

Position Paper

Prepared for the Contact Committee “Return Directive” (2008/115/EC)

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Bringing migrant detention into line with human rights standards

Article 15 of the Return Directive (RD) only allows Member States to detain third-country nationals who are subject to return procedures in limited circumstances to prepare the return and/or carry out the removal process. And only then if “other sufficient but less coercive measures” will not be effective in a specific case. In practice, however, alternatives to detention have only been developed in a limited number of Member States. For 2011, for instance, NGO reports record large numbers of undocumented migrants deprived of their liberty: 51,385 in France; 7,735 in Italy; 3,457 in Germany; 13,241 in Spain; and 2,244 in Sweden.¹ This suggests that less coercive measures should be developed and implemented urgently.

Governments should also set out the rights and conditions of detention clearly in legally binding statutes or codes, as is the case for criminal detainees. Provisions on administrative detention are often contained in circulars or ministerial orders. Reports by NGOs and international human rights bodies over the last five years suggest that these are insufficient to protect migrants from abuse.²

Articles 15, 16 and 17 of the RD do provide for some procedural safeguards for the administrative detention of returnees, and rules on the conditions of such detention (see Tables 1 and 2). In addition to those, according to Article 53 of the Charter of Fundamental Rights, Member States also have to comply with the standards developed by the European Court of Human Rights (ECHR).³ However, the conditions and safeguards contained in the RD and those found so far in the jurisprudence of the ECHR and the Court of Justice of the European Union (CJEU) are not yet as comprehensive as international standards developed by HR institutions specialised in issues of detention or migration.

These standards are elaborated in greater detail by the Council of Europe’s Committee for the Prevention of Torture (CPT)⁴ and the Office of the High Commissioner for Human Rights of the United Nations.⁵ This document will highlight where provisions of the RD fall short of these rules.

¹ For some countries, the data include reception centres in addition to expulsion centres as well as figures for asylum seekers. Doctors for Human Rights (2013) *The CIE Archipelago-Summary*, p. 20.

http://www.mediciperidiritiumani.org/pdf/CIE_Archipelago_eng.pdf

² It is outside the scope of this paper to enumerate rights violations occurring in administrative detention in specific Member States. For general reference, see the post-2010 country reports by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Commissioner for Human Rights of the Council of Europe and the Special Rapporteur on the Human Rights of the Migrants.

³ For a comprehensive review of the jurisprudence of the ECHR and CJEU in this domain see: European Union Agency for Fundamental Rights and Council of Europe (2013) *Handbook on European law relating to asylum, borders and immigration*, pp. 135-161.

⁴ European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2011) General Report 2008-2009, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2011, para. 75-95: *Safeguards for irregular migrants deprived of their liberty*.

PROCEDURAL SAFEGUARDS FOR MIGRANTS DEPRIVED OF THEIR LIBERTY ACCORDING TO THE CPT AND THE OHCHR

- a) migrants should have direct access to *judicial* (and not merely administrative) redress to challenge *the lawfulness* (and not other lower standards of scrutiny) of the detention order *before a court*, in an *oral hearing*, with legal assistance provided through *legal aid* if necessary, or by a lawyer chosen by the migrant if he so wishes; the migrant shall have the possibility to have private conversations with his lawyer; this process should be available at the time of the first adoption of the detention order *as well as* during further reviews of the detention order;
- b) the reviews of the detention order need to be *automatic* and regular;
- c) immediate release should be automatic upon expiry of the maximum detention time or when prospects for removal are no longer real and tangible *for reasons beyond the responsibility of the TCN*;⁶
- d) the migrant has a right to be heard and to lodge an appeal before an independent authority for matters concerning *behaviour in detention or detention conditions*.⁷

MINIMUM DETENTION CONDITIONS FOR MIGRANTS DEPRIVED OF THEIR LIBERTY ACCORDING TO THE CPT AND THE OHCHR

- a) detention for irregular migrants should reflect the nature of their deprivation of liberty, with as few restrictions on freedom of movement as possible, and a varied regime of activities; all migrant detention facilities, whatever their form, should be subject to a common set of standards, policies and practices;
- b) *contacts* with the external world should include *visits* from family members, NGO representatives, or other persons of the detainee's choice;
- c) medical care should be freely available and include screening upon detention, the provision of the required treatment and medicines, including by a doctor chosen by the detainee; medical care providers should monitor hygiene conditions in the centres;
- d) independent monitoring visits of detention centres should be both frequent and unannounced; an independent central authority should be dedicated to ensuring compliance with the common set of standards, policies and practices across the detention facilities for migrants.

⁵ The various principles endorsed by the OHCHR are effectively summarised by the 2012 Report of the Special Rapporteur on the human rights of the migrants, François Crépeau (2012) A/HRC/20/24, 2 April. Tables 1 and 2 detail the exact reference to the cited documents of the OHCHR.

⁶ On this, see also Court of Justice of the European Union C-357/09 C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)*, judgment of 30 November 2009.

⁷ On access to remedies concerning detention pending removal and detention conditions see also the ruling of the ECHR *Ahmade v. Greece* (appl. no. 50520/09), of 25 September 2012.

RECOMMENDATIONS

On the occasion of the 2013 review of the implementation of the RD, we encourage the Commission to consider whether to adopt updated guidelines and urge the Member States to consider adopting legislation to bring procedural safeguards and minimum conditions in line with HR standards whenever detention is used during the return process.

