EUROPEAN RULES FOR THE ADMINISTRATIVE DETENTION OF MIGRANTS

Written submission to the European Committee on Legal Co-Operation of the Council of Europe

Rotterdam

14 July 2017

Stichting LOS

Meldpunt Vreemdelingendetentie

Meldpunt vreemdelingendetentie

Stichting Landelijk Ongedocumenteerden Steunpunt

CONTACT

Stichting LOS
Meldpunt Vreemdelingendetentie
Hang 16
3011 GG Rotterdam
T 010-7470156
E info@meldpuntvreemdelingendetentie.nl
I www.meldpuntvreemdelingendetentie.nl

ABOUT MELDPUNT VREEMDELINGENDETENTIE

Meldpunt Vreemdelingendetentie is an initiative of Stichting LOS, the National Support Centre for Undocumented Migrants in the Netherlands. It serves as a cost-free *hotline* for undocumented migrants within administrative immigration detention, who are able to submit complaints regarding circumstances in detention. We examine these reports, submit formal complaints to appropriate authorities, and ask for awareness within politics and media. The goals are to make the circumstances in the detention centres transparent and through this to intensify the political and legal pressure towards improving these circumstances.

I. BACKGROUND

Meldpunt Vreemdelingendetentie supports and recognizes the need to codify European immigration detention rules into a single and specific instrument offering a coherent and universal set of standards and conditions for the use of administrative detention for migrants, based on fundamental human rights and the rule of law. In this respect, we are aware of the fact that the European Committee on Legal Co-operation (CDCJ) is currently carrying out a codifying exercise, and is calling for additional written submissions and shared expertise on the (Draft) Codifying Instrument of 18 May 2017.

Meldpunt Vreemdelingendetentie is in agreement with the Joint Statement submitted on 22 June 2017 by 53 other non-governmental human rights and migrant support organizations[1], and the joint submission of International Detention Coalition and International Commission of Jurists. Alongside these submissions, we wish also to strongly reiterate and emphasize the fundamental distinction between criminal and administrative detention, and the inappropriateness and inadequacy of prison rules for immigration administrative detention. Building on these fundamental points, however, this written submission also further outlines a number of specific observations and concrete recommendations that are based on the unique expertise of Meldpunt Vreemdelingendetentie, and the direct experiences of migrants in administrative detention with whom we have regular contact. We therefore wish to submit these to the European Committee on Legal Co-Operation of the Council of Europe for final consideration in the drafting of the Codifying Instrument.

---

[1] Joint Statement to the European Committee on Legal Co-Operation of the Council of Europe on the codification of European Rules for the Conditions of Administrative Detention of Migrants. (2017, June 22). Retrieved from http://idcoalition.org/wp-content/uploads/2017/06/Joint-Statement_COE-administrative-detention-of-migrants_FINAL-1-1.pdf

II. SUMMARY OF RECOMMENDATIONS:

A. The Use of Handcuffs & Other Forms of Restraint in Transit:

Recommendation #1: *Migrants should not be restrained (by handcuffs, anklecuffs, or body belts) during periods of transport*

B. The Use of Isolation as Disciplinary Sanction

Recommendation #2: *The use of isolation or solitary confinement as a disciplinary sanction should be altogether abolished within administrative detention for migrants*

C. Repeated Administrative Detention

Recommendation #3: *States should adopt specific measures to reduce and/or abolish cases of repeated detention of migrants where repatriation was unsuccessful during the first period of detention*

D. Procedures on Complaints

Recommendation #4: ***Migrants should be allowed a sufficient amount of time to deliberate about and draft complaints.*** In particular, we recommend that migrants receive a minimum period of 14 days to submit formal complaints to the complaint body.

Recommendation 5: *Complaints submitted by migrants should be processed within a reasonable period of time, and without undue delays.* In particular, we recommend that formal complaints must be processed within a maximum period of 30 days.

A. THE USE OF HANDCUFFS & OTHER FORMS OF RESTRAINT IN TRANSIT:

During their time in detention, many migrants will be required to attend appointments and hearings at various locations outside of detention, such as hospitals, embassies, and courts. In many cases, during these periods of transit migrants will be physically restrained by way of handcuffs, anklecuffs, or body belts. Although international human rights bodies, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), has strongly criticized the use of restraint such as handcuffs, anklecuffs and body belts for undocumented migrants during periods of transit[2], it nonetheless occurs on a regular basis. This practice represents an undue deprivation of liberty and violates the fundamental distinction between criminal and administrative detention, understood as a basic principle in the (Draft) Codifying Instrument (Part A section B). Further, it is a humiliating experience for the migrants who may be seen publicly being restrained as if they are criminals. Meldpunt Vreemdelingendetentie has repeatedly submitted formal complaints on behalf of our clients to the complaint commissions of immigration detention centres in the Netherlands because they have been restrained and cuffed during periods of transit. Nevertheless, it continues to be an ongoing problem.

<u>Recommendation #1:</u> Migrants should not be restrained (by handcuffs, anklecuffs, or body belts) during periods of transport

The current draft of the codifying instrument contains no provisions specifically prohibiting the use of handcuffs in transport, which we feel has important relevance to a number of the basic principles set out in the codifying instrument (general provisions B), including in particular the fundamental distinction between criminal and administrative law.

As such, in relation to the use of restraints (as stipulated in s. I.2 – I.4), the Codifying Instrument should clearly specify the forms of restraint referred to, including mentions of the use of handcuffs, anklecuffs, and body belts. Further, it should contain an additional provisions **prohibiting the use of restraint specifically during periods of transport**, reflecting the reality that migrants are often transported to a variety of locations outside of the detention centre, and are often physically restrained by handcuffs or otherwise during these periods of transit.

B. THE USE OF ISOLATION AS DISCIPLINARY SANCTION:

Meldpunt Vreemdelingendetentie strongly opposes the position expressed in the (Draft) Codifying Instrument permitting the use of solitary confinement or isolation as a disciplinary sanction (sec. I.13). Numerous scholarly commentators have identified the significant psychological and physical harms associated with the use of isolation or solitary confinement as a form of discipline[3]. Further,

---

[2] CPT. (2009). *Report to the Government of the Netherlands on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Retrieved from https://rm.coe.int/16806ebb7c

[3] Glancy, G.D., & Murray, E.L. (2006). The psychiatric aspects of solitary confinement. *Victims & Offenders, 1*(4), 361-368. doi. 10.1080/15564880600922091; Haney, C. (2003). Mental health issues in long-term solitary and "supermax" confinement. *Crime & Deliquency, 49*(1), 124-156. doi: 10.1177/0011128702239239; Kelsall, D. (2014). Cruel and usual punishment: Solitary confinement in Canadian prisons. *Canadian Medical Association Journal, 186*(18), 1345. doi: 10.1503/cmaj.141419

prominent international human rights bodies, such as the UN Human Rights Council have strongly criticized the use of isolation as punishment, stating that it "can amount to cruel, inhuman, or degrading treatment or punishment and even torture"[4]. Similarly, Meldpunt Vreemdelingen-detentie regularly encounters migrants who have suffered significant psychological and physical health consequences as a result of isolation. In view of this problem, we therefore make the following recommendation:

<u>Recommendation #2:</u> The use of isolation or solitary confinement as a disciplinary sanction should be altogether abolished within administrative detention for migrants

We strongly recommend that Provision I.13 of the (Draft) Codifying Instrument, permitting the use of solitary confinement or isolation as a form of discipline, be removed. Further, we recommend that it be specified that states should move to abolish the use of isolation as a form of discipline, in alignment with the growing consensus among prominent human rights organizations, academic scholars, and mental health practitioners.

C. REPEATED ADMINISTRATIVE DETENTION:

In accordance with the EU Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), pre-removal administrative detention is intended to serve the administrative function of detaining undocumented migrants while facilitating their return to their country of origin. However, in many cases removal procedures are hindered or unsuccessful, often because migrants have lost, damaged, or falsified legal identification documents, or because countries of origin do not cooperate with repatriation procedures. The detained migrants are then eventually released from detention, and may sometimes be re-apprehended and detained again at a later date. In these cases, the migrants are not allowed to stay in the country where they are residing, but are also exceedingly difficult to return to their country of origin. They therefore end up in a cycle of repeated arrest and detention on the one hand, and precarious irregular residence on the other. *Meldpunt Vreemdelingendetentie* has itself encountered cases of undocumented migrants who have been in and out of pre-removal administrative detention in the Netherlands up to 10 times, which can have a devastating impact on the lives of undocumented migrants. Numerous academic researchers and civil society organizations have similarly identified the need to address this problem of repeated detention[5]. Official statistics on this phenomenon—last collected in 2010—indicated that 27% of the total immigration detention population in the Netherlands had already been previously detained[6]. Further, although the Returns Directive sets out a maximum length of

[4] UN Human Rights Council. (2011). *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment.* Retrieved from http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf

[5] Amnesty Internationl. (2013). *Vreemdelingendetentie in Nederland: mensenrechten als maatstaf*. Amsterdam, NL: Amnesty International, Afdeling Nederland; Kox, M. (2011). *Leaving Detention? A Study on the influence of immigration detention on migrants' decision-making processes regarding return*. Den Haag, NL: International Organization for Migration (IOM); Leerkes, A. & Broeders, D. (2010). A case of mixed motives? Formal and informal functions of administrative immigration detention. *British Journal of Criminology, 50*(5), 830-850. doi: 10.1093/bjc/azq035

[6] Dienst Justitiële Inrichtingen. (2012). *Een profielschets van vreemdelingen in bewaring, 2010*. Den Haag, NL: Dienst Justitiële Inrichtingen.

administrative detention of 18 months, with repeated detention the combined length of administrative detention is *de facto* unlimited. In this respect, the Dutch government has interpreted this to apply only to individual periods of detention, and despite a stated maximum length of 18 months, many migrants nonetheless experience a combined stay in detention that amounts to years.

Meldpunt Vreemdelingendetentie therefore maintains that in these cases of repeated detention administrative detention does not serve its formal administrative function as defined by the 'Returns Directive', and that these cases represent a greater risk of disproportionate and arbitrary use of detention in a way that conflicts with the basic principles as set out in the present (Draft) Codifying Instrument.

***Recommendation #3:* States should adopt *specific measures* to reduce and/or abolish cases of repeated detention of migrants where repatriation was unsuccessful during the first period of detention**

The current draft of the codifying instrument contains no provisions explicitly expressing the need to avoid and more meaningfully respond to cases of repeated administrative detention of migrants, which we feel has important relevance to a number of the basic principles set out in the instrument; most notably, individualized detention decisions (B.2), non-arbitrariness and proportionality (D.1), and detention as a last resort (B.1).

Meldpunt Vreemdelingendetentie argues that repeated detention may be significantly reduced by adopting the following specific measures:

- States should provide for an additional level of juridical oversight to ensure that the newly imposed detention reflects a realistic prospect for return. In particular, it should be demonstrated (with juridical oversight) that since the migrant's previous period of detention, new and concrete circumstances or facts have emerged which have materially improved the prospects for successful return.
- The 18 month limit on administrative detention as set out in the EU 'Returns Directive' should be more strictly interpreted to include cumulative periods of repeated detention, so that length of administrative detention is truly limited in practice.
- Considerations regarding alternatives to detention should be more urgently considered if migrants have already been previously administratively detained on one occasion.

D. PROCEDURES ON COMPLAINTS

The current (Draft) Codifying Instrument rightly recognizes the rights of migrants to be able to make complaints and have their complaints heard (C.11–14). However, Meldpunt Vreemdelingen-detentie feels that these provisions could yet be improved. In particular, we feel that migrants should receive a sufficient amount of time to submit formal complaints. In many cases, migrants must first deliberate about complaints with relevant contacts both inside and outside of detention (such as lawyers, support organizations, other actors and witnesses involved in a particular incident, and so on). In the Netherlands, formal complaints must be submitted with 7 days of the incident or decision. Meldpunt Vreemdelingendetentie submits complaints on behalf of its clients on a regular basis, and we have found that this period of 7 days is much to short to submit a well deliberated formal complaint. In few of this problem, we submit the following recommendation:

Recommendation 4: ***Migrants should be allowed a sufficient amount of time to deliberate about and draft complaints.*** In particular, we recommend that migrants receive a minimum period of 14 days to submit formal complaints to the complaint body.

Additionally, once a complaint has been received by the complain commission, it often takes an exceptionally long period of time before they are processed—sometimes exceeding 6 weeks. By this time, many migrants may already have been released from detention or returned to their country of origin. This reality further emphasizes the need for a speedy complaint procedure. In this respect, we submit the following recommendation:

Recommendation 5: ***Complaints submitted by migrants should be processed within a reasonable period of time, and without undue delays.*** In particular, we recommend that formal complaints must be processed within a maximum period of 30 days.

In view of provisions of the Codifying Instrument in relation to procedures on requests and complaints (currently stated in sec. C.11–C. 14), we suggest that the instrument include additional provisions that reflect these two recommendations.

We strongly encourage the drafting committee of the European Committee on Legal Co-Operation to consider these recommendations in their ongoing efforts to codify European immigration detention rules into a single and specific instrument offering a coherent and universal set of standards and conditions for the use of administrative detention for migrants. These recommendations will help to further ensure that the final draft of the codifying instrument reflects European commitment to fundamental human rights and the rule of law.

Meldpunt vreemdelingendetentie

LOS Stichting Landelijk Ongedocumenteerden Steunpunt