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DETENTION OF ASYLUM-SEEKERS AND OTHER FOREIGNERS BASED ON MIGRATION LAW (ARTICLES 11 AND 16)

BORDER DETENTION OF ASYLUM-SEEKERS

In its previous concluding observations, the Committee against Torture (the Committee) urged the Netherlands to “ensure that the detention of asylum seekers is only used as a last resort, and, where necessary, for as short period as possible and without excessive restrictions, and to effectively establish and apply alternatives to the detention of asylum seekers.”¹

Amnesty International is concerned about the automatic detention of asylum-seekers at the Schiphol International Airport border. Approximately 10% of all asylum-seekers reach the Netherlands by air, through Schiphol International Airport. Their asylum requests are processed at the *Justitieel Complex Schiphol (JCS)*, which entails automatic detention in JCS' Closed Application Centre.² The organization is concerned with the lack of individual assessments of the necessity of detention in these cases. Many asylum-seekers reach the country traumatized and confused from their travels and experiences in their home country. Detention may cause an additional risk for their health. Vulnerable and/or sick people are not excluded from detention.

The asylum procedure at Schiphol can take up to two weeks, during which time the asylum-seeker remains in detention. For situations in which the government needs more time to take a decision, and the decision is expected to be negative, the procedure will be extended to the so-called ‘closed extended procedure’, which can last up to six weeks in total. This period can also be extended; if the asylum-seeker lodges an appeal against the rejection, he or she continues to be detained. In case the court rejects the appeal the asylum-seeker remains detained if there is a prospect of expulsion.³

In 2013, there were nearly 700 asylum-seekers in this form of detention in the JCS at the Schiphol border, of which 164 people were detained in the ‘closed extended procedure’. In 2014 around 1060 people asked for asylum at the Schiphol border⁴, of which 261 were

¹ CAT/C/NLD/CO/5-6, 20 June 2013, para. 14.

² Art 6 VreemdelingenWet; see also: <http://www.unhcr.nl/unhcr-in-nederland/campagnes/grensdetentie.html>

³ The maximum period of detention with a purpose of removal is six months, but under circumstances this period can be extended with twelve months. See: the European Return Directive art. 15.

⁴ Rapportage Vreemdelingenketen periode januari-december 2014, p 34.

detained in the closed extended procedure.⁵

Since September 2014, a new policy was introduced that put an end to the automatic detention of families with children at the Schiphol International Airport border. From that moment families with children who arrive at Schiphol Airport are submitted to a short screening (credibility of the family ties, the risk of trafficking or child smuggling, or the risk of a violation of the public order) and, barring any indication of these risks, transferred to an open centre in Ter Apel.⁶ Whilst this policy leaves open the possibility of detaining families with children, in practice no asylum-seeking families have been detained since September 2014. So far, however, no effort has been made by the government to put in place a similar screening policy - for example in order to identify vulnerable people who should not be detained - for adult asylum-seekers, to minimize the need for detention.

The automatic detention of asylum-seekers other than families with children at Schiphol Airport contrasts sharply with the Dutch policy and practice vis-à-vis asylum-seekers who arrive through the Netherlands' so-called 'green' borders, i.e. by land. They are not detained and remain in Application Centres which, although some restrictions are in place, are in principle open.

Amnesty International therefore suggests to the Committee to ask the Government of the Netherlands to clarify:

- *Which measures have been taken, or are foreseen, to prevent the unnecessary detention of asylum seekers at all border posts, including Schiphol International Airport?*
- *In particular, is the government of the Netherlands considering implementing an individual screening procedure to determine the necessity and proportionality of detention for each adult asylum seeker?*

DURATION AND FREQUENCY OF DETENTION

In its concluding observations, the Committee recommended that the Netherlands "[s]crupulously observe the absolute time limit for the administrative detention of foreign nationals, including in the context of repeated detention" and avoid "the accumulation of administrative and penal detention, in excess of the absolute time limit of 18 months of detention of migrants under migration law."⁷

Amnesty International notes that the average period for all forms of immigration-related detention (both detention of asylum-seekers at the Schiphol borders and detention for the purpose of removal) was 67 days in 2014.⁸ In comparison to earlier years, the average duration of detention has not been reduced significantly. The average period for detention is

⁵ Vreemdelingenbewaring in getal 2010-2014 mei 2015, p 18.

