



European  
Network on  
Statelessness

# PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION

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IN THE NETHERLANDS



“ You can't send a Dutchman to Belgium just because he understands Flemish. Send us to our country of origin, not to the neighbours.

ANGELA, STATELESS FORMER DETAINEE IN THE NETHERLANDS, ORIGINALLY FROM AZERBAIJAN



## LIST OF ABBREVIATIONS

<b>ACVZ</b>	<i>Adviescommissie voor Vreemdelingenzaken</i>	Advisory Committee for Migration Affairs
<b>BRP</b>	<i>Basisregistratie Persoonsgegevens</i>	Basic Municipal Registry
<b>DT&amp;V</b>	<i>Dienst Terugkeer &amp; Vertrek</i>	Departure and Returns Service
<b>DJI</b>	<i>Dienst Justitiële Inrichtingen</i>	Custodial Institutions Agency
<b>ECtHR</b>	<i>Europees Hof voor de Rechten van de Mens</i>	European Court of Human Rights
<b>EU</b>	<i>Europese Unie</i>	European Union
<b>ICCPR</b>	<i>Internationaal verdrag inzake burger en politieke rechten</i>	International Covenant on Civil and Political Rights
<b>IND</b>	<i>Immigratie- en Naturalisatiedienst</i>	Immigration and Naturalisation Service
<b>LP</b>	<i>Laissez-passer</i>	Laissez-passer
<b>UNHCR</b>	<i>VN Hoge Commissarissen voor de Vluchtelingen</i>	UN High Commissioner for Refugees
<b>UMA</b>	<i>Alleenstaande minderjarige asielzoeker</i>	Unaccompanied Minor Asylum seeker
<b>VBL</b>	<i>Vrijheidsbeperkende locatie</i>	Freedom-restricting location
<b>Wob</b>	<i>Wet openbaarheid van bestuur</i>	Public access to government

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# INTRODUCING THE INTERVIEWEES

**Mohammed Al-Fadhly** is a stateless Bidoon from Kuwait. He is in his 30s and arrived in the Netherlands on a fake passport in April 2013, hoping to escape the utter exclusion faced by the Bidoon community in his home country. Even though his statelessness is well-established, he spent two months in border detention, and has spent the last 8 months or so in a 'freedom-restricting location'. At the time of writing, he was still there.

**Yusuf Adam** is a young man from Somalia, who came to the Netherlands in 2009. He is a member of the often-discriminated Bajuni tribe from the south of the country, close to the border of Kenya. To this date, the Dutch authorities doubt his Somali origins, and have presented him to the embassies of Kenya and Uganda instead. These embassies denied his citizenship, and Yusuf has been detained twice as attempts to arrange his deportation continue.

**Ivan Niyazov** (pseudonym) is a 46-year old man originally from the Soviet Union. He was born in what is now Uzbekistan. Fleeing the country in 1990, he drifted through several countries before finally arriving in the Netherlands in 2002. Ivan can neither obtain Russian nor Uzbek nationality. He is HIV positive, has chronic hepatitis C and suffers from post-traumatic stress syndrome. He has been in and out of alien detention, losing about 3.5 years to imprisonment.

**Hazem Haboush** is 26 years old and comes from Gaza, Palestine. He fled to the Netherlands in January 2015. Upon arrival he was immediately placed in border detention. After a little more than two months he was released because there was no prospect of his deportation, though his asylum claim was also rejected. Panic attacks while in detention led to his solitary confinement, which still haunts him today. He is destitute and lives in a night shelter.

**Angela and Christina Avakian** (pseudonyms) are two ethnically Armenian sisters from Azerbaijan. Although both in their mid-20s at present, they arrived in the Netherlands in their early teens already. Both Armenia and Azerbaijan have refused to facilitate the family's voluntary return countless times. An attempt at deportation led to their detention in late 2012, which impacted the sisters hugely. A court ruled that their detention was unlawful. A court-ordered moratorium on their forced return expired in April 2015.

**Pamma Singh** is a middle-aged man from rural India. He was smuggled to the Netherlands in 2000, in search of a better life. It was the first time he left his country. Pamma never possessed any proof of his Indian citizenship. He was detained twice, for a total period of about 20 months. He has approached his embassy countless times, but without proof of identity they will not facilitate his return. He is in ill health and survives with the help of a few concerned compatriots.

## ANGELA AND CHRISTINA'S STORY

Both Angela and her younger sister Christina were born in Azerbaijan; 26 and 24 years ago. They fled their home country following ethnic conflict between people of Azeri and Armenian heritage, arriving with their parents in the Netherlands on 4 April 2002 – 13 and 11 years old at the time. In early 2004 their claim to asylum was rejected, and for years the family moved from one crisis shelter to another. Countless efforts to obtain new travel documents were made, but Azerbaijan refuses to cooperate. As even voluntary return to their home country proved impossible, immigration authorities then concluded that the family should 'return' to Armenia instead. "Going back to Azerbaijan we accepted, but not Armenia!" Angela recalls indignantly. "You can't send a Dutchman to Belgium just because he understands Flemish. Send us to our country of origin, not to the neighbours". It turned out to be a moot point, as Armenia also refused its cooperation in providing the necessary paperwork.

Time passes. By repeatedly re-applying for asylum the family retains their right to shelter most of the time. The Departure & Returns Service (DT&V) never manages to effectuate their expulsion. The father continues to visit the Armenian embassy. The consul reacts angrily when he sees him for the umpteenth time. The father pleads with him and asks if his family may travel to Armenia after all, despite never having lived there. The consul simply says: "you can visit us a thousand times, without Armenian documents this will never work". Then, in September 2012, the family receives a message calling them to travel to Zevenaar, in the east of the Netherlands, and to bring their luggage. "My mother already had a sense of foreboding", Angela recalls.

"Dad was as pale as the wall when the aliens' police ordered our detention", Christina remembers. "It's like we were criminals, we weren't allowed to speak." Angela was exempted, as she still happened to have a pending procedure that prohibited her detention. Still, the officials told her, "you might as well come along – it's 99% certain we'll detain you anyway". "I'll never forget that, it was merciless", Christina says, crying as she relates the story. Without Angela, the rest of the family was first transferred to a regular police cell in Almelo, where they were stripped of their clothes, inspected and placed in separate cells for the night. "My mom fainted", Christina tells. "I didn't understand what was happening, but the assistant public prosecutor told us that we hadn't cooperated. I told him we did and that we had evidence of this, but he only said we could show this in the detention centre".

The family was transferred to Rotterdam. A cavity search was performed and the mother fainted once again. This time they were placed in a shared cell. The family attended their hearing over Skype, from the detention centre. They had dreaded the moment, as many other of the people in custody had spent four, six or eight months there already. However, two days after the hearing they were released, and compensation was paid. In total they spent 'only' two weeks locked up, but the damage was done. "We grew up much too quickly, that's for sure", Christina says. "I've stopped thinking about the future. Now I just live from day to day". Angela plans to travel the world, if this mess ever gets resolved. For the moment though, "the documents I do have tell me I'm of 'unknown nationality'. Officially I still don't exist."





# 1. INTRODUCTION



## 1.1 STATELESSNESS AND DETENTION

The increasing use of immigration detention, including for punitive purposes, and the criminalisation of irregular migration by a growing number of states, is a concerning global and European trend. This results in increasing numbers of persons being detained for longer than they should, or for reasons that are unlawful. While arbitrary detention is a significant area of concern in general, the unique characteristics associated with stateless persons and those at risk of statelessness make them more likely to be detained arbitrarily, for unduly lengthy periods of time. As the European Court of Human Rights (ECtHR) held in *Kim v. Russia*, a stateless person is highly vulnerable to be “left to languish for months and years...without any authority taking an active interest in

his fate and well-being”.<sup>1</sup> This is mainly because immigration systems and detention regimes do not have appropriate procedures in place to identify statelessness and protect stateless persons.

All stateless persons should enjoy the rights accorded to them by international and regional human rights law. Their rights should be respected, protected and fulfilled at all times, including in the exercise of immigration control. The circumstances facing persons with no established nationality – including their vulnerability as a result of their statelessness and the inherent difficulty of removing them – are significant factors to be taken into account in determining the lawfulness of immigration detention. The process of resolving the identity of stateless persons and a stateless person’s immigration

status is often complex and burdensome. Lawful removal of such persons is generally subject to extensive delays and is often impossible. In many European countries, stateless persons detained for removal purposes are therefore vulnerable to prolonged and repeat detention. These factors in turn make stateless persons especially vulnerable to the negative impact of detention. The emotional and psychological stress of lengthy—even indefinite—periods of detention without hope of release or removal is particularly likely to affect stateless persons throughout Europe.

It is evident that the failure of immigration regimes to comprehend and accommodate the phenomenon of statelessness, identify stateless persons and ensure that they do not directly or indirectly discriminate against them often results in stateless persons being punished for their statelessness. Thus, the European Network on Statelessness has embarked on a two year project aimed at better understanding the extent and consequences of the detention of stateless persons in Europe, and advocating for protecting stateless persons from arbitrary detention through the application of regional and international standards. Among the outputs of this project are:

- A regional toolkit for practitioners, on protecting stateless persons from arbitrary detention – which sets out regional and international standards which states are required to comply with and practitioners can draw on in their work;<sup>2</sup> and
- A series of country reports investigating the law, policy and practice related to the detention of stateless persons in selected European countries and its impact on stateless persons and those at risk of statelessness. These reports are meant as information resources but also as awareness raising and advocacy resources that we hope will contribute to strengthening protection frameworks in this regard. In year 1 of the project (2015), three such country reports (including this one) have been drafted on Malta, the Netherlands and Poland. In year two, further reports will be published on other countries.<sup>3</sup>

## 1.2 RESEARCH OBJECTIVES, METHODOLOGY AND LIMITATIONS

The goals of this study are two-fold: i) filling an information gap on statelessness and detention in the Netherlands; and ii) to serve as an advocacy tool to promote greater protection for stateless persons and those at risk of statelessness from arbitrary detention, including through improved identification and determination of statelessness. To this end, the present first chapter provides an overview of the research objectives and introduces the reader to the Dutch context. The second chapter is concerned with law and policy and existing (statistical) data on statelessness and

detention. Then, in chapter three, key issues of concern are identified. The report concludes with a summary of findings and recommendations for improvement.

This study employs a varied methodology: a thorough desk review of the existing literature on both statelessness and alien detention; statistical review of available quantitative data; interviews with policy makers, legal professionals and NGOs; and finally of course in-depth semi-structured interviews with stateless persons who have themselves experienced detention. With regard to these interviews, it should be noted that no extensive legal analysis or fact check of each individual case was conducted. These stories and personal experiences are meant to inform and illustrate broader research findings. Due to significant recent changes in policy, case studies may refer to situations or practices no longer common. For this reason, we have – as much as possible – attempted to seek out interviewees whose experiences with detention are recent (i.e. within the past three years). The findings in this report are up-to-date as of July 2015.

The interviewees' accounts relate only to administrative detention practices; the situation of stateless persons and those at risk of statelessness in criminal detention is not examined. There are, after all, considerable differences between the two. As opposed to criminal detention, "administrative immigration detention is defined as a non-punitive, bureaucratic measure that is meant to effectuate border control, that is, to ensure that 'unwanted' migrants can be located and identified and cannot abscond while their expulsion is being prepared". According to the UNHCR, detention is "the deprivation of liberty or confinement in a closed place" which the individual "is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities."

While detention is an obvious deprivation of liberty, other administrative measures aim mostly at restricting it. In the Netherlands this is common practice through the use of so-called freedom-restricting locations (vrijheidsbeperkende locatie, or VBL), where residents are expected to report regularly and are prohibited from leaving the municipality. This restriction of liberty will also be taken into account for the purposes of this report, because of its similarity in purpose and impact with actual detention. A former State Secretary of Justice phrased it as follows: "the Freedom Restricting Location is not a measure to offer shelter, but instead a measure to restrict the freedom of movement to allow supervision of aliens to ensure their departure".

