtaining safe conduct granted by the prefect. Mr. Alashram had to report to the gendarmerie four times a day, every day, without exception. The compulsory residence order also required him to remain in the hotel at which he resided, from 9 p.m. to 7 a.m.

12. According to the source, on 27 May 2015, Mr. Alashram was stopped and questioned in the street and taken to the Strasbourg Central Police Station, where he was notified of the deportation order and the order requiring him to reside in Parthenay. Gendarmes took him to his place of restricted residence.

13. The source further indicates that, on 29 October 2015, the prefect of Deux-Sèvres issued a new compulsory residence order transferring him from the commune of Parthenay to that of Sauzé-Vaussais, while maintaining exactly the same restrictions. Mr. Alashram was transported from one place to another by the gendarmes, as would be the case for each change of place of restricted residence. Indeed, on 23 September 2016, the prefect of Deux-Sèvres again modified the place of restricted residence, transferring him to the commune of Saint-Junien. Lastly, on 16 March 2018, the prefect of Creuse ordered Mr. Alashram to be required to reside in the commune of La Souterraine, where he currently resides. The restrictions imposed by the compulsory residence order are the same as those specified in the previous orders, with the sole exception of the obligation to report to the police station, which was reduced to once a day, instead of the four times required previously. This amendment follows a decision of 11 August 2017 issued by the Council of State, to which the matter was referred for a summary judgment.

14. The source indicates that, in the meantime, on 23 June 2016, the French Office for the Protection of Refugees and Stateless Persons decided to withdraw Mr. Alashram's refugee status. This decision is based on information provided by the Ministry of the Interior. Mr. Alashram's appeal to the National Court on the Right of Asylum is still pending.

15. The source explains that the compulsory residence orders are intrinsically linked to the deportation order, which constitutes the only grounds for them. Thus, the compulsory residence order may be challenged by lodging an appeal against not only the compulsory residence order itself but also against the detention order, which, if it were annulled, would make the compulsory residence order null and void. Mr. Alashram therefore challenged the deportation order in the administrative court. His application for annulment was dismissed by the Strasbourg Administrative Court on 19 October 2016, and then by the Nancy Administrative Court of Appeal on 19 July 2018. An appeal is pending before the Council of State. Mr. Alashram has also filed several applications (for summary proceedings and for annulment) against the various compulsory residence orders. All were rejected or ended in the denial of access to judicial proceedings, with the exception of summary proceedings that resulted in a partial relaxation of the conditions for compulsory residence by the Council of State in a decision of 11 August 2017. An application for annulment of the fourth compulsory residence order is pending before the Limoges Administrative Court.

(b) Legal analysis

16. The source submits that Mr. Alashram's deprivation of liberty is arbitrary under categories III and IV.

17. By way of introduction, the source indicates that compulsory residence constitutes a deprivation of liberty; the source relies in particular on the Working Group's deliberation No. 1 on house arrest (1993) and revised deliberation No. 5 on deprivation of liberty of migrants (2018) to reach this conclusion. In fact, this obligation was in no way freely undertaken, since, on 27 May 2015, Mr. Alashram was arrested by police officers who took him to the police station on the pretext that his identity papers appeared to have been forged. Upon his arrival at the police station, a police officer notified him of the deportation order and compulsory residence order, and then confiscated his residence permit, leaving him only with a travel document. On the same day, gendarmes came to pick him up at the police station to take him to the first place of restricted residence, without allowing him to pick up any belongings at his home. Subsequently, Mr. Alashram was each time transferred from one place of restricted residence to another under duress by gendarmes.

18. In addition, the source indicates that the compulsory residence order to which Mr. Alashram is subject is characterized by confinement to a place that he is not free to leave for several hours daily. Indeed, since he was first arrested on 27 May 2015, Mr. Alashram has been forced to stay in the hotel at which he resides, for 10 hours a night, from 9 p.m. to 7 a.m. He has never been free to choose his accommodation in the successive communes in which he has been subject to compulsory residence. The hotel rooms in which he has

resided and still resides today were each time chosen and paid for by the French authorities. It is therefore not a place of residence, but rather an alternative place of detention.