⁶ Letter to the Parliament 28 may 2014, *Screening and new location for children*.

⁷ CAT/C/NLD/CO/5-6, 20 June 2013, para. 15.

⁸ Amnesty does not have the figures of the average duration of border detention in 2014. In 2012 the average duration in border detention was 39 days. Vreemdelingenbewaring in getal 2010-2014 mei 2015, p 33.

also longer than in a number of other EU Member States bound by the same rules under the EU Returns Directive. Amnesty International considers this concerning, given the explicit role of detention as a measure of last resort that needs to be, when used, as short as possible.

Amnesty International is concerned about the situation of people who are repeatedly detained. Since 2010, the government has not provided any new statistics about the incidence of repeated migration-related detention. The issue raises acute questions about the necessity, proportionality as well as the effectiveness of migration-related detention. The organization therefore considers the gathering and publication of statistics on this phenomenon an important starting point for efforts to avoid repeated detention. Amnesty International has come across a number of individual cases in which repeated detention cumulatively exceeded the absolute time limit of 18 months under the EU Returns Directive.

Amnesty International therefore suggests to the Committee to ask the Dutch government:

- *For an overview of the development of the average duration of migration-related detention over the last few years, separating figures of border detention of asylum-seekers and detention for the purpose of removal;*
- *To clarify which measures it has taken and intends to take to reduce the average period for migration-related detention, inter alia by drawing on the experiences of other EU countries where the duration of detention is significantly lower.*
- *To provide updated statistics on the incidence of repeated detention (separating figures of border detention of asylum seekers and detention for the purpose of removal)*
- *To outline which measure are, or will be taken, to prevent repeated detention.*

REGIME OF IMMIGRATION DETENTION/DETENTION CONDITIONS

In its concluding observations, the Committee noted its concern about the similarities between the detention regime in migration detention centres and penal detention centres. It urged the Netherlands to “ensure that the legal regime of alien detention is suitable for its purpose and that it differs from the regime of penal detention.”⁹

Amnesty International notes that very few steps have been taken to more clearly distinguish the regime for migration detention from that in penal detention. The migration detention centres in the Netherlands resemble penal detention centres, and are built so that they can be used as such in the future, should this need arise, without any structural changes to be made. Migration detainees are detained in cells in heavily guarded buildings with high walls and cameras. The oldest centre (in Zeist) still uses barbed wire between the different buildings. The centre in Schiphol (*Justitieel Complex Schiphol*) with more than 450 (mostly double) cells, accommodates asylum-seekers waiting for their application to be processed, rejected asylum-seekers and irregular migrants awaiting their deportation, as well as drugs smugglers. Most of the people in migration detention are put in a multi- persons cell with other detainees (97%) This contrasts unfavourably with remand prisons, where this

⁹ CAT/C/NLD/CO/5-6, 20 June 2013, para. 16.

percentage is 15%.¹⁰

Migration detention for the purpose of expulsion is governed by the Penitentiary Principles Act (*Penitentiarië beginselenwet, Pbw*). This act was principally developed for criminal detention, which means that irregular migrants and rejected asylum seekers are subject to the same penitentiary rules and regulations as remand prisoners. Migration detainees are required to remain in their cells approximately 16 hours per day. In 2014 there were 2467 new arrivals in migration detention for the purpose of expulsion.¹¹

In December 2013, the government published a draft Bill with a new separate regime for migration detention.¹² The draft Bill seeks to create two different regimes for migration detention. Newly arrived migrants and migrants who pose a risk for order and security would be subjected to a comparatively more restrictive regime. For example, in the restrictive regime people can be locked up in a cell for 17 hours a day, the right to receive visitors is limited to one hour a week and the number of activities such as sport is limited to 8 hours a week. The right to stay in the outside air is limited to one hour per day.

Migration detainees may subsequently be allowed to move to a slightly less restrictive regime for example being allowed to leave their cells in the evening.