Finally, this report considers the situation of several groups, although the dividing lines between them may at times be blurry. First and foremost, we concern ourselves with the situation of stateless people, defined in Article 1 of the 1954 Convention relating to the Status of Stateless



Persons as “a person who is not considered as a national by any State under the operation of its law”. This definition is part of customary international law and has been authoritatively interpreted in the UNHCR Handbook on Protection of Stateless Persons. Accordingly, “establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status. This is a mixed question of fact and law”. Thus, it is not always a straightforward process to identify if someone is stateless or not, and there will be people who appear to have a nationality, but actually are stateless, or whose statelessness becomes apparent over a period of time. For this reason it is also important to consider the situation of persons at risk of statelessness. In the immigration detention context in particular, the protection needs of those at risk of statelessness – which stem from their un-returnability – significantly overlap with the stateless. Other terms often used to describe similar or overlapping groups include the *de facto* stateless, unreturnable persons and those with ineffective nationality. By using the term ‘persons at risk of statelessness’ this report does not box the individual in a category that is separate to statelessness, but rather shows that the individual is in a place of vulnerability that can escalate into statelessness.

### 1.3 STATELESSNESS AND DETENTION IN THE NETHERLANDS

The formal purpose of alien detention in the Netherlands is to ensure people remain within the government’s sight while their deportation is being prepared. For any undocumented person, both voluntary and forced return usually require the cooperation of the country of origin. Since there is not likely to be such country willing to facilitate return in the case of stateless people, deportation is notoriously difficult – if not intrinsically impossible. Their detention intuitively appears to be pointless and unlawful. Although reality is considerably more complex, it is this apparent contradiction that lies at the heart of this report: *Protecting stateless people from arbitrary detention*.

Up until very recently, little to no research into statelessness in the Netherlands had ever been conducted. This is not to say though that the issue had not presented itself: historically, the Netherlands has actually generated statelessness on a number of occasions, going back to the mid-19<sup>th</sup> century when Dutch Catholics fighting for the Papal army were stripped of their nationality upon return. Over the course of several decades, small numbers of Dutch citizens were rendered stateless by joining either the allied and German forces in World War II, or by signing up for the fight against general Franco in Spain. Until 1964, women marrying a

foreign husband lost their Dutch citizenship even if that would leave them stateless, and as late as 2003 – in an effort to prevent fraudulent acknowledgements – children born out of wedlock were at risk of remaining stateless for several years, though only in exceptional cases.<sup>4</sup>

These days, virtually all instances of statelessness in the Netherlands are the result of migration. In 2011 the UN High Commissioner for Refugees (UNHCR) published its report *Mapping Statelessness in the Netherlands*, presenting recommendations on the identification and registration of statelessness, necessary legal reform to comply with the Statelessness Conventions of 1954 and 1961, as well as suggesting improvements in the protection of stateless persons. The establishment of a formal statelessness determination procedure, as a way of enhancing both identification and ensuring access to essential rights, was a key recommendation. The report also expressed its concern at the “most pervasive and disturbing problem [...] of lengthy, repeated and hopeless periods of detention”.<sup>5</sup>

The Minister of Immigration, Integration and Asylum Affairs and the Minister of Interior responded with a polite but dismissive letter, rejecting all crucial recommendations from the report.<sup>6</sup> This caused the authoritative Advisory Committee on Migration Affairs (ACVZ) to initiate its own research in 2013, presenting the government with a report reiterating the findings and recommendations of the earlier UNHCR study.<sup>7</sup> Among other things, ACVZ concluded that the Netherlands requires a statelessness determination procedure to meet its obligations as a State party to the 1954 Convention; if statelessness is determined, this should result in a residence permit; the prevailing birth certificate requirement for naturalisation should be waived for recognised stateless persons; and the legal residence requirement for stateless children born in the Netherlands who wish to acquire Dutch nationality by option should be dropped.

The State Secretary of Security and Justice responded by way of two letters, announcing the establishment of a statelessness determination procedure, a slightly more flexible burden of proof during naturalisation requests,<sup>8</sup> and the replacement of the requirement of legal stay by a number of other questionable requirements for stateless children who want to exercise their right of option to Dutch nationality.<sup>9</sup> However, the State Secretary also repeated the long-held government conviction that “statelessness does not present, as opposed to a well-founded fear of persecution in line with the Refugee Convention, an objective barrier to return”.<sup>10</sup> As a result, objective determination of statelessness will not result in a residence permit at present.

In January 2013 the routine application of immigration detention in the Netherlands came under intense scrutiny. Aleksandr Dolmatov, a Russian asylum seeker who had been placed in detention following an administrative mistake, committed suicide in his cell in Rotterdam. Public outcry and substantial political debate ensued, culminating in the State Secretary's commitment to enforce Dutch refugee policy more humanely. One principal method of doing so was by drafting a new Returns and Detention Law, which is under debate in Parliament at the time of writing. The affair also sparked much debate about possible alternatives to detention, with a whole range of local and international NGOs and the national Ombudsman advocating for the use of detention as an *ultimum remedium* (last resort). Amnesty International had already published a series of reports on Dutch detention practices and released a new edition in September 2013.<sup>11</sup> That same year the ACVZ investigated the decision-making process of imposing immigration detention,<sup>12</sup> as well as Dutch policy vis-à-vis failed asylum seekers who cannot leave the Netherlands through no fault of their own (e.g. due to the country of origin refusing to issue a *laissez-passer*).<sup>13</sup>

The Dolmatov scandal dovetailed with impending budget cuts, resulting in the government's decision to drastically reduce immigration detention capacity. Having peaked at more than 3,000 cells – detaining 12,485 persons in one year – in 2007, capacity is set to decrease to 933 places by 2016.<sup>14</sup> The average length of detention is approximately 70 days; a notable decline when compared to the early 2000s, but still more than twice as long as was common in the 1990s.<sup>15</sup> Whether or not this average also applies to stateless and unreturnable persons is not directly apparent from the available data, but will nonetheless be further examined in section 2.3 below. For now, it suffices to say that much has happened in a few short years. Further substantial changes in policy and practice on statelessness and detention would appear to be imminent.

## 2. LAW AND POLICY CONTEXT



### 2.1 INTERNATIONAL AND REGIONAL OBLIGATIONS PERTAINING TO STATELESSNESS AND DETENTION

Having a nationality is an inalienable right, enshrined in Article 15 of the Universal Declaration of Human Rights. This right is reinforced by a whole range of human rights instruments with provisions on the right to nationality, to which the Netherlands is a State Party: the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws<sup>16</sup> as well as its Protocol relating to statelessness,<sup>17</sup> the 1966 Convention on the Elimination of all Forms of Racial Discrimination,<sup>18</sup> the 1966 Covenant on Civil and Political Rights,<sup>19</sup> the 1979 Convention on the Elimination of All Forms of Discrimination against Women,<sup>20</sup> and the 1989 Convention on the Rights of the Child.<sup>21</sup> Furthermore, two Council of Europe Conventions seek to address and prevent statelessness, and the Netherlands is a State Party to both: the 1997 European Convention on Nationality,<sup>22</sup> and the 2006 Convention on the Avoidance

of Statelessness in Relation to State Succession.<sup>23</sup> Perhaps even more pertinently, the Netherlands is party to both the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. The former provides a definition of a stateless person and specifies a range of entitlements to protect stateless individuals. The latter includes key provisions on the prevention and reduction of statelessness, most importantly by securing that new-borns acquire the nationality of their country of birth if they would otherwise be stateless. Taken together with the more broadly oriented international human rights regime, one could conclude that stateless persons in the Netherlands enjoy a high level of protection.

Similarly, the practice of (administrative) detention is governed by a variety of human rights instruments, including the European Convention on Human Rights, which *inter alia* stipulates that authorities must always have a legal ground for deprivation of liberty, that it may not be applied arbitrarily and that administrative detention is only permissible with a view to deportation



or prevention of illegal entry.<sup>24</sup> Crucially, in December 2010 the EU Returns Directive entered into force. Article 15(1) is especially important,<sup>25</sup> as it specifies that detention can only be imposed when there are “no other sufficient but less coercive measures can be applied”.<sup>26</sup> It goes on to state that “Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process” in particular when there is a risk of absconding or when the person in question obstructs his or her own return process. The section finally orders that detention shall be as short as possible, though never more than 18 months. For stateless persons (and those at risk), section (4) is also of importance: “When it appears that a reasonable prospect of removal no longer exists for legal or other considerations [...] detention ceases to be justified and the person concerned shall be released immediately”.<sup>27</sup>

In conclusion, it is important to note that there is not one single instrument that explicitly governs detention of stateless persons, even though general principles on arbitrariness, proportionality, necessity and anti-discrimination are well protected.<sup>28</sup> Even the recently published UNHCR Handbook on the Protection of Stateless Persons comments on stateless persons in detention only briefly. Still, its insight is well-worth remembering throughout the remainder of this report:

“Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Moreover, stateless persons are often without a legal residence in any country. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for detention of such persons.”<sup>29</sup>

Whether or not actual policies in the Netherlands are in line with this UNHCR recommendation, is up for examination in the next section.

## 2.2 NATIONAL LAWS, POLICIES AND JURISPRUDENCE PERTAINING TO STATELESSNESS AND DETENTION

All matters relating to the acquisition and loss of nationality in the Netherlands are governed by the Dutch Nationality Act, which has incorporated the definition of a stateless person from the 1954 Convention.<sup>30</sup> Article 6 sets out requirements for the right of option to Dutch nationality for children born in the territory who would otherwise be stateless. At present it still includes a ‘lawful stay’ requirement, which means that only stateless children who already are in possession of a residence permit may apply. UNHCR and various other organisations have contended that this directly contravenes the 1961 Convention, which only requires a child to have ‘habitual residence’.<sup>31</sup> In late 2014 the State

Secretary acknowledged this position and announced that Article 6 would be amended. As soon as the proposed change takes effect, stateless children born in the Netherlands can naturalise after five years of residence, though only if the parents cannot remedy the child’s statelessness themselves and have not “frustrated their departure” or absconded from the authorities’ oversight.<sup>32</sup> According to Article 8(4), stateless persons are eligible for facilitated naturalisation. They require only three instead of five years of legal residence before they can apply. Article 14(6) governs loss of Dutch nationality, and allows for statelessness if citizenship was acquired by fraudulent means.<sup>33</sup>

Up until the moment that a statelessness determination procedure is established (as per the State Secretary’s announcement), the most fitting procedural recourse for stateless persons to regularise their residence is the so-called ‘no-fault procedure’ [*buitenschuldprocedure*]. This rather unique procedure initially grants a one year renewable regular residence permit to persons who are – in essence – stuck in the Netherlands because they cannot leave the country despite their best efforts. Substantiating that one has made every effort imaginable to depart from the Netherlands is this procedure’s lynchpin. For many years, the government contended that this system fulfilled their obligations under the two Statelessness Conventions, and in fact goes above and beyond because it allows persons at risk of statelessness to apply as well. While the latter is indeed good practice, the procedure has nonetheless met with heavy criticism due to its one-sided and stringent burden of proof; its low approval rate; the absent formal recognition of statelessness and subsequent difficulty in invoking the rights enshrined in the Statelessness Conventions; the provision of considerable subjective discretion to immigration authorities; the requirement that there is no uncertainty about the applicant’s identity and nationality; and finally the fact that an (often futile) asylum procedure has to be completed first.<sup>34</sup>

Stateless persons are not protected from detention in any specific way. In general, Dutch legislation on administrative deprivation of liberty is laid out in the Aliens Act 2000, and its only purpose is to ensure that aliens remain within the authorities’ line of sight and ready for removal.<sup>35</sup> The law distinguishes between two scenarios: aliens who have been refused entry at the border, and aliens who have been arrested on grounds of illegal presence. Border detention is governed by Article 6, and applies to all aliens who enter the Netherlands through either an international airport, or the harbour of Rotterdam. People without a valid visa are either sent back the way they came or – if they claim asylum – they have to await the outcome of their procedure from a detention facility. This policy too has come under increased scrutiny in recent years,<sup>36</sup> which has probably contributed to the government’s intention to abolish the

routine detention of asylum seekers at the border. “The sole fact that you don’t carry any documents to prove your identity will soon no longer be grounds to make you go through your asylum procedure from border detention”, a senior official from the Ministry of Security and Justice commented.<sup>37</sup> New regulations are expected to be in place by late 2015. These changes are also imminently relevant for stateless persons arriving in the Netherlands, because with no other procedure to turn to, they often claim asylum too.