19. The source also notes that, in the commune of Sauzé-Vaussais, Mr. Alashram was forced to stay in a squalid hotel closed to the public that was very poorly insulated and very cold in winter. The gendarmes often called him in the morning, between 5 a.m. and 8 a.m. A gendarmerie vehicle followed him as soon as he went out, watched the hotel in the evening and lit the window of his room with a projector. The source indicates that Mr. Alashram was subjected to psychological harassment. At the same time, the prefect withdrew all social assistance, including State health care. He only got back medical coverage after his fourth transfer, to the commune of La Souterraine, on 16 March 2018. He developed an eye allergy and a severe toothache that he was unable to have treated for want of money. He fed himself nothing but bread and tuna for such a long time that he suffers from digestive problems. He only ate warm and varied meals when friends came to visit him.

20. Furthermore, the source explains that Mr. Alashram is forced to remain during the day within a strictly delimited geographical area. He has been compelled to reside successively in four small communes.¹ Mr. Alashram is strictly prohibited from travelling beyond this area without the written authorization of the prefect of the place of restricted residence, who thus grants safe conduct. Such authorization is rarely given. Mr. Alashram was thus denied permission to attend several hearings in connection with appeals against the deportation order and compulsory residence order concerning him. He was also not allowed to leave the commune in which he was subject to compulsory residence to meet his lawyer. In this respect, Mr. Alashram is subject to the same restrictions as a person facing a “conventional” form of detention. The source also points out that Mr. Alashram is not given permission to work.

21. According to the source, any violation by Mr. Alashram of the conditions governing the compulsory residence order is liable to criminal prosecution. Mr. Alashram is currently being prosecuted in a criminal court for violating his compulsory residence order on 1 December 2015, the date on which he went to dinner with people living in a neighbouring commune and was taken into police custody upon his return. He is liable to a sentence of 3 years’ imprisonment.

(i) Category III

22. The source indicates that such deprivation of liberty is arbitrary because it is based on a deportation order, presented as a preventive measure, but which in fact serves as a penalty without the principal concerned receiving the guarantees given in criminal proceedings. In addition, Mr. Alashram’s appeal against the deportation order was not fairly considered by the administrative court, as the administrative court of appeal placed an undue burden of proof on Mr. Alashram, thereby breaking with the principle of equality of arms, and demonstrated a certain bias.

23. The source indicates that the charges laid against Mr. Alashram, if proved, would constitute offences liable to criminal prosecution. Deportation proceedings involving deprivation of liberty by means of a compulsory residence order affords the person concerned less protection than criminal proceedings, in which he or she would benefit from the presumption of innocence and the obligation of judges to investigate exonerating circumstances as well. Thus, the source considers that the authorities knowingly circumvented the criminal proceedings that should have been initiated in view of the charges brought, in order to deprive Mr. Alashram of procedural guarantees. Consequently, according to the source, Mr. Alashram is the victim of the use of administrative control measures, in the context of the fight against terrorism, instead of criminal proceedings.

24. Furthermore, the source indicates that Mr. Alashram’s deprivation of liberty is arbitrary because his appeal against the deportation order was not fairly considered by the

¹ On 27 May 2015, he was required to reside in the commune of Parthenay (10,381 inhabitants, 11 km²), on 29 October 2015, in the commune of Sauzé-Vaussais (1,626 inhabitants, 19 km²), on 23 September 2016, in the commune of Saint-Junien (11,156 inhabitants, 56 km²) and, on 16 March 2018, in the commune of La Souterraine (5,315 inhabitants, 37 km²).

administrative court, as the administrative court of appeal placed an undue burden of proof on him, thereby breaking with the principle of equality of arms and showing the court's bias. The decision to reject the appeal against the deportation order on 19 October 2016 was thus challenged. The source points out in this context that Mr. Alashram was unable to attend the hearings of the Administrative Court of Appeal on 30 January and 11 June 2018. In the first instance, the safe conduct issued was incompatible with public transport schedules; in the second, the prefect did not reply to the request for safe conduct.