The proposal does contain improvements for people staying in the less restrictive regime, for example, fewer hours being locked up in a cell and the possibility of receiving phone-calls which is currently not possible. However, important elements of the draft Bill repeat the provisions of the current Penitentiary Principles Act. Importantly, the draft Bill does not change the fact that individuals in migration detention are locked up in a cell for many hours, may not work, and cannot ask for special leave or unsupervised visits (prisoners in penitentiary detention can). Furthermore, the proposal seeks to create the exact same regime in both border detention for asylum-seekers and detention for the purpose of removal. In practice, this would mean that asylum-seekers, who currently enjoy a bit more internal freedom than aliens up for removal, will be faced with more restrictions than hitherto.

It is unclear at the time of writing whether the limited improvements in the first draft will be retained, and whether further improvements are envisaged; the draft Bill has not yet been sent to the parliament for approval.

Amnesty International therefore suggests to the Committee to ask the Government of the Netherlands:

- *Which measures it intends to take to more clearly distinguish migration detention from penal detention?*
- *Why it continues to use buildings for migration detention that are structurally exactly the same as for penal detention?*

¹⁰ Inspectie voor de Santietoepassing themaonderzoek 2011 meerpersoonscelgebruik.

<https://www.ivenj.nl/actueel/inspectierapporten/inspectierapport-meerpersoonscelgebruik.aspx>

¹¹ Vreemdelingenbewaring in getal 2010-2014, mei 2015, p.21.

¹² <https://www.internetconsultatie.nl/vreemdelingenbewaring>

USE OF ISOLATION CELLS AND SOLITARY CONFINEMENT

Amnesty International is very concerned about the continued use of isolation cells and solitary confinement in migration detention.

Isolation is commonly used in a broad range of situations. People may be placed in a isolation cell for reasons such as aggression, resistance to deportation, but also punishment for disobeying orders given by detention centre staff. While the authorities describe these measures as “isolation” or “separation” in practice these isolations may amount to solitary confinement, with the individuals concerned isolated for more than 22 hours a day without meaningful human contact. Sometimes migrants are placed in isolation for medical reasons, or if they are on hunger strike, for example; this is referred to as ‘observation’. A joint study by Médecins du Monde the Netherlands, Amnesty International the Netherlands and the LOS Foundation has found that the use of isolation has not decreased since 2011. Hundreds of migrants are held in isolation each year, with potentially detrimental health effects.¹³ In reaction to this report, the government has said it would explore measures to reduce the use of isolation, but no specific measures have been presented at the time of writing.

Amnesty International also notes that the draft Bill (see previous section) continues to allow detention centre directors to use isolation as a punitive measure, something Amnesty International considers to contradict the notion of migration detention as an administrative measure, which needs to clearly be distinguished from penal detention.

Amnesty International therefore suggests to the Committee to ask the Government of the Netherlands:

- *Which (legislative and policy) measures have been taken to prevent the use of isolation cells and solitary confinement?*
- *Whether it will consider ending the use of isolation and solitary confinement as a punitive measure in migration detention?*

MIGRATION DETENTION OF CHILDREN AND THE DETENTION OF OTHER PARTICULARLY VULNERABLE INDIVIDUALS

In its concluding observations, the Committee, inter alia, recommended that the Netherlands “take alternative measures to avoid detention of children or their separation from their families”.¹⁴

Amnesty International notes that the detention of unaccompanied children for the purpose of removal remains possible, when removal is foreseen within 14 days.

Families with children can also be detained. Between September 2013 and October 2014, a

¹³ See the recent report (2015) *Isolatie in vreemdelingendetentie* Médecins du Monde the Netherlands, Amnesty International the Netherlands and the LOS Foundation.

https://www.amnesty.nl/sites/default/files/public/rapport_isolatie_in_vreemdelingen_detentie19mrt.pdf

¹⁴ CAT/C/NLD/CO/5-6, 20 June 2013, para.17.

relatively high bar was in place for the detention of families, which considered deprivation of liberty prudent only when the family in question had previously absconded, or had attempted to do so. In October 2014, however, a special facility was opened in Zeist for the detention of unaccompanied children and families with children. The regime in this family migration detention centre has no locked cells and less restrictions. Although the regime is in many ways better than a regular detention centre, it still constitutes detention and fails to comply with the Committee's recommendation. Moreover, with the opening of the above-mentioned family detention centre, the original standard for detention has been relaxed, leading to a renewed increase in the numbers of detained families.¹⁵