Only a very small percentage (3-4%) of all migrants who are detained at any given time are placed in a border detention facility.<sup>38</sup> After all, the vast majority of irregular migrants enter the Netherlands overland and because – in line with the Schengen Treaty – the Dutch borders with other EU countries are no longer *external*, border detention is not permitted in such cases. Therefore, persons who fail to depart after a denied asylum application or whose old residence permit has expired, often end up in a ‘regular’ administrative detention facility. The decision to detain a person without legal residence is made “for reasons of public interest or national security” and with a view to deportation, on the basis of Article 59 of the Aliens Act. With this objective in mind, detention is only permitted when a real prospect of removal exists – which has to be demonstrated in court by the authorities.<sup>39</sup> Detention is to be lifted as soon as “the alien indicates he wishes to leave the Netherlands *and the opportunity to do so exists*”.<sup>40</sup> In accordance with the EU Return Directive, the initial 6-month detention period may be extended to a total of 18 months in case removal, “in spite of reasonable efforts”, takes more time; because the alien does not cooperate with his removal; “or *because the required documentation is still absent*”.<sup>41</sup> None of these provisions mention adapted requirements for stateless persons.

Responding to heavy civil society criticism, Article 59 is also up for considerable amendment. Upon acceptance of these legislative changes by Parliament (expected in autumn 2015), detention may be used only as a measure of last resort (*ultimum remedium*), after it has been established that no less intrusive measures can be used.<sup>42</sup> Furthermore, the annex to the draft law places an “investigative duty” to consider alternatives with the authority imposing detention.<sup>43</sup> The revised Article also states that “detention shall be as short as possible”<sup>44</sup> and provides that detention of vulnerable groups requires additional motivation.<sup>45</sup> The general grounds for detention remain the same, as does the primary purpose of removal, but the problematic provision that opportunity to depart from the Netherlands must exist before detention is lifted has been deleted. Unfortunately, the notion that detention may be extended in the absence of documentation required for removal remains unchanged (as it is, in fact, in line with the EU Return Directive – though the due diligence

requirements of the Directive apply equally in this context as well). A last and equally significant upcoming change is the introduction of a new Return and Detention Law, regulating the regime of immigration detention. Although it has always been an administrative measure, the current detention regime is still predicated upon the Penitentiary Principles Law [*Penitenciaire Beginselenwet*], regulating the living conditions in criminal detention facilities. The proposed law is intended to more clearly distinguish between these two, especially since immigration detention should be non-punitive in nature.

A final point on Dutch policy vis-à-vis migrants without legal stay: it is – and has long since been – the formal government position that voluntary return is *always* possible. Moreover, it is considered an alien’s own responsibility to depart from the Netherlands once his application for legal stay has been denied. The former State Secretary confirmed this position to Parliament as follows: “[T]here are no countries that consistently disregard their legal obligation to facilitate re-entry of their subjects. In practice independent (voluntary) return is almost always possible”.<sup>46</sup> Significantly, this statement only relates to third country nationals and not to stateless persons, who are not the ‘subjects’ of any country. In any case, the government stance stands in stark contrast to the perception of many legal professionals, advisory bodies and countless aid organisations. Moreover, the very existence of the no-fault procedure and regular court decisions declaring return to one country or another unfeasible, would appear to indicate otherwise.<sup>47</sup> It is however a crucial difference in opinion, as it means that the authorities will in most cases assume a prospect of deportation to exist (or the inability to be due to lack of cooperation), automatically legitimising the initial decision to detain.

Jurisprudence from the Administrative Jurisdiction Division of the Council of State, the country’s highest authority in matters of administrative law, has usually validated the government’s position. While it is beyond the scope of this report to provide an exhaustive overview of relevant case law, some decisions are particularly important: in a landmark 2013 verdict the Council of State ruled non-cooperation with removal (e.g. refusal to confirm to one’s embassy that return is voluntary) to be a valid ground for extending detention, even if this lack of cooperation has effectively undone any chance of deportation.<sup>48</sup> Several Council of State rulings from early 2015 interpret the Mahdi verdict from the European Court of Justice,<sup>49</sup> instructing courts in the Netherlands to cease the common practice of ‘marginal inquiry’ [*marginale* or *terughoudende toets*], and instead undertake a full examination of each decision to detain. In 2015 the Council of State also overturned a verdict from the Amsterdam District Court, which had considered the deprivation of liberty of one man unlawful (and ordered alternatives to be explored) because prior periods in

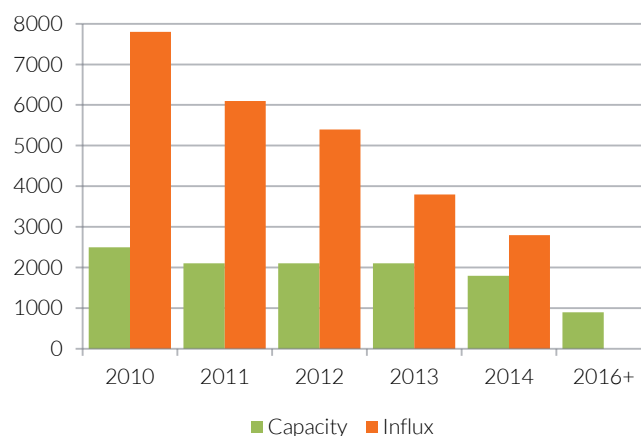
detention had never led to his deportation.<sup>50</sup> In appeal, the Council of State though held it against the defendant that he expressed no real desire to return, and found that the State Secretary had properly motivated the decision to detain.<sup>51</sup> No jurisprudence exists yet on how exactly this line of reasoning would apply to a stateless person.

### 2.3 DATA ON STATELESSNESS AND DETENTION

The number of registered stateless persons in the Netherlands has been relatively constant for a number of years. On 1 January 2013 the Central Bureau for Statistics counted 2,003 stateless persons, one year later a total of 1,978 people were recorded as such. However, on account of flawed registration procedures, these figures should be interpreted with considerable caution.<sup>52</sup> This also applies to a large group of persons of 'unknown nationality': 81,635 individuals in 2013 and 80,643 in 2014. While an unidentified number of stateless persons (or people at risk) may be clouded by these figures, the vast majority refers to immigrants who were undocumented at the time of registration with their municipality. In practice, it is often used by municipal registrars as a 'lump category', used for people whose nationality is not immediately in evidence.<sup>53</sup> It should be noted that significant changes in the number of registered stateless persons may be on the horizon, due to the arrival of large numbers of stateless asylum seekers: in 2014, Syrians and Eritreans constituted the two largest groups, but 'stateless' surprisingly took third place. Precisely 11.6% of all asylum applications were made by stateless persons, mostly Palestinians and Kurds from Syria.<sup>54</sup>

Because no statelessness determination procedures exists yet, their presence in administrative detention has to be inferred from general statistics. In any case though, the overall use of immigration detention in the Netherlands has decreased considerably in recent years. While in 2010 the number of individuals that entered a detention facility was 7,547, this figure had already dropped to 2,467 in 2014.<sup>55</sup> This downward trend is expected to continue, both in light of the planned changes in legislation and the ongoing reduction in capacity: from 2,379 places in 2010 to 933 in 2016 and beyond – a decrease of more than 50% (see chart 1 below). Although the Advisory Committee on Migration Affairs concluded that these statistics indeed reflected the government's new embrace of the *ultimum remedium* principle,<sup>56</sup> other explanations may also contribute: a Council of State judgment prohibited mobile surveillance teams from the Royal Military Constabulary to arrest non-criminal irregular migrants at the border with other EU countries;<sup>57</sup> the overall number of irregular migrants in the Netherlands appears to decrease (as measured by the number of arrests); and for either practical or security-related reasons deportations to a number of important

refugee-producing countries proved impossible for long periods (e.g. China, Iraq, Somalia).<sup>58</sup> It is interesting to note that the significant decline in detention cases has not resulted in lower deportation statistics, suggesting that the oft-assumed causal link between detention (acting as



a deterrent) and rates of return is not direct.<sup>59</sup>

More than 90% of the detained population is male, and the average length of detention has been consistent for years, hovering between 67 and 76 days. Taking 30 September 2014 as a reference day, virtually no children and only very few elderly persons were detained.<sup>60</sup> However, about 15% of the population had been detained for longer than six months, though only 0.7% (three individuals) were held for longer than a year. More worrisome is the pervasiveness of repeated detention: in 2010 exactly 27% of the detained population had been incarcerated at least once before. Of this group – a total of 2,255 persons – 61% was held once before, 29% two or three times, and 9% four times or more. In one particularly egregious case the man in question had been detained 11 times altogether.<sup>61</sup>

Another reason complicating any efforts to obtain an exact figure of the number of stateless persons in detention, is that the Custodial Institutions Agency (*Dienst Justitiële Inrichtingen*, or DJI), responsible for all detention facilities, and other immigration related authorities use separate registration systems, that cannot be cross-referenced due to stringent privacy protection protocols. Interviewees reported that DJI only registers people's *stated* nationality, which may be very different from one's citizenship status as verified by the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*, or IND).<sup>62</sup> However, in January 2011 the DJI nevertheless prepared such a cross-referenced list for UNHCR. Bearing in mind that the number of detained migrants was much higher then, 99 (or 7.3%) persons were of 'unknown nationality' according to the IND, whereas 9 individuals (or 0.9%) were actually considered stateless.<sup>63</sup>



In 2013, similar to the cross-checked reference date in 2011, 7.2% of the influx consisted of people of 'unknown nationality'. If this group were included in the country ranking, it would take second place. It is an obvious question how this label relates to the requirement that one can only be detained with a clear prospect of removal. After all, how can one be deported if the country of origin is unknown? The explanation offered by the DJI is, as before, that only people's stated nationality is recorded, e.g. because "the absence of identity documents and the use of aliases can cause people's nationality to be unknown at the time of registration".<sup>64</sup> Any refusal to answer the question of one's citizenship thus results in a label 'nationality unknown'.<sup>65</sup> This makes it particularly difficult to discern how many stateless people might be obscured this way, especially because many stateless persons may not self-identify as such. Presumably though, their numbers are quite low. One reason for this assumption is that the most prevalent countries of origin of people who arrive in detention have remained largely consistent since 2009: six of the ten most common countries had a spot in the top 10 five years in a row (Afghanistan, Algeria, Morocco, Nigeria, Somalia, and Turkey). Another three countries secured their top 10 place for four out of five years (China, Iraq and Suriname).<sup>66</sup> Apart from China, Iraq and Somalia – these are not countries particularly notorious for generating statelessness. However, several are notorious for refusing to re-document their citizens if they do not already possess clear proof of their identity. This may well heighten people's risk of statelessness, while also impacting the length of detention. This is further examined in section 3.3.

### 3. KEY ISSUES OF CONCERN



#### 3.1 IDENTIFICATION & DETERMINATION PROCEDURES

At the time of writing, there is no formal statelessness determination procedure. Although its establishment has been announced, no details are known yet – apart from the fact that it is not the government’s intention to couple the determination of statelessness with a right to stay.<sup>67</sup> This means that the procedure would merely be declarative, allowing for facilitated naturalisation and perhaps the opportunity to exercise a right of option to Dutch nationality (since these are only available to ‘recognised’ stateless persons). However, since access to all social services and general participation in society is linked up with lawful stay, this leaves even recognised stateless persons exceedingly vulnerable. Not granting a right to stay is clearly anomalous when compared to other countries that have chosen to create a mechanism to determine statelessness: all twelve States that have done so until now, offer legal stay upon approval.<sup>68</sup> Specifically in the context of the decision to detain and the assessment of legality of ongoing detention, there is a due diligence requirement to identify statelessness – as this

often has a bearing on the removal objective of detention. Therefore, even ‘mere’ determination of statelessness (without granting a residence permit) is likely to result in less stateless people being arrested and subjected to detention.