25. The source further reports that, on 20 February 2018, the Nancy Administrative Court of Appeal rendered an interlocutory judgment in which it considered that it did not "[find] in the file sufficiently precise evidence to enable it to assess whether, at the date of the deportation decision, Mr. Alashram's presence in France would constitute [...] a serious threat to public order". On 19 July 2018, in a surprising reversal of opinion compared with the reservation expressed in its interlocutory judgment, the Nancy Administrative Court of Appeal dismissed Mr. Alashram's appeal on the grounds that the briefing memos contained "precise, detailed and consistent facts", even though a third memo provided by the Ministry of the Interior did not provide any conclusive evidence on the allegations reported in the first two memos. The absence of a previous criminal conviction of Mr. Alashram and the Deportation Commission's adverse opinion were not taken into account by the court.

26. In the light of these decisions, the source indicates that the reasons for the judgment reflect the unfairness of the procedure. On the one hand, the Administrative Court of Appeal violated the fundamental principle of equality of arms by placing an undue burden of proof on Mr. Alashram. It assumed that the information reported in the briefing memos was true, whereas these are documents that are not signed, dated or sourced, neither for that matter are they corroborated by any other source of information, and that constitute the sole basis for the court's decision. Conversely, the court required Mr. Alashram to provide evidence that each of the allegations reported in the three memos were untrue. Despite the fact that it was impossible for him to travel because of his compulsory residence order, he was able to collect a great deal of evidence. While he was not able to provide full transcripts of all the sermons mentioned in the memos, but only quotations of a few lines or even a few words, he managed, nevertheless, to produce translated transcripts of three of them. However, the court claims that he was able to make the alleged remarks when breaking off into digressions in Arabic and thus implicitly establishes that, whatever evidence he provides, Mr. Alashram will be suspected of lying and concealing information. The source thus alleges that, in so doing, the court not only violated the principle of equality of arms but also showed a clear bias, even going beyond the allegations mentioned in the briefing memos.

27. Thus, according to the source, the unfairness of the procedure for the review of the legality of the deportation order makes Mr. Alashram's deprivation of liberty arbitrary in another respect. Mr. Alashram's appeal against his deportation order can be considered as one of the many remedies he has sought to have the compulsory residence order against him annulled. If the legality of the compulsory residence order is not meant to be examined by the administrative court in the context of the proceedings against the deportation order, any decision taken on the legality of the deportation order necessarily has legal effects on the compulsory residence order. Therefore, the source considers that the unfairness of the judicial procedure for the annulment of the deportation order also denotes the lack of a fair remedy against the compulsory residence order, which leads to the arbitrary nature of the deprivation of liberty under category IV.

28. The source also points out that Mr. Alashram's deportation order and compulsory residence order are certainly linked to his migrant status, but they are also and above all part of the Government's policy to combat terrorism. In this context, the source reports that the administrative authorities have issued numerous compulsory residence orders not only to migrants subject to deportation orders or an entry ban to the French territory, but also French nationals, all of whom are suspected of posing a threat to public order. The climate of fear in France is such that judges do not dare overturn administrative decisions, even if they are said to rest on vague and unsubstantiated information. The result is judges who almost systematically align themselves with the Government's positions.

(ii) Category IV

29. According to the source, Mr. Alashram's refugee status was withdrawn on the basis of the same information from the Ministry of the Interior that led to the deportation order. However, it is established that Mr. Alashram cannot be deported to Palestine, where he risks being tortured and sentenced in an unfair trial, if he is not, beforehand, taken in for questioning by the Israeli authorities. Thus, Mr. Alashram is subject to a deportation order that cannot and will not be able to be executed unless France finds a third country to receive him. He can therefore remain subject to the compulsory residence order for the rest of his life.