Amnesty International notes that, apart from the above-mentioned policies on children, the government has not instituted any clear policies to prevent the detention of other vulnerable groups, such as victims of torture and/or persons with serious physical or mental health problems. Currently, 'suitability for detention' (*detentieggeschiktheid*), a norm developed for the penal system, is the only measure in place. This norm only looks at the extent to which health care can be provided in detention, and not at the proportionality of, or the possible damage to the individual's health caused by, placement in detention.¹⁶

Amnesty International suggests to the Committee to ask the Government of the Netherlands:

- *Which alternative measures will the government take to avoid the detention of children?*
- *How does the government ensure by law or procedure that the detention of vulnerable individuals, such as victims of torture and persons with serious physical or mental health problems, is prevented as much as possible?*
- *Why does the government consider the 'suitability for detention' to be an appropriate standard for immigration detention and how does this relate to the proportionality of detention, as well as to the prevention of unnecessary damage to the health of the individual caused by the detention?*

PREVENTION AND INVESTIGATION OF DEATHS IN MIGRATION DETENTION

In its concluding observations, the Committee noted with concern reports of incidents of deaths in places of detention, and recommended, inter alia, that the Netherlands carry out thorough investigations of deaths.¹⁷

Amnesty International notes that on 10 June 2015, reports surfaced that a South African asylum-seeker committed suicide in the Rotterdam Detention Centre. He was in detention awaiting a transfer to France under the so-called Dublin-procedure, since France was his first state of entry into Schengen and therefore responsible for handling his asylum claim. At this

¹⁵ Vreemdelingenbewaring in getal p. 24-25.

¹⁶ Amnesty International Netherlands, Mediciens du Monde and LOS Foundation, Geketende zorg [healthcare in chains], May 2014, <http://www.amnesty.nl/nieuwsportaal/rapport/geketende-zorg-gezondheidszorgen-in-vreemdelingendetentie>

¹⁷ CAT/C/NLD/CO/5-6, 20 June 2013, para. 26.

point in time, the grounds for his detention are unclear. In general, there is a policy not to detain 'Dublin-claimants' if they cooperate in the transfer process. Amnesty International continues to monitor this case and stands ready to provide the Committee with updates at a later stage. The government has initiated an investigation, to be carried out by the Inspectorate for Security and Justice and the Inspectorate for Health (on these Inspectorates, please also see under Other issues/Optional Protocol below).

Amnesty International also notes that current measures to prevent suicides in migration detention may be inadequate and even inappropriate. In particular, in light of the suicide of Russian rejected asylum-seeker Aleksandr Dolmatov in January 2013, detention centre staff seem to have been resorting to isolation as a response to any signal that an individual was suicidal or was having suicidal thoughts (for the use of isolation, see above).¹⁸

When people are held in the state's custody it has a heightened obligation to protect their rights to life, personal integrity, and health.¹⁹ This requires that there be appropriate health care provision and a thorough, independent and impartial investigation of any deaths in custody, which in cases where a person is found to have taken their own life, should include identifying any failures by the custodial authorities which may have been contributory factors. A health care service in places of detention should include measures for suicide prevention, which should include special observation for as long as necessary of any detainees identified as a suicide risk and preventing them from easy access to means of killing themselves.²⁰ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment and the CPT have drawn attention to the links between solitary confinement and suicide.²¹

Amnesty International suggests to the Committee to ask the Government of the Netherlands:

- *To provide details of the eventual findings of the investigation into this case, including the identification of potential measures to reduce the risk of suicide;*
- *To clarify which measures it takes to prevent suicide, whilst at the same time refraining, as much as possible, from the use of isolation.*

JUDICIAL REVIEW OF THE LAWFULNESS OF MIGRATION DETENTION

Amnesty International notes that there is a distinct disparity in access to a judicial review of the lawfulness of detention for individuals in migration detention, as compared, for example, to persons in penal detention. In a criminal law context, a suspect will see an examining magistrate within three days and fifteen hours. In contrast, migration detention is not checked automatically by a judge at short notice. The Aliens Act 2000 gives the detainee the right to have his or her detention examined by the special 'Migration Chamber' at the administrative districts court. This is done following an application by the individual, which is

¹⁸ See the recent report (2015) *Isolatie in vreemdelingendetentie* from Médecins du Monde the Netherlands, Amnesty International the Netherlands and the LOS Foundation.