Until the determination procedure is in place, the Basic Municipal Registry [*basisregistratie personen*, or BRP] is the leading instrument to record statelessness, although it only includes persons legally present in the Netherlands.<sup>69</sup> The Ministry of Security and Justice admitted that the BRP does not suffice as a determination procedure, because it offers no opportunity for thorough research or analysis, and its only purpose is to register what is already apparent.<sup>70</sup> Therefore, the box ‘stateless’ will only be ticked if the applicant presents authentic documents that clearly and unambiguously confirm statelessness. Fully documented stateless persons are, for obvious reasons, rather rare. However, even in such cases where statelessness is established beyond any doubt, policies from different agencies might still conflict. Mohammed Al-Fadhly for instance is a member of Kuwait’s Bidoon community, who are universally

recognised as stateless. The municipality of Heerlen is convinced of this too and registered him as such, but the IND simply refuses to accept this judgment. Mohammed explained his exasperation as follows: “the IND says: ‘prove that you’re stateless with documents’. Once you show them documents they say: ‘a stateless persons wouldn’t have these’. Now, I have nothing more to offer them”.<sup>71</sup>

The no-fault procedure can provide a stateless person with a regular residence permit, but only if it has been proven beyond doubt that return to a former country of habitual residence is impossible – and that the person in question is not to blame for this. Chapter 2 above, while noting its usefulness in principle, already outlined some of the practical drawbacks of this procedure. A crucial concern is that the no-fault procedure provides no legal determination of statelessness per se, thereby preventing people from accessing the rights attributed to them under the Statelessness Conventions. The no-fault procedure, in short, does not *identify* statelessness.<sup>72</sup> Moreover, determining statelessness is all about demonstrating that a person is not considered as a national by any country. Whoever is at fault is in fact irrelevant.<sup>73</sup> Practical experience, mostly related to the one-sided and onerous burden of proof, also shows the no fault-procedure to be unfit for stateless persons. In one case study from the Dutch Refugee Council, a young woman from mixed Congolese-Rwandan descent who lost her citizenship upon turning 18, received the following notification from the authorities: “Now that it’s obvious that claimant does not possess Congolese nationality, no efforts aimed at her departure to the DRC can be considered efforts to leave the Netherlands, because these a priori cannot lead to her departure. Claimant will have to irrefutably demonstrate her identity and nationality before mediation [by the DT&V] can lead to any meaningful result”.<sup>74</sup> Nevertheless, some improvements have also been announced, for instance the acceptance that non-response from embassies may not be attributable to the individual, and should actually be taken on board in the assessment of one’s ‘returnability’; and the slightly relaxed requirements to substantiate identity and nationality with documents.<sup>75</sup>

The UN High Commissioner for Refugees already highlighted that statelessness is “a juridically relevant fact under international law. Thus, recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and enjoyment of rights afforded to stateless persons under the 1954 Convention”.<sup>76</sup> One example of a prerogative that only a recognised stateless person could exercise, is the right to an identity document under Article 27 of the 1954 Convention. This is particularly pertinent, because the Netherlands made carrying identification at all times mandatory in 2004. Stateless persons are usually unable to meet this requirement. What’s worse, UNHCR already

noted the “adverse connection between the interviewees’ inability to identify themselves and the likelihood of detention”,<sup>77</sup> simply because an arrest – revealing one’s irregular status – is much more likely. One of the interviewees, Ivan Niyazov, ended up in detention for three months, after he was asked to show his ID by two police officers while he was walking his dog. Since then he’s hardly left the apartment.<sup>78</sup> No procedure to provide ID documents even to recognised stateless persons exists at present, because the Dutch State is yet to appoint a competent authority to adjudicate such a request.<sup>79</sup>

In general, procedural solutions to statelessness are still too limited. Their cases are often regarded from an ill-fitting asylum perspective, and especially the situation of non-refugee stateless persons is easily misunderstood. This is for instance demonstrated by the fact that to apply for a no-fault permit, one has to have coursed all the way through an asylum procedure first. This not only burdens the asylum system with unnecessary claims, but also reduces the chance of statelessness being identified and addressed. Moreover, officers involved in refugee status determination often do not realise when genuine cases of statelessness cross their desk. As Ivan Niyazov, recalls, “sometimes they wrote I’m Russian, sometimes they recorded me as Soviet, or something else. Nobody listened to my protests; I’m not Russian - I only ever lived there illegally.” To date, his statelessness has never been accepted. “Still, it caused all my problems”, he says. “An ethnic Russian, born in Uzbekistan, from a country that is now seventeen countries. I don’t know who I am”.<sup>80</sup> The arrival of a dedicated procedure will hopefully amend this situation.

### 3.2 DECISION TO DETAIN AND PROCEDURAL GUARANTEES

In previous studies on statelessness in the Netherlands, one of the most pressing concerns was the prevalence of “lengthy, repeated and hopeless periods of detention”.<sup>81</sup> The initial decision to detain is taken by an assistant public prosecutor [*Hulpofficier van Justitie*], either working for the Royal Military Constabulary (in case of arrest at an external border), or the Aliens Police (in case of arrest on grounds of illegal stay). Migrants may be held in pre-detention at the police station for a few days, before being transferred to a detention centre. There the process of removal is initiated by the DT&V,<sup>82</sup> and the decision to detain is then submitted to a court, “legally within four weeks but in practice after 10-12 days in detention”.<sup>83</sup> Within two weeks of submission the court is obliged to render a judgment – a decision which can be appealed. After six months have passed, another judicial review is mandatory, if the DT&V decides to extend detention for a maximum of twelve more months. In the meantime, detainees can ask a judge to re-examine the lawfulness of their incarceration at any time, for instance



checking the continued prospect of deportation. In these proceedings, appeal is not possible.<sup>84</sup>

Detention may only be ordered when the following conditions, in summary, have been met cumulatively:

- Detention is in the interest of public order *or* national security *and* imposed with a view to deportation.<sup>85</sup> (When the proposed changes to the Aliens Act take effect, it will have to be demonstrated convincingly that less severe measures than detention cannot suffice.)
- The individual might evade the authorities' supervision *or* does in fact frustrate his or her deportation proceedings.<sup>86</sup>
- An exhaustive list of further criteria is then specified in the Aliens Decree. In principle, two of these grounds must be met to justify detention.<sup>87</sup>
  - Significant grounds for detention are: irregular entry and avoiding supervision; disregarding the obligation to depart; not independently leaving the Netherlands after an order to do so; no or insufficient cooperation with establishing identity and nationality; presenting wrong or contradicting information; deliberately destroying travel- or identity documents; presenting fraudulent documents; having been declared an undesirable alien; indicating an intention to ignore one's duty to return;
  - Light grounds for detention are: ignoring obligations when crossing a border; multiple applications for a residence permit that have not led to an approval; not having a fixed domicile; not having sufficient means of subsistence; undertaking labour without a permit; and being suspected or convicted for any crime.

Before detention can even be considered, a so-called return decree [*terugkeerbesluit*] is issued. This is confirmation that one's continued presence in the Netherlands is unlawful and that the person in question is under a duty to return. If this obligation is not fulfilled independently, it is possible to be issued an entry ban [*inreisverbod*]. Once these steps have been taken, the initial decision to detain is taken in a purely legalistic way. In one lawyer's experience, prosecutors simply stringently apply the criteria mentioned in the Aliens Decree. Continued applicability means continued detention.<sup>88</sup> Amnesty International concluded back in 2011 already that files usually lack basic information on the detainee's personal background. Information on the asylum claim, medical issues or family history do not appear in the file and are not factored in the decision to detain.<sup>89</sup> Today, some observers still contend that examination of personal circumstances "is absent in all cases" and carefully weighing the individual's interest against the State's happens insufficiently. In one lawyer's

experience, the assistant public prosecutor "always assumes the prospect of deportation to exist, unless it concerns a notorious 'difficult country'".<sup>90</sup> Another practitioner argued that in the first detention interview, a very short conversation after which the assistant public prosecutor renders a decision, "the prospect of deportation is hardly examined." Illegal residence and/or alleged avoidance of supervision weigh much more heavily.<sup>91</sup> This may also be influenced by time pressure: until an ACVZ advice led to a slight increase, assistant public prosecutors only had six hours after an immigrant's arrest to decide whether detention should be applied.<sup>92</sup>

The situation is somewhat different for migrants arriving at an external border: their entry to the Schengen territory will be denied, and if they apply for asylum they will be placed in a border detention facility for the duration of the procedure. Ideally the procedure is concluded within eight days, but it may take up to six weeks. In the latter case, asylum-seekers are transferred to an open reception centre. However, in addition to grounds related to fraud; a possibly serious criminal past; or a hand-over to another EU country; the need for additional inquiry into a person's identity or nationality is considered a valid reason to detain. If it takes longer to conclude the inquiry, continued detention is permitted.<sup>93</sup> This practice affects most stateless people arriving by sea or air, and during the research period we encountered several persons (mostly Palestinians) who were detained for this very reason, while their asylum claim was under examination.

It should be noted that in earlier research, prosecutors indicated that certain vulnerabilities might be reason *not* to detain, or to seek out an alternative measure (e.g. age, mental or physical health). In general however, while clear circumstances in which detention *should* be imposed do exist, no guidelines specify when detention must be avoided.<sup>94</sup> Such criteria do exist under international law though (for instance Article 9 of the International Covenant on Civil and Political Rights).<sup>95</sup> In any case, suspected statelessness plays little to no role in the decision to detain, due to the government's policy that return to a country of former habitual residence might still be possible. In fact, most bilateral return agreements with countries of origin include a clause on re-admitting former residents who are (presumed) stateless.<sup>96</sup> The Aliens Act demands every irregular migrant's cooperation, stateless or otherwise. As one official put it: "statelessness itself is not leading, but rather the question whether there is *any* country to which one can return", adding later that "our system is a shovel board with all kinds of boxes; stateless just isn't one of them".<sup>97</sup>

The judge who rules whether or not the decision to detain was lawful often also assumes deportation to be possible, at least without clear evidence to the contrary: "judges often grant the DT&V a number of weeks or even months

to prepare deportation”.<sup>98</sup> Other observers also stated that judges are rather prone to accepting the authorities’ viewpoint that removal could be effectuated sometime in the near future, for instance when embassies have not yet issued a laissez-passer to facilitate return.<sup>99</sup> However, when it is time to consider whether detention may be extended beyond the initial six-month period, a more thorough examination takes place, including a review of the prospect of deportation.<sup>100</sup> In general, the government has announced that as part of its recent policy changes, DT&V will more closely examine whether deportation can be arranged soon, and whether alternatives to detention have become available since the initial decision to detain was taken.<sup>101</sup>

The abovementioned concerns about the decision-making process notwithstanding, statistical evidence clearly indicates that on average the decision to detain is taken much more infrequently than just a few years ago, as shown by a starkly declining influx into detention centres and these facilities’ lowered capacity. These statistics are corroborated by observations from practitioners. Several specialised law firms from around the country confirmed that, in the words of one respondent, authorities have become “about 100% more reticent” to impose detention.<sup>102</sup> This decline is also evidenced by the reduced number of detention-related cases before the Legal Aid Service [*piketdienst*].<sup>103</sup>

### 3.3 LENGTH OF DETENTION

Before the EU Return Directive entered into force in 2010, alien detention could in principle go on indefinitely. However, the Directive now provides a number of clearly delineated instructions on the maximum length of detention, all of which have been transposed into national legislation: it may not exceed six months initially, but may be extended for another 12 months after judicial review. This extension may be approved due to a lack of cooperation, or because of “delays in obtaining the necessary documentation from third countries.”<sup>104</sup> This latter point clearly renders stateless persons, for whom obtaining proof of identity or nationality is intrinsically difficult, at disproportionate risk of lengthy periods of detention. However, due to the centrality of the imminent prospect of deportation in Dutch legislation and jurisprudence, this presumption finds only limited base in the available evidence. In fact, length of detention is a poor proxy for statelessness, because when prospects of removal are poor, detention may not be imposed at all. In 2012 and 2013 for instance, considerably fewer people of Chinese and Iraqi origin were detained, precisely because Courts had determined the prospects of their imminent deportation to be too slim.<sup>105</sup> In fact, both countries tumbled out of the ‘top 10’ in 2013, suggesting that detention practices follow judicial decisions quite closely.