30. The source indicates that Mr. Alashram's deprivation of liberty is justified solely by the impossibility of having his deportation carried out because of the risks he faces if he is returned to Palestine. The compulsory residence order can thus be indefinite. In the case of Mr. Alashram, under article L561-1 of the Code on the Entry and Stay of Aliens and the Right of Asylum, the administrative authority is under no obligation to review the merits of the compulsory residence order until after five years, in order to justify the continuation of the order.

31. The source indicates that French law does not impose any obligation on the judicial authority to regularly review the legality, absence of arbitrariness, necessity and proportionality of the compulsory residence order. This is because, under French law, compulsory residence is not considered a measure of deprivation of liberty, and the person under arrest therefore does not receive the guarantees provided for in article 9 of the International Covenant on Civil and Political Rights.

32. With regard to the obligation to allow the person deprived of his or her liberty to lodge periodic appeals against his or her detention, the source notes that a first appeal to an administrative court may be brought immediately after the compulsory residence order has been issued, but under conditions that are not consistent with article 9 of the International Covenant on Civil and Political Rights.

33. The source reports that the time taken to review the legality of Mr. Alashram's compulsory residence order was unreasonable. According to the source, it appears from all the proceedings brought by Mr. Alashram, both appeals on the merits and in summary proceedings, that the court failed to fulfil its obligation to rule without delay on the legality and proportionality of the compulsory residence order. All the applications for summary proceedings were rejected by various administrative courts of first instance, in particular because the judges found that the urgency of the matter had not been established. When, on 11 April 2018, the Council of State implicitly acknowledged the urgency and necessity of a prompt review of the legality of the compulsory residence measure by quashing the Limoges Administrative Court ruling to dismiss the appeal and referring the case back to this court, the Limoges Administrative Court again deprived Mr. Alashram of his right to an appeal without delay on the grounds that the contested compulsory residence order had been revoked and replaced by a new order. In these circumstances, the source considers that it is clear that Mr. Alashram is the victim of a continuing violation of article 9 (4) of the International Covenant on Civil and Political Rights.

34. Lastly, the source argues that, despite all the appeals brought by Mr. Alashram against the various compulsory residence orders, the legality and proportionality of the orders were, in the end, examined only once, by the Poitiers Administrative Court, on 4 November 2015, after more than three months of proceedings. According to the source, this demonstrates the lack of regular judicial review of the legality and proportionality of the deprivation of liberty.

Government reply

35. On 4 January 2019, the Working Group sent a communication to the Government of France, giving the Government until 5 March 2019 to reply. The Government replied on 4 March 2019.

36. The French authorities would first like to clarify the distinction between a deportation order and a compulsory residence order, which are administrative police measures that take into account threats to public order. That being the case, they differ from criminal measures, which aim to prevent offences from being committed. The French

authorities also point out that briefing memos are accepted as evidence validated by the Council of State (see Council of State, *Minister of the Interior v. Rakhimov*, case No. 238662, 3 March 2003).

37. With regard to guarantees in the context of the deportation proceedings, article L522-1 of the Code on the Entry and Stay of Aliens and the Right of Asylum provides for referral to the Deportation Commission as soon as a deportation decision is received. The Government recalls that the matter had indeed been brought before the Commission and that its decision is in no way binding, and did not, therefore, prevent the prefect from issuing a deportation order. In addition, Mr. Alashram had legal remedies against the deportation decision. The Government indicates that he has only challenged the deportation order before the Strasbourg Administrative Court and has lodged an appeal, but he has not applied for an interim ruling on his release, for example. Lastly, the Government asserts that, contrary to what the source claims, a due hearing of the parties was given in the proceedings before the Nancy Administrative Court of Appeal. Indeed, the person concerned submitted two reply briefs and, when he could not be present, he was always represented by his lawyer.

38. Concerning the compulsory residence order, the Government points out that it conformed to the Committee's general comment No. 20 on the prohibition of torture or cruel, inhuman or degrading treatment or punishment (1992), which provides that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment by returning them to their countries. Compulsory residence orders are indeed a temporary measure that ends as soon as the person concerned can be physically and legally removed from the national territory on the basis of a deportation order. It is therefore not indefinite detention, as the source claims. With regard to conditions of detention, the Government points out that it has no obligation to finance the accommodation and food of a foreign national subject to a compulsory residence order, but that it has nevertheless done so. In addition, the person concerned could receive visits from his friends.