¹⁹ See e.g. UN Special Rapporteur on EJE A/61/311 2 September 2006 para. 50, CESCR General Comment 14 on the right to the highest attainable standard of health, para. 34.

²⁰ See CPT 3rd General Report [CPT/Inf (93) 12] paras 57, 59.

²¹ See Report of the Special Rapporteur A/66/268, 5 August 2011, para. 68 and annex; 21st General Report of the CPT (2011) para 53.

then followed by a court procedure within 14 days. This is followed by another 7 days (maximum) for the court to decide on the appeal. If the alien does not submit an appeal of his/her own accord, the court will be informed by the authorities no later than 28 days after the deprivation of liberty. This can lead to detention of more than a month before the first judicial review of the lawfulness of the decision to detain the individual is made. In the worst case migrants can be detained up to 42 days before they first see a judge.

Furthermore, the detention case file (including the grounds of the detention and the developments that are made in the returning process) is only given to the detainee's lawyer in case of an appeal, leading to lawyers facing a shortage of information about the problems of their clients and the developments that are made in preparing the return.²²

Amnesty International therefore suggests to the Committee to ask the Government of the Netherlands:

- *What steps has it taken to guarantee a speedy, thorough judicial review of each decision to deprive an individual of his or her liberty on migration grounds?*

CONCERNS ABOUT THE FUNCTIONING OF NPMS

In its concluding observations, the Committee notes the positive development of NPMS being designated. However, the Committee also expresses some reservations, inter alia, on the way the NPMS have been established and the lack of independence of the bodies making up the NPM.²³

In this context, Amnesty International particularly notes the role of the Inspectorate for Security and Justice, which was established in 2012 through a merger between the Inspectorate for Public Order and the Inspectorate for Penal Institutions. The new Inspectorate continues to operate under the aegis of the Ministry of Security and Justice and is physically housed in Ministry of Security and Justice buildings. The Inspectorate for Security and Justice has been responsible, inter alia, for oversight of migration detention centres. Since 2014, it also took over oversight tasks in the area of (forced) return of migrants and rejected asylum-seekers from the now-defunct Committee for Integral Oversight of Return (CITT, Commissie Integraal Toezicht Terugkeer).²⁴ The CITT was also designated an NPM body in 2011, just like the Inspectorate. However, until its dissolution in 2014, no change was ever made to its mandate to reflect its new role as a torture prevention mechanism. Rather, the CITT had a dual mandate to ensure the effectiveness of return policy

²² Amnesty International also regularly receives messages from lawyers that they experience practical problems in representing their clients, for example due to limited possibilities to reach their clients by phone and not being allowed to inspect or examine the (isolation) cells that their clients are held in.

²³ Positive developments (e) and para 28.

²⁴ <https://zoek.officielebekendmakingen.nl/kst-19637-1655.html>

on the one hand, and 'humane' return on the other. As reflected in its annual reports, the CITT's focus was generally firmly with the former aspect, as evidenced, for example, by the lack of data on use of force by government staff in preparation of or during removals.

Since 2014, the Inspectorate for Security and Justice has been in the process of developing its own standards on oversight of returns. However, it is not evident that this has led to a specific framework that ensures its effectiveness as a mechanism to prevent torture, nor that it has sufficient staff to carry out this task.

Amnesty International therefore suggests to the Committee to ask the Government of the Netherlands:

- *To provide information on any developments that have improved the independence of the national bodies making up the NPM, in particular the Inspectorate for Security and Justice;*
- *To explain how the mandates of the different Inspectorates, which pre-date the institution of an NPM system in the Netherlands, have changed to reflect their torture prevention tasks;*
- *To clarify whether the Inspectorate for Security and Justice, given its expanding duties over the last few years, has sufficient capacity to undertake its NPM-related tasks effectively and thoroughly.*

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