Table 1*

Procedural safeguards in detention according to the RD and specialised HR bodies		
RD	CPT	OHCHR
Detention (D). must be ordered in writing with reasons given in fact and in law by <i>administrative</i> or judicial authorities. If ordered by administrative authorities: - speedy judicial review OR - right for TCN to take proceeding for a speedy judicial review and be informed of the possibility to do so	Detained irregular migrants should benefit from an effective legal remedy enabling them to have the lawfulness of their deprivation of liberty decided speedily by a judicial body The judicial review of a detention order should entail an oral hearing with legal assistance (eventually provided through legal aid) and interpretation (if required)	Art. 9 par. 4 of the ICCPR provides that anyone who is deprived of their liberty... shall be entitled to take proceedings before a court . The HRC in its general comment no. 8 stated that this provision is applicable to all deprivations of liberty, including migration control.
D. must be reviewed at reasonable intervals of time <i>either</i> on application <i>or</i> ex officio. Only in case of prolonged detention periods reviews must be subject to judicial authority	The need for continued detention should be reviewed periodically by an independent authority	The Working Group on Arbitrary detention has stated that there should be automatic, regular and judicial , not only administrative, review of detention in in each individual case, and that review should extend to the lawfulness of detention and not only its reasonableness or other lower standards of detention ⁸
	The right of access to a lawyer should include the right to talk with a lawyer in private, and access to legal aid	...migrants in detention are accurately informed of the status of their case...migrants and their lawyers should have full and complete access to the migrants' files.
The period of detention shall be limited and not exceed six months. It can be extended up to 18 months in specific cases only. Extension to 18 months of the detention period may be ordered in case of		The Working Group on Arbitrary Detention...stated that upon expiry of the maximum period of detention established by the law, the detainee must be automatically released...the legal and practical obstacles for the removal of detained

⁸ Report of the Working Group on Arbitrary Detention (2010) A/HRC/13/30, *Detention of immigrants in an irregular situation*, para. 54-65, para. 61.

-lack of cooperation by the TCN <i>-delays in obtaining the necessary documents from third countries</i>		migrants do not lie within their sphere of responsibility⁹
	The house rules should be made available in various languages and also contain disciplinary procedures and provide detainees with the right to be heard on the subject of violations that they are alleged to have committed and to appeal to an independent authority against any sanctions imposed.	

* The table includes excerpts from the Return Directive, the CPT standards (European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2011) General Report 2008-2009, *CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2011, para. 75-95: *Safeguards for irregular migrants deprived of their liberty*) and the 2012 Annual report by the SR on the HR of migrants (Report of the Special Rapporteur on the human rights of the migrants, François Crépeau (2012) A/HRC/20/24, 2 April, para. 15-32).

The corresponding provisions of the RD that may need to be further detailed by guidelines, especially in light of cumbersome State practice highlighted by the same human rights bodies over the last five years, are *in italics and bold*.

Table 2.

Guidance on minimum conditions to be applied to the detention of migrants		
RD	CPT	OHCHR
D. should take place in specialised detention centres. If obliged to resort to prison accommodation: -TCNs in detention kept separate from prisoners	Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and varied regime of activities	Detention of migrants on the ground of their irregular status should under no circumstances be of a punitive nature. ..they should not be subject to prison-like conditions and environments, such as prison uniforms, highly restricted movements, lack of outdoor activities.
<i>TCNs shall be allowed on request to establish in due time external contacts. Contacts can be established with:</i>	Detained irregular migrants should have every opportunity to remain in contact with the outside world (including frequent opportunities to... receive external visits) and should be	The Standard Minimum Rules for the Treatment of Prisoners, ¹⁰ which apply to all categories of prisoners, both criminal and those imprisoned under any other non-criminal process, set out

⁹ *Ibidem*, para. 61 and 91.

¹⁰ Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

<p>- <i>legal representatives</i> - <i>family members</i> - <i>consular authorities</i></p>	<p>restricted in their freedom of movement as little as possible</p>	<p>minimum standards for, inter alia, accommodation, personal hygiene, clothing, bedding, food, exercise, access to newspapers, books and religious services, communication with the outside world and medical services.</p>
<p>Vulnerable persons shall receive particular attention. <i>Emergency health care and</i> <i>- essential treatment of illness shall be provided</i></p>	<p>All newly arrived detainees should be promptly examined by a doctor or nurse reporting to a doctor and be examined by a doctor of their choice if they so wish; at minimum...a person with recognised nursing qualifications must be present on a daily basis...and should ensure the provision and distribution of prescribed medicines, keep the medical documentation and supervise the general conditions of hygiene.</p>	<p>...[T]he Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment ¹¹ are applied to all migrants under detention. These include the provision of a proper medical examination, medical treatment and care whenever necessary and free of charge..., the right to obtain, within the limits of available public resources, educational, cultural and informational material.</p>
<p>TCNs shall be systematically informed on the rules of the facility, their rights and obligations - Including their right to contact external NGOs or IGOs, <i>according to national law</i></p>	<p>Arrangements should be made enabling detained irregular migrants to consult a lawyer or doctor of their choice on an ongoing basis and to receive visits from NGO representatives, family members or other persons of their choice and to have telephone contact with them</p>	
<p>Relevant and competent IGOs and NGOs shall have the possibility to visit detention centre. <i>- Visits may be subject to authorisation</i></p>	<p>To be fully effective, independent monitoring visits of detention centres should be both frequent and unannounced; monitoring bodies should be empowered to interview regular migrants in practice and examine all issues related to detention (i.e. material conditions, custody records, etc.)</p>	<p>The use of privately run detention centres should be avoided. Representatives of, inter alia, national human rights institutions, OHCHR, UNHCR, ICRC and NGOs should be allowed access to all places of detention. All migrant detention facilities whatever their form should be subject to a common set of standards, policies and practices and should be monitored by an independent central authority that is dedicated to ensuring compliance with the common set of standards, policies and practices</p>

¹¹ Resolution A/RES/43/173 adopted by the General Assembly of the United Nations on 9 December 1998, <http://www.un.org/documents/ga/res/43/a43r173.htm>