39. The Government indicates that Mr. Alashram is not deprived of his liberty and recalls that compulsory residence orders are not a measure of deprivation of liberty, but a restriction on freedom of movement.

40. Lastly, the Government indicates that Mr. Alashram has used various judicial remedies against his compulsory residence order, all of which have been rejected or are still pending. For the Government, it is therefore difficult for the person concerned to establish that he has been deprived of legal remedies.

Further information from the source

41. After receiving a copy of the Government's reply, the source submitted additional information on 27 March 2019.

42. The source reiterates all the allegations made in his communication and considers that the French authorities do not provide a satisfactory reply.

43. With regard to the assertion that compulsory residence orders do not constitute a measure involving deprivation of liberty, the source emphasizes that Mr. Alashram's house arrest is not occurring according to the same procedures as the jurisprudence cited by the French authorities. Indeed, Mr. Alashram is subject to a much more restrictive compulsory residence requirements with regard to where he must stay and how often he must go to the police station and the strict ban on leaving the commune in which he has been ordered to reside.

44. As to whether the deportation order is an administrative measure rather than a criminal penalty, the source does not dispute the distinction but notes that the charges laid against Mr. Alashram may constitute a criminal offence and should therefore have been reported to the prosecutor. The source considers that the briefing memos, the only evidence against Mr. Alashram, would certainly not have been sufficient for his criminal conviction and constitute a violation of the presumption of innocence and the rights of the defence in court. The source indicates that the authorities therefore knowingly deprived Mr. Alashram of the opportunity to defend himself by ordering his deportation instead of reporting the facts to the public prosecutor.

45. Concerning the indefinite nature of the compulsory residence order, although the French authorities dispute this, it is nevertheless confirmed by an opinion of the Constitutional Council, which refers to compulsory residence orders as “without a limitation of time”. Mr. Alashram is thus subject to a compulsory residence order “without a limitation of time” or, in other words, indefinite arrest.

46. With regard to the assertion that the compulsory residence order is the fault of Mr. Alashram, the source recalls that this arrest is an arbitrary deprivation of liberty based on an unjustified deportation order. These measures have not been systematically reviewed by the courts within a reasonable enough time to verify the legality and proportionality of the deprivation of liberty. The source indicates that it is not up to Mr. Alashram to end his compulsory residence order by agreeing to be sent back to Gaza or elsewhere, despite the risks involved, but to the French administration to put an end to arbitrary detention.

47. With regard to the lack of prompt and effective remedies available to Mr. Alashram, the source provides an extract from a decision of the Constitutional Council, whose reasoning regarding judicial review of other measures violating freedom supports his allegation. It states that, first, the right to an effective judicial remedy requires that the administrative court be required to rule on the application for annulment of the measure as soon as possible. Secondly, by allowing the contested measure to be renewed for more than six months without a court giving a ruling beforehand, at the request of the person concerned, on the legality and merits of the renewal decision, the law has struck a clearly uneven balance between constitutional requirements and the constitutional objective of preventing the undermining of public order. It is surprising that the French authorities do not guarantee the same judicial review of compulsory residence orders, which constitute deprivation of liberty, as that provided for in the event of measures less prejudicial to fundamental freedoms.

48. Lastly, with regard to the burden of proof, the source refers to the fact that Mr. Alashram was subjected to an undue burden of proof by the administrative courts that reviewed the legality of his deportation order, which constitutes the basis for his deprivation of liberty. The administrative courts have not taken into account the considerable evidence demonstrating the misleading nature of the briefing notes.

Disposition

49. On the basis of the submissions, the Working Group is not in a position to reach a conclusion in this case. Accordingly, the Working Group decides to close the case without prejudice to the ability of the source and the Government to submit additional information.

[Adopted on 16 August 2019]