Having said this, it has been observed often that the ‘prospect of deportation’ is defined liberally by both the authorities and the judiciary. Indeed, 2013 saw 451 persons detained for more than six months, without this leading to observable return. In 2014 the figure dwindled, but 256 persons were still held without achieving the formal objective of their detention: their return. After six months of detention, removal was only achieved in 16.6% and 14.3% of cases (2013 and 2014 respectively).<sup>106</sup> Amnesty International reported that “in case of countries where returns are demonstrably difficult, [officials] often refer to a tiny number of successful cases of (forced) return, which supposedly show that a prospect of deportation exists in all cases”.<sup>107</sup> Another source confirms that the determination of one’s ‘prospect of deportation’ – and thus the extension of detention – hinges on the successful removal of compatriots. In the words of one lawyer: “if one Chinese person is removed, this means the prospect of deportation is confirmed”.<sup>108</sup>

However, a number of countries refuse almost systematically to facilitate the return of their citizens, certainly if the person concerned does not state explicitly that return is voluntary. In line with standing jurisprudence, non-cooperation may occlude the prospect of deportation, but detention may still be extended because potential *future* cooperation might improve this prospect.<sup>109</sup> In the case of *Abdi v the United Kingdom* the European Court of Human rights ruled that “[w]here return was not possible for reasons extraneous to the person detained, the fact that he was not willing to return voluntarily could not be held against him since his refusal had no causal effect”.<sup>110</sup> This judgment is consistent with the non-punitive nature of administrative detention – i.e. detention should not be used to punish those who refuse to cooperate. Accordingly, even a stateless person refusing to cooperate with return may not be held in detention any longer if return was not likely anyway.

Country-based statistics also show that deportation to several states is notoriously difficult. The DJI writes that “Algeria and India for instance are countries to which it is hard to deport; on average Indians and Algerians therefore spent 142 days in alien detention in 2013. Their relative presence in a facility’s population is therefore considerably higher than in its influx”.<sup>111</sup> In spite of this knowledge, lengthy detention for presumed nationals from these and other countries remains very common. In 2014, none of the 31 Algerians who were detained for more than 6 months were deported. Similarly depressing results apply to Egypt (1 out of 17), Surinam (1 out of 16) and those of unknown nationality (0 out of 32).<sup>112</sup> In the same year, one registered stateless person was detained longer than 6 months, but not deported. Looking back at people detained for more than 6 months in 2013, a similar picture emerges, with the addition of Guinea (3 out of 18 successful deportations), Ivory Coast (0 out of 11), Palestine (1 out of 10), Sierra

Leone (1 out of 10), and Sudan (0 out of 15). A negative record is set by people of unknown nationality: only 1 out of 76 long-term detainees was deported. With such a low rate of success, this practice would appear to point to a punitive purpose of alien detention after all. Lastly, in 2013, two stateless persons were detained for more than 6 months, one of whom was returned to the former country of habitual residence.

### 2013 long-term detention

Nationality	Average duration (days)	Persons
India	142,3	116
Algeria	141,3	177
Sierra Leone	131,8	44
Guinea	129,1	73
Sudan	127,9	45
Unknown	92,3	294

Source: DJI

### 2014 long-term detention

Nationality	Average duration (days)	Persons
Algeria	139,6	122
India	122,1	78
Egypt	115,2	70
Guinea	109,0	43
Sierra Leone	100,5	35
Unknown	76,7	170

Source: DJI

Finally, it is important to remark that in spite of a considerable reduction in the number of persons that are detained each year, the average duration of 75 days is still significantly above many other European countries. Sweden, Finland and Denmark – although abiding by the same maximum terms under the EU Return Directive – maintain averages of 12, 29 and 31 days respectively. Belgium, France and Spain have instituted much shorter maximum terms than allowed under the Directive; eight months, 45 days and 60 days respectively.<sup>113</sup> Considering the hugely reduced efficacy of long-term detention in achieving its stated goal of return, this raises the question whether Dutch detention durations are disproportionate and consequently arbitrary.

## 3.4 REMOVAL AND RE-DOCUMENTATION

Recent ACVZ research showed that both municipalities and civil society organisations often regard the government's viewpoint that (voluntary) return is always possible as fiction – especially problematic because it also influences the decision to detain (see above). Advocacy organisations complain that immigration authorities

assume return to be feasible for an entire population based on a single individual who received travel documents. Moreover, it is the view of many legal professionals that although officials continue to highlight an individual's duty to depart throughout the removal proceedings, it is in fact common for consular authorities to refuse to oblige. Since most diplomatic representations will not confirm their non-cooperation in writing, undocumented migrants have a hard time substantiating that they are not to blame – a requirement if they are to apply for a no-fault permit.<sup>114</sup> Government agencies have a strikingly different interpretation of the facts on the ground: Ministry officials instead emphasise that “people often just pretend to cooperate with their return and could even approach their embassy, only to send them an empty envelope or a letter cursing the consul”.<sup>115</sup> These opposing views have given rise to a situation in which most discussions revolve around the question of culpability: who is to blame for the fact that people become ‘unremovable’?

In a series of interesting case studies, the Dutch Refugee Council described the situation of several stateless people (and persons at risk), who could not meet the stringent evidentiary requirements of the no-fault procedure, and were stuck in limbo as a result. In the case of Egide from Burundi, his embassy would only allow his return home if he showed a passport, which he could only obtain from *within* Burundi. Exasperated, Egide commented that “the last two meetings with DT&V were strange. They told me that there's nothing they can do, because they're dependent on [Burundi's] embassy. In the meantime I should undertake additional efforts, but what those are they don't mention. I think they want to go on like this for years”.<sup>116</sup> In a different case, Samuel from Guinea described the re-documentation process as follows: “this is the last time we'll visit the embassy”, DT&V said. ‘Afterwards we'll recommend you for a no-fault permit.’ But each time it turns out there's another ‘last try’. [...] I've been working on my return for six years now. If I could've gone back I would have done so a long time ago”.<sup>117</sup> If, somewhere along the road of countless attempts at re-documentation, the authorities feel that removal proceedings are being frustrated, detention looms.

The consular authorities of several countries rarely respond to people's inquiries, or take exceedingly long to do so. This is particularly problematic for persons who have to await any possible reply from a detention centre. Making use of the Public access to government information act [*Wet openbaarheid van bestuur*, or Wob], internal country analyses from the DT&V revealed that forced removal is indeed impossible to several countries (e.g. Ethiopia, Iran, Sierra Leone, Somalia), but that even voluntary return to for instance China is generally unattainable if one does not already possess documents.<sup>118</sup> People who do decide to actively pursue



their return are offered (non-confined) shelter for a period of 28 days, from where they can prepare for their departure. If documents have not become available in this timeframe, they may be transferred to a freedom-restricting location for a maximum of 12 more weeks (or 84 days). However, these periods are demonstrably too short – and the authorities know this – since the DT&V's country information reveals that 'difficult' embassies may take anywhere between 101 and 1,051 days to issue a *laissez-passer* – or of course not at all. In a rather unsavoury turn of events, interviewee Ivan Niyazov

recalls: "the lady from the IND told me 'you know very well how to leave: just buy a passport. You did it before, didn't you?' I told her I did so once before, and look where it got me..."<sup>119</sup>

	Average duration of a LP application in 2012	Average duration of a LP application in 2013	Average duration of a LP application in 2014
Afghanistan	No LPs issued. Forced removal possible with EU travel document		
Armenia	231 days	294 days	538 days
China	No LPs issued	1,051 days	101 days
DRC	186 days	146 days	101 days
Eritrea	No LPs issued. No forced removal		
Guinea	390 days	226 days	134 days
Iraq	No LPs issued. Forced removal may be possible with EU travel document		
Iran	No LPs issued. Forced removal only with valid (Iranian) travel document		
Nigeria	154 days	224 days	122 days
Sierra Leone	No LPs issued		
Sudan	238 days	203 days	No LPs issued
Somalia	No LPs issued. Return possible with EU travel document		

Source: DT&V<sup>120</sup>

In some case, when an identity or travel document has finally been obtained, the IND rejects their validity because they were not acquired under presentation of *other* identity documents, or because the embassy's investigation is considered insufficient.<sup>121</sup> Further reports indicate that efforts to obtain proof of identity or nationality in countries of origin may be stymied by the Dutch embassy there, because it refuses to legalise documents on grounds that they belong to a person without legal residence in the Netherlands.<sup>122</sup> Recently it even came to light that the Dutch authorities had for years deported allegedly Guinean nationals using fake documents: journalists uncovered that the Guinean Ministry of Interior, supposedly the issuing authority, was closed in 2010.<sup>123</sup> The Ombudsman also admonished the DT&V for repeatedly pursuing one person's removal without proper documents, all the while detaining him too.<sup>124</sup>

Incidents such as these, combined with the generally difficult practice of re-documentation, present a need to impose a time limit on attempts at expulsion. Another potential improvement is found in Germany, which "sometimes brings the representatives of various

embassies together to prevent what the German authorities call 'embassy tourism', that is, to limit the risk that various successive embassies reject the migrant as their own".<sup>125</sup> A denial of responsibility from all embassies present should result in a positive determination of statelessness. This might in turn release people from the burden of futile embassy visits and shield them from future detention. After all, especially when a failure to realise deportation is not proven to be due to an individual's own (in)actions, punishment for an inability to leave is particularly harsh. Indeed, "under Article 7 of the International Covenant on Cultural and Political Rights repeated attempts at expulsions to a country which is not guaranteed to admit the individual concerned may amount to inhuman or degrading treatment".<sup>126</sup> At present, people interviewed for this report wasted years attempting to secure travel documents, long after any realistic chance of their embassy's cooperation had faded. Yusuf was presented to Kenyan, Ugandan and Tanzanian embassies, based on hunches about his accent.<sup>127</sup> Pamma lost count of how many times he visited the Indian embassy, and the resulting frustration is absolute: "I begged to be taken back", Pamma recalls. "I don't have a life here". The consul however stated clearly that without

proof of his Indian citizenship he would not be allowed to return. “I’m not even angry, just sad. Still, it’s no use thinking about the future; I’m basically dead already”.<sup>128</sup>

The practices described in this chapter complicate people’s attempts at acquiring proof of citizenship. They increase the risk of future statelessness, prevent current cases from being recognised as such, and causes people to languish in detention much longer than can be considered justifiable. Stateless persons are also expected to go through the motions of re-documentation, even though their attempts might appear inherently futile. In the eyes of Dutch authorities, however, stateless persons are not exempt from a duty of return. Even when their statelessness is not in contention, return to a former country of habitual residence might still be possible.<sup>129</sup> While this practice in itself does not contravene the Statelessness Conventions, it is worthwhile to recall UNHCR’s viewpoint on this matter: “protection can only be considered available in another country when a stateless person (i) is able to acquire or reacquire nationality through a simple, rapid, and nondiscretionary procedure, which is a mere formality; or (ii) enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible”.<sup>130</sup>

### 3.5 ALTERNATIVES TO DETENTION

After the suicide of Alexandr Dolmatov (see section 1.3), one of the government’s most explicit commitments was to explore and apply the use of alternatives to detention to a much greater extent. This is particularly relevant to avoid any arbitrariness in the decision to detain, since unnecessary detention is arbitrary per se.<sup>131</sup> This then obligates the exhaustion of any alternatives, starting with those least restrictive and, where necessary, moving on to more restrictive options. Thus, alternatives are not ‘optional good practices’, but in fact essential in order to ensure that detention is not arbitrary. While in the past the Aliens Act Implementation Guideline [*vreemdelingendecirculaire*] offered specific instructions on the application of alternatives to detention, this document was drastically shortened in 2013. Currently the only provision states that “the alien’s file must demonstrate that the official charged with border monitoring or supervision of aliens has properly weighed interests before imposing detention”.<sup>132</sup> This clearly provides the authorities with considerable discretionary powers.

In the Netherlands, a number of pilots were initiated in early 2012. Three different approaches were tried out: (i) a reporting duty combined with intensive DT&V case management; (ii) a bail system to prevent people from absconding; and (iii) increased cooperation with NGOs supporting voluntary return. From the outset though, the Ministry of Security and Justice formulated strict

participation requirements. The pilots were only available to persons who:

- Had never been convicted of any crime;
- Do not obstruct their return in any way;
- Have not been detained at the border;
- Had never evaded other forms of supervision;
- Had not yet applied for a residence permit.

The State Secretary himself indicated that “most aliens in detention did not meet these requirements [...] and] as a result the group who could make use of these pilots was small”.<sup>133</sup> Although it had a high rate of voluntary return (presumably due to stringent pre-selection), the pilot on imposing a reporting requirement had only 20 participants in 2012. Approximately three persons a month made use of the bail system.<sup>134</sup> The graph below illustrates all alternatives available at present.

Investigating the application of alternatives to detention is a clear step in the right direction. The fact that the ‘new and improved’ version of Article 59 Aliens Act will explicitly require less coercive measures to be considered adds weight and credibility to this intention. However, neither current legislation nor the announced reforms clearly specify how this duty to consider alternatives is guaranteed in individual cases. It is, after all, no longer a matter of benevolence, but rather a clear obligation under the Return Directive, the European Convention on Human Rights and the ICCPR.<sup>135</sup> In this regard, the ACVZ already recommended that the initial decision to detain should motivate explicitly why an alternative is not being applied.<sup>136</sup> Furthermore, it is important to note that the first two ‘new’ alternatives – reporting and bail requirements – were both hamstrung by very low participation due to potential participants’ limited willingness to return. It appears that a double standard is being applied here. After all, alien detention’s primary purpose is to ensure people remain supervised while their (forced) return is under preparation. While in detention, some people cooperate, others do not. Similar reasoning ought to be applied to the use of alternatives: as long as supervision is maintained and the risk of absconding mitigated, requiring full cooperation with return is counterproductive. This is particularly important because a requirement of full cooperation would undermine the purely ‘administrative’ nature of immigration detention and would introduce a punitive element (punishing those who do not cooperate by detaining them) that is not legitimate. Moreover, the use of alternatives is not only a means to an end (removal), it is also an end in itself: exploring less coercive methods of maintaining oversight. By more reasonably interpreting the prospect of removal, and by contemplating alternatives in case one’s view to expulsion is uncertain, stateless people would also benefit.



Source: Ministry of Security and Justice

### 3.6 CHILDREN, FAMILIES AND VULNERABLE GROUPS

Even when compared to just a few years ago, the situation with regard to the administrative detention of children and families has witnessed major changes.<sup>137</sup> Again spurred on by considerable public debate and a prolonged civil society campaign, but also by new case law, the first big overhaul came in March 2011 when it was announced that unaccompanied minor asylum seekers (UMAs) would in principle not be detained anymore. Only when deportation can be arranged within a matter of days, is it still considered acceptable. In 2013, this happened to four children, although another 25 were transferred to a regular juvenile detention centre.<sup>138</sup> For several years though, the situation was quite different for children arriving by air or sea, because preventing entry to the Schengen zone was considered of such importance that detaining them remained a possibility. In 2013, 70 families with 120 children were held in Schiphol's custodial facility, although usually very briefly.<sup>139</sup>

As of May 2014, the government formally adopted the viewpoint that no child should be detained and announced that a new closed facility with a special child-friendly regime would be opened in 2015. Here families stay together in separate pavilions that can be locked from the inside. Guards do not wear uniforms and people are free to roam the terrain, though they are still deprived of liberty for a few days until they are transferred to a reception facility to process their (asylum) claim. Families who are scheduled for deportation but who refuse to cooperate will soon be placed in this facility too. Since September 2013, families whose deportation was imminent were not detained at all, but Ministry officials remarked that too many of them disappeared for this

'leniency' to continue.<sup>140</sup> Many human rights organisations responded enthusiastically to the proposed changes, though they also warned that the availability of a child-friendly location should not in practice *encourage* the decision to deprive a family of its liberty.<sup>141</sup>

More generally, the government has stated that for people with physical disabilities, medical issues and the elderly alternative measures may be applied, but that detention is still the "appropriate instrument" if other kinds of supervision have not led to return.<sup>142</sup> It has been observed repeatedly that detainees often struggle with serious psychiatric difficulties, which detention centres are often ill-equipped to deal with (note for instance the use of solitary confinement as a 'suicide watch' instrument – see chapter 3(g)). The Aliens Police has previously acknowledged that very few alternatives exist for undocumented persons with mental health problems. They are sometimes placed in a detention centre "because it seems better than to put them back on the street".<sup>143</sup> From interviews conducted for this report it is certainly evident that the mental toll exerted by detention is not to be underestimated: "I can't trust people anymore", Ivan Niyazov confided. "It doesn't matter who you are. Detention changed me. My wife now calls me an oyster, 'you're always shut', she says".<sup>144</sup> Mohammed Al-Fadhly, who stays in the more relaxed freedom-restricting location, told how ever since he arrived in the Netherlands his health has been deteriorating: "I'm constantly tired, I have stomach bacteria and hyperventilation. I'm stressed, at night I scream because of my nightmares." He lost a lot of weight and has tremors in his left hand. Openly gay, he was sexually assaulted by fellow residents.<sup>145</sup>

Sometimes detention exacerbates an existing condition, in other instances it was the very cause. This is compounded by the fact that, as remarked before, there are no clear guidelines to identify conditions under which detention is certainly *not* permitted. The new Return and Detention Law does not aspire to include such parameters.<sup>146</sup> This is a missed opportunity, because a sound assessment of prevailing vulnerabilities is essential to ensure the proportionality of any decision to detain, as well as protection from torture, cruel, inhuman or degrading treatment and discrimination.<sup>147</sup> Anchoring such principles in legislation is all the more important, because current practice indicates that individual circumstances are not weighed heavily during the initial decision to detain. This is in spite of the Return Directive's provision that "*particular attention shall be paid to the situation of vulnerable persons*",<sup>148</sup> which is hard to do if there is no process to identify people as such. Thus, such legislative change would also bring Dutch law fully in line with the Directive and Netherlands' international human rights obligations. Though not currently the case, the inherently diminished chance of return for stateless persons means they too must be considered a vulnerable group.

### 3.7 CONDITIONS OF DETENTION

Back in December 2011 the then-State Secretary characterised the regime in Dutch detention centres as "just shy of a hotel". Unfortunately, this is not quite the case, although improvements – particularly with regard to medical care – are underway.<sup>149</sup> Detainees are under lock and key for 16 hours a day; 97% share their cell with another person. They never know for how long they will be held (the prospect of deportation is not clear-cut in most cases), but contrary to criminal detention it is not permitted to work or access education. After all, alien detention is not aimed at their re-socialisation, but squarely at ensuring people's availability for deportation. Transport may, whenever necessary, occur under guard and/or handcuffed. Visits are strictly regulated and visitors need to present a valid ID.<sup>150</sup> This means that stateless detainees usually cannot receive guests if they are in a similar predicament (although the State Secretary indicated this requirement might be revisited).<sup>151</sup> Until March 2015, strip- and cavity searches were standard practice.<sup>152</sup> It is telling that two major administrative detention facilities (at Schiphol and in Zeist) in fact double as regular penitentiaries, even though the departments are separated.

One particularly distressing practice is the use of solitary confinement, either as a disciplinary measure; or as a method of maintaining order (i.e. protecting the detainee from harm to self or others). In border detention this measure can only be applied in the latter case, not as punishment. This is, however, set to change under the new Return and Detention Law, because it unifies the

detention regime. Hazem from Palestine recalls how after receiving word of his rejected asylum claim, "I panicked and asked for something to calm me down. The [border detention] guards though, they placed me in an isolation cell, stripped me of my clothes and handed me a paper gown".<sup>153</sup> Hazem's personal history of solitary detention and torture by Hamas was not taken into account. This was by no means an isolated incident though: in 2013, 662 persons were placed in solitary confinement. On average, isolation lasts 4.8 days if it has been imposed for disciplinary reasons and 4.5 days for reasons related to order.<sup>154</sup> Information released under the Access to public information Act confirms that isolation is applied e.g. when people refuse a cavity search; decline to enter their cell; exhibit suicidal behaviour; go on hunger strike; or resist transportation.<sup>155</sup>

Although the new law intends to emphasise the administrative character of alien detention, some observers have expressed concern that key provisions are carbon copies of the old Penitentiary Principles Law.<sup>156</sup> What's more, the facilities are still managed by the Custodial Institutions Agency, which is also responsible for all criminal prisons in the country. Thus alien detention remains "very much penitentiary in nature".<sup>157</sup> In line with this, a variety of disciplinary measures exist, including – in ascending order of severity – suspension of pocket money; exclusion from activities; seclusion in room; reduction in visiting privileges; and lastly detention in an isolation cell. The new law also provides the director of a detention centre with the capacity to physically force a detainee to attend embassy presentations or removal meetings with DT&V. During an interview Ministry of Justice officials explicitly stated that these punishments cannot be applied simply because someone is generally uncooperative with his or her return process.<sup>158</sup> Clearly this is still a source of confusion though, because Article 22 of the proposed law states that cooperating with one's return proceedings is mandatory while in detention. Moreover, the annex to the draft law goes on to explain that staff members can issue an order to cooperate, and that failure to do so may result in a disciplinary measure.<sup>159</sup>

### 3.8 CONDITIONS OF RELEASE AND RE-DETENTION

As shown in chapter 3(b), Dutch law specifies clearly under what conditions detention may be imposed. Quite the opposite applies to people's release. The Aliens Act only offers that detention should be ended when "the alien indicates he wishes to leave the Netherlands and the opportunity to do so exists".<sup>160</sup> Before the Implementation Guidelines were overhauled in 2013, they explained that this meant "the alien had to be in possession of the necessary valid travel documents and a ticket or sufficient means to put departure into effect".<sup>161</sup> This is obviously problematic for any stateless persons in



detention, who may be inherently unable to meet this requirement for release. However, the Aliens Decree clarifies that “detention should be lifted as soon as its grounds no longer prevail”.<sup>162</sup> Obviously, release also occurs when the maximum detention period has been reached, but in practice these limits are rarely reached. After all, the view to expulsion is paramount. Most often, when deportation has not proved possible for some time, either the authorities or a judge conclude that this prospect is not going to resurface anytime soon. The person concerned is then released from aliens or border detention without further ceremony: Hazem Haboush, from Palestine, told of the shock he experienced when he was told his asylum claim was rejected, but that he would nonetheless be released from detention because he could not be deported.<sup>163</sup> It is important to note that this release did not in any way absolve him of his duty to return, nor did it imply legal stay.<sup>164</sup> Instead, Hazem ended up in a twilight zone where his return might be impossible, but a residence permit and the security that comes with a legal status is an equally distant prospect.

Interviewees generally had no idea on what grounds they were released, or what they were expected to do next. Mohammed for example, a stateless Bidoon from Kuwait, described how less than a week after his asylum application was rejected, he was released from border detention without any explanation whatsoever. Suddenly, he found himself on the streets. “This was my biggest shock. I had never travelled abroad, didn’t know where to go. I slept in the airport for a week, just walking around the terminal during the day”.<sup>165</sup> Ivan from the former Soviet Union says he lost track of how often he was detained. When asked about the reasons behind his release, he explained: “I can’t count how many times the DT&V tried to deport me. But they never give you any information. In criminal detention, at least you know what will happen to you.” His prospect of deportation was never discussed, never explained to Ivan. He continued to follow the DT&V’s instructions, and wrote to both Uzbek and Russian embassies. “They never tell me their replies though. I just sit and wait until they release me again”.<sup>166</sup>

Many interviewees are haunted by thoughts of a repeat of events; by no means an irrational fear, considering how 27% of all people in alien detention centres were held at least once before. Although human rights organisations lament that repeat detention causes the EU Return Directive’s statutory limit of 18 months to be easily overshoot, this is not the position of either the government or (it would appear) the Council of State. They contend that the counter is reset after each period in detention, instead of adding up cumulatively. Indeed, in one lawyer’s experience the Aliens Police rarely considers a (recent) previous period in detention relevant when arresting or deciding to detain someone. Courts on the other hand do consider efforts to deport in the past 12 months (the authorities must then demonstrate that new facts and

circumstances apply) – beyond that these become irrelevant.<sup>167</sup>

The Aliens Act Implementation Guidelines even state that “it is possible to re-detain the alien immediately after release”, as long as the assistant public prosecutor presents new facts and circumstances. This may be the case when “necessary travel documents have been procured, *or may be in the near future*”.<sup>168</sup> Even though time limits exist for each individual detention period, this practice makes the total detention duration theoretically limitless, especially for people who are difficult to deport. The government sees its approach validated by recent research, which found that a second, third and fourth period in detention act as a sufficiently strong deterrent to inspire slightly increased cooperation with return. After cycle five and beyond, this effect has become statistically negligible.<sup>169</sup> This practice is, quite simply, inhumane. The human consequences of spending years imprisoned, as well as the considerable efforts and resources expended by the government, in no way justify the marginal increase in cooperation with return – even less so because it was gained by deliberately reinforcing people’s sense of desperation. Anecdotal evidence confirms that the DT&V occasionally uses people’s fear of detention to impose compliance. Angela and Christina from Azerbaijan remember how their family was called up in 2014, and that the DT&V “threatened that ‘they could easily send the aliens’ police to Roermond’. They then said that Armenia had promised its cooperation with our return, but when we called the embassy to confirm, they denied that a conversation with the DT&V had ever taken place”.<sup>170</sup> In short, immigration detention can never be used as a *deterrent* or as a *punishment* for non-compliance (e.g. with return), but only as an instrument to ensure people remain within the authorities’ ambit as it seeks to achieve deportation.

## 4. CONCLUSION AND RECOMMENDATIONS



The issue of statelessness in the Netherlands has only recently emerged from near-total obscurity. However, precise data on the presence of stateless persons in administrative detention facilities remains elusive, mostly due to inaccurate registration of statelessness at the municipal level; the inability to share data between several government stakeholders; and the current absence of a statelessness determination procedure. Nevertheless, it is very clear that the use of immigration detention in general has declined markedly in just a few short years. Budgeted cuts dovetailed with civil society campaigns to reduce the routine application of administrative detention, and both the annual influx of detainees and the average detention capacity have gone down enormously. This process has been spurred on by changes in legislation, firmly establishing detention as a measure of last resort only. The limits on the use of detention imposed by the EU Return Directive are now well respected (at least in law). It must be noted though, that many other European countries impose shorter time-limits for detention, and so there is room for further improvement in this regard, as there is greater scope to curb multiple detentions.

In spite of several positive developments, a number of problems remain deeply entrenched. In general, procedural solutions to statelessness are still too limited. Their cases are often regarded from an ill-fitting asylum perspective, and especially the situation of non-refugee stateless persons is easily misunderstood. Perhaps the biggest issue is that authorities fail to acknowledge the fact that in most cases of statelessness, return has become intrinsically impossible. Since detention may only be imposed as long as a clear prospect of deportation exists, this implies a due diligence requirement to rule out statelessness prior to any decision to detain. A future statelessness determination procedure could play a crucial role in this regard, preventing the incarceration of persons whose return is *a priori* infeasible. Currently this discovery is often made a few weeks *after* detention has already been ordered. The prospect of deportation is too easily assumed to exist (e.g. based on a single successful removal), and examination of personal circumstances – including the juridically relevant fact of statelessness – figure insufficiently or not at all in the decision to detain.

The view to expulsion is also of central importance for the length of detention. The average duration of detention in the Netherlands is significantly higher than that of many other European countries. However, the most clear-cut cases of statelessness probably face only relatively brief periods in detention (if held at all), because the prospect of deportation is so obviously absent. This does mean however, that persons whose citizenship status is more complex, including those at risk of statelessness are more likely to be detained for disproportionately long periods. This is especially concerning where the inability to return is not due to one's lack of cooperation, but because of some embassies' systematic refusal to facilitate the return of their nationals. Indeed, Dutch authorities are aware of these 'difficult countries', and the time spent in detention by their citizens is twice the overall average. What's more, in the case of several countries, long-term detention did not lead to any deportations. Here, administrative detention appears to have become punitive in nature; to act as a deterrent instead of a measure of supervision.

The authorities' renewed commitment to the application of alternatives to detention is cause for celebration. A swift scale-up of the existing possibilities, and widening of their scope, would give real meaning to this ambition. It is also important to recall the ACVZ's recommendation that any future decision to detain should clearly motivate why an alternative was not employed. In general though, neither current nor proposed legislation specify when detention *may not* be used – even though exhaustive criteria do exist for when it *should*. There is room for improvement here, because a sound assessment of prevailing vulnerabilities is essential to ensure the proportionality of any decision to detain. Statelessness might well be considered as one such vulnerability, in which case detention should not be imposed. This is all the more important because circumstances in detention remain harsh, despite recent changes and a new draft law regulating the regime. The still common use of solitary confinement as a disciplinary measure is very distressing indeed.

One of the most important contributions the Dutch government can make in the lives of stateless people, is to end what has often amounted to a lifetime of uncertainty. Without clear procedural solutions, they will continue to fear repeated detention, while also being unable to return. Even when released, few stateless persons perceive a solution, and they are often left to live aimlessly and invisibly on the margins of society. Actively utilising the threat of imprisonment to enforce their cooperation with return is simply inhumane, but also mostly ineffective. As the United Nations highlighted, “for detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory”.<sup>171</sup> Having made several meaningful reforms already, and with a new

determination procedure in the horizon, the Netherlands now can and should offer a durable solution to all stateless people in the country.

### Recommendations on identifying statelessness

1. The Netherlands should expedite the introduction of a statelessness determination procedure – accessible to all persons in the territory of the country. Determination of statelessness in a dedicated procedure should unequivocally rule out detention, as it precludes the view to expulsion. Alternatives to detention may be employed to effectuate return to a country of former habitual residence, as long as this is not in violation of the principle of *non refoulement* and (at least) permanent residence status is on offer there.
2. Return is rarely easy for stateless persons. This vulnerability must be taken into account when deciding to detain, and in order to do so, statelessness must be identified first. Thus, in removal proceedings, where there is lack of clarity around the nationality of an individual, or there is reason to believe an individual may be stateless or at risk of stateless, such individuals should be directed to the dedicated statelessness determination procedure before a decision to detain is taken. Failure to do so is likely to render detention arbitrary.
3. In case a person of unknown nationality is detained, investigate actively whether this might impact the prospect of deportation. For those at risk of statelessness, a good determination procedure could highlight their particular circumstances so that if detained, they benefit from greater scrutiny of the process.
4. Develop practical policy [*werkinstructies*] vis-à-vis stateless persons in regular or asylum procedures, as well as in the administrative detention system. Linking up the IND registration system with DJI's database might lead to better identification of relevant cases and allows for an adequate response.
5. To protect from detention, provide a temporary residence permit upon determination of statelessness, and facilitate the issuance of an identity document for all recognised stateless people – regardless of their residence status. This means a competent authority to issue these must also be appointed.

### Recommendations on the decision to detain

6. Ensure that detention is always used as a last resort, after all alternatives (starting with the least restrictive) are exhausted. Alternatives should not be used as a reward for cooperation with removal. If detention is deemed to be necessary, the initial decision to detain should motivate explicitly why an alternative is not being applied.

7. Examine the prospect of deportation more thoroughly and in an earlier stage before a decision to detain is made. It should not hinge on isolated cases of successful removal, but instead be reflective of the outlook more generally. Applying detention when it could already have been determined that deportation is unattainable, should be considered arbitrary. Documents that might come available in the future cannot justify detention in the interim. If the risk of absconding is high, alternatives to detention can be employed.

#### **Recommendations related to removal, release from detention and re-detention**

8. Efforts at re-documentation should be subject to limitations, both in terms of time and the number of embassy presentations. After repeated rejections or prolonged non-response, statelessness should be assumed – and all corresponding rights offered. People must not end up as victims of a state's reluctance to facilitate return.
9. The Aliens Act should contain clear provisions outlining the criteria for repeated detention and impose a limit to the number of times it may be applied as an instrument to facilitate return. The total cumulative period of detention should be recorded. Detention should not be used as a means to enforce cooperation with return. Punishing non-cooperation in this way is contrary to the administrative nature of alien detention.
10. Past efforts to deport should be considered more strongly in any decision to re-detain, both by the Aliens' Police assistant public prosecutor, and by courts – also beyond the 12 month period that most courts now appear to apply.
11. All released detainees (who could not be removed within a reasonable period of time), should be granted at least a temporary legal status with corresponding rights relevant to their situation. Documentation which protects them from re-arrest and detention should be provided in all cases, at least until meaningful new facts or circumstances have arisen.



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# ENDNOTES



- <sup>1</sup> Kim v. Russia [2014] Application no. 44260/13 (ECtHR) para. 54
- <sup>2</sup> European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2015)
- <sup>3</sup> Further information is available on the European Network on Statelessness website at [www.statelessness.eu](http://www.statelessness.eu)
- <sup>4</sup> UNHCR, Mapping Statelessness in the Netherlands (November 2011) para 33
- <sup>5</sup> Ibid, para 79
- <sup>6</sup> Ministerie van Binnenlandse Zaken, Beleidsreactie UNHCR-rapport 'Staatloosheid in Nederland' [Policy response to the UNHCR report 'Statelessness in the Netherlands'] (2012)
- <sup>7</sup> Adviescommissie voor Vreemdelingenzaken, Geen land te bekennen [No country of one's own] (2013)
- <sup>8</sup> Ministerie van Veiligheid en Justitie, Eerste reactie van het kabinet op het advies van de ACVZ inzake staatloosheid [First response from the cabinet to the ACVZ advice on statelessness] (2014)
- <sup>9</sup> Ministerie van Veiligheid en Justitie, Aanvullende reactie van het kabinet op het advies van de ACVZ inzake staatloosheid [Additional response from the cabinet to the ACVZ advice on statelessness] (2014)
- <sup>10</sup> Ministerie van Veiligheid en Justitie, Eerste reactie van het kabinet op het advies van de ACVZ inzake staatloosheid (2014) at 3
- <sup>11</sup> Amnesty International, Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf (2013)
- <sup>12</sup> Adviescommissie voor Vreemdelingenzaken, Vreemdelingenbewaring of een lichter middel? [Aliens' detention or a less intrusive measure?] (2013)

- <sup>13</sup> Adviescommissie voor Vreemdelingenzaken, Waar een wil is maar geen weg [Where there's a will but no way] (2013)
- <sup>14</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague, (31 March 2015)
- <sup>15</sup> Amnesty International, *Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf* (2013) at 6. Most recent figures date from 2014, when the average duration in detention was 67 days. See *Dienst Justitiële Inrichtingen, Vreemdelingenbewaring in Getal - 2010-2014* (2015) at 33
- <sup>16</sup> Trb. 1967, 73. Entry into force in the Netherlands on 2 April 1937. The preamble reads: 'Being convinced that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only; recognizing accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases of statelessness and double nationality'.
- <sup>17</sup> Trb. 1967, 74. Article 1 reads: 'In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State'.
- <sup>18</sup> Trb. 1966, 237. Entry into force in the Netherlands on 9 December 1972. Articles 1 and 5 refer to nationality.
- <sup>19</sup> Trb. 1978, 177. Entry into force in the Netherlands on 10 March 1979. Article 24(3) provides: 'Every child has the right to acquire a nationality'.
- <sup>20</sup> Trb. 1980, 146. Entry into force in the Netherlands on 22 August 1991. Article 9(1) provides: 'States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They



- shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband'. Section 2 continues: 'States Parties shall grant women equal rights with men with respect to the nationality of their children'.
- <sup>21</sup> Trb. 1990, 170. Entry into force in the Netherlands on 8 March 1995. Article 7(1) reads: 'Every child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents'. Article 7(2) obligates States Parties to "ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."
- <sup>22</sup> Trb. 1998, 10 and 149. Entry into force in the Netherlands on 1 July 2001.
- <sup>23</sup> Trb. 2010, 99. The Convention was signed by the Netherlands on 16 September 2010.
- <sup>24</sup> See Amnesty International, *Vreemdelingendetentie en internationaal recht*, available at <http://www.amnesty.nl/vreemdelingendetentie-en-internationaal-recht> [accessed 16 May 2015]
- <sup>25</sup> For an examination of other Articles relevant to stateless persons (and those at risk), see ECRE, Flemish Refugee Action, Detention Action, France terred'asile, Menedek, *Point of No Return: The futile detention of unreturnable migrants* (2014)
- <sup>26</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF> [accessed 16 May 2015]
- <sup>27</sup> For further analysis on the EU Returns Directive see European Network on Statelessness, *Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners* (2015)
- <sup>28</sup> Equal Rights Trust, *Unraveling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons* (2010) at 99
- <sup>29</sup> United Nations High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014) at 40
- <sup>30</sup> Article 1(f), Rijkswet van 19 december 1984, houdende vaststelling van nieuwe, algemene bepalingen omtrent het Nederlanderschap ter vervanging van de Wet van 12 december 1892, Stb. 268 op het Nederlanderschap en het ingezetenschap
- <sup>31</sup> See e.g. UNHCR, *Mapping Statelessness in the Netherlands* (2011); UNHCR The Hague, *Legal observations regarding the proposal to amend the nationality act* (2015) (on file with the author); or ASKV Refugee Support, Defence for Children International – ECPAT Nederland, Dutch Section of the International Commission of Jurists and Institute on Statelessness and Inclusion, *public letter*, (30 January 2015) available at <http://www.defenceforchildren.nl/images/69/3717.pdf> [accessed 22 July 2015]
- <sup>32</sup> Ministerie van Veiligheid en Justitie, Aanvullende reactie van het kabinet op het advies van de ACVZ inzake staatloosheid [Additional response from the cabinet to the ACVZ advice on statelessness] (2014) at 2
- <sup>33</sup> For a more in-depth analysis of the Dutch legal framework on statelessness, see UNHCR, *Mapping Statelessness in the Netherlands*, December 2011.
- <sup>34</sup> Ibid, at 44-45. See also Adviescommissie voor Vreemdelingen zaken, *Waar een wil is maar geen weg* [Where there's a will but no way] (2013) at 14, 38; and VluchtelingenWerk Nederland, *Als terugkeer niet mogelijk is: Over beleid en praktijk van 'buitenschuld'* [When return is not possible: on the policy and practice of 'no-fault'] (2013)
- <sup>35</sup> Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet [Aliens Act 2000]
- <sup>36</sup> UNHCR and the Dutch Refugee Council, 'Pas nu weet ik: vrijheid is het hoogste goed': Gesloten Verlengde Asielprocedure 2010-2012 ['Only now do I realise, freedom is most precious of all'] (2013)
- <sup>37</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague (31 March 2015)
- <sup>38</sup> Dienst Justitiële Inrichtingen, (2014) at 28
- <sup>39</sup> Ibid, at 9. See also jurisprudence from the Administrative Jurisdiction Division of the Council of State, 1 July 2009, ECLI:NL:RVS:2009:BJ1600, para 2(4)(1); and more recently on 1 May 2015, ECLI:NL:RVS:2015:1485. Under EU case law too, for instance in *Kadzoev*, detention ceases to be justified when it appears that a reasonable prospect of removal no longer exists, in particular where it appears unlikely that the person concerned will be admitted to a third country before the expiry of the 18-month time limit. *Said Shamilovich Kadzoev v. Direksia Migratsia pri Ministerstvo na vatrešnite raboti* [2009] Case C-357/09 (ECJ)
- <sup>40</sup> Aliens Act 2000, Article 59(3), author's translation, emphasis added
- <sup>41</sup> Aliens Act 2000, Article 59(6), author's translation, emphasis added
- <sup>42</sup> Draft revised Article 59(1) Aliens Act 2000, mentioned in draft Return and Detention Law, at 20, available <https://www.internetconsultatie.nl/vreemdelingenbewaring> [accessed 17 May 2015]
- <sup>43</sup> Draft annex to the Return and Detention Law, at 38, available <https://www.internetconsultatie.nl/vreemdelingenbewaring> [accessed 17 May 2015]
- <sup>44</sup> Draft revised Article 59(3) Aliens Act 2000
- <sup>45</sup> Vulnerable groups, in line with Article 3(9) of the EU Return Directive, are minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence
- <sup>46</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr. 1721, at 32
- <sup>47</sup> In recent years, courts have ruled the 'prospect of deportation' to be absent for example for China, Iran, Iraq, Sierra Leone, and Somalia. They are not mentioned here in detail because returns policy towards individual countries changes rapidly.
- <sup>48</sup> Administrative Jurisdiction Division of the Council of State, ECLI:NL:RVS:2013:BZ4428 (March 2013)
- <sup>49</sup> European Court of Justice, 5 June 2014, C-146/14 PPU. See Administrative Jurisdiction Division of the Council of State rulings from 23 January 2015, ECLI:NL:RVS:2015:23 (2015)
- <sup>50</sup> District Court of Amsterdam ECLI:NL:RBAMS:2014:7153 (30 October 2014)
- <sup>51</sup> Administrative Jurisdiction Division of the Council of State, 23 February 2015, ECLI:NL:RVS:2015:674, para 1(1)
- <sup>52</sup> For more details, see UNHCR, *Mapping Statelessness in the Netherlands* (2011)
- <sup>53</sup> Ibid
- <sup>54</sup> Central Bureau for Statistics, 'Aantal asielzoekers fors toegenomen' [Number of asylum seekers significantly higher] (January 2015) Available at <http://tinyurl.com/stateless-cbs> [accessed 20 May 2015]
- <sup>55</sup> Dienst Justitiële Inrichtingen, *Vreemdelingenbewaring in Getal - 2010-2014* (May 2015), at 19
- <sup>56</sup> Adviescommissie voor Vreemdelingen zaken, *Vreemdelingenbewaring of een lichter middel? [Aliens' detention or a less intrusive measure?]* (May 2013), at 34
- <sup>57</sup> Dienst Justitiële Inrichtingen, *Vreemdelingenbewaring in Getal - 2009-2013* (July 2014), at 13-14
- <sup>58</sup> Amnesty International, *Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf*, (September 2013), at 9
- <sup>59</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague (31 March 2015)
- <sup>60</sup> Dienst Justitiële Inrichtingen, *Vreemdelingenbewaring in Getal - 2010-2014* (May 2015), at 28-29. Due to the methodology of a reference day, this does not mean that no children were detained at all: chapter 3(f) will clarify that this does in fact happen, but usually very briefly, reducing the chances of these events showing up in the available statistics
- <sup>61</sup> Dienst Justitiële Inrichtingen, *Een profielschets van vreemdelingen in bewaring 2010* (1 February 2012), at 30
- <sup>62</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague, (31 March 2015)
- <sup>63</sup> Correspondence with DJI, (6 April 2011)
- <sup>64</sup> Dienst Justitiële Inrichtingen, *Vreemdelingenbewaring in Getal - 2009-2013* (July 2014), at 21



- <sup>65</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague, (31 March 2015)
- <sup>66</sup> Dienst Justitiële Inrichtingen, Vreemdelingenbewaring in Getal - 2009-2013 (July 2014), at 20
- <sup>67</sup> This approach would directly contradict recommendations from the Advisory Committee on Migration Affairs (ACVZ), UNHCR and The Netherlands Institute for Human Rights
- <sup>68</sup> European Network on Statelessness, Statelessness Determination and the Protection Status of Stateless Persons (2013), at 36
- <sup>69</sup> Wet van 3 juli 2013 houdende nieuwe regels voor een basisregistratie personen (Wet basisregistratie personen)
- <sup>70</sup> Ministerie van Veiligheid en Justitie, Eerste reactie van het kabinet op het advies van de ACVZ inzake staatloosheid [First response from the cabinet to the ACVZ advice on statelessness] (10 September 2014), at 2
- <sup>71</sup> Interview with Mohammed Al-Fadhly – Amsterdam (18 April 2015)
- <sup>72</sup> S Janghai & C Vlieks, 'Buitenschuldbeleid schiet tekort in bescherming staatlozen', A&MR 05 &06 (2013), at 287-292
- <sup>73</sup> S Goudsmit, 'Bescherming van staatlozen in Nederland vraagt om een aparte vaststellingsprocedure', Nederlands Juristenblad, afl 7, (2014), at 466
- <sup>74</sup> VluchtelingenWerk Nederland, Als terugkeer niet mogelijk is: Over beleid en praktijk van 'buitenschuld' [When return is not possible: on the policy and practice of 'no-fault'], (September 2013), at 17
- <sup>75</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr. 1721, at 39
- <sup>76</sup> United Nations High Commissioner for Refugees (UNHCR), Handbook on Protection of Stateless Persons (2014) para 23
- <sup>77</sup> United Nations High Commissioner for Refugees (UNHCR), Mapping Statelessness in the Netherlands (2011), para 82
- <sup>78</sup> Interview with Ivan Niyazov (pseudonym) Rotterdam (31 March 2015)
- <sup>79</sup> See jurisprudence, confirming the right to identity documents even for illegally residing stateless persons, from the District Court The Hague, 19 February 2014, ECLI:NL:RBDHA:2014:2255
- <sup>80</sup> Interview with Ivan Niyazov (pseudonym), Rotterdam (31 March 2015)
- <sup>81</sup> United Nations High Commissioner for Refugees (UNHCR), Mapping Statelessness in the Netherlands (2011), para 79
- <sup>82</sup> Dienst Justitiële Inrichtingen, Vreemdelingenbewaring in Getal - 2009-2013 (July 2014), at 16
- <sup>83</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague (31 March 2015)
- <sup>84</sup> Adviescommissie voor Vreemdelingenzaken, Vreemdelingenbewaring of een lichter middel? [Aliens' detention or a less intrusive measure?] (May 2013), at 25-26
- <sup>85</sup> Article 59 of the Aliens Act 2000 [Vreemdelingenwet 2000]
- <sup>86</sup> Article 5.1a of the Aliens Decree 2000 [Vreemdelingenbesluit 2000]
- <sup>87</sup> Article 5.1b of the Aliens Decree 2000 [Vreemdelingenbesluit 2000]
- <sup>88</sup> Questionnaire reply, law firm in Deventer (13 April 2015)
- <sup>89</sup> Amnesty International, Vreemdelingendetentie in Nederland: Het moet en kan anders [Alien detention in the Netherlands: It must and can be different] (October 2011), at 13
- <sup>90</sup> Questionnaire reply, law firm in Deventer (13 April 2015)
- <sup>91</sup> Questionnaire reply, law firm in Leeuwarden (13 April 2015). On the detention interview, see A. Brand, 'Immigration Detention and the Rule of Law (National Report: Netherlands)', Bingham Centre for the Rule of Law (2013), at 39
- <sup>92</sup> Adviescommissie voor Vreemdelingenzaken, Vreemdelingenbewaring of een lichter middel? [Aliens' detention or a less intrusive measure?] (May 2013), at 9
- <sup>93</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr. 1721, at 22
- <sup>94</sup> Ibid, at 43, 60
- <sup>95</sup> See European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2015)
- <sup>96</sup> Data provided by the Ministry of Security and Justice (11 May 2015)
- <sup>97</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague (31 March 2015)
- <sup>98</sup> Questionnaire reply, law firm in Leeuwarden (13 April 2015)
- <sup>99</sup> Interview with Amnesty International (12 March 2015)
- <sup>100</sup> Questionnaire reply, law firm in Deventer (13 April 2015). Also expressed by law firm in Amerongen, (10 April 2015)
- <sup>101</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr. 1721, at 10
- <sup>102</sup> Questionnaire replies from law firms in Amerongen, Amsterdam, Deventer and Leeuwarden (April 2015). Also confirmed in private correspondence with firms in Haarlem and Rotterdam
- <sup>103</sup> Questionnaire reply, law firm in Amsterdam (13 April 2015)
- <sup>104</sup> Article 15 of the EU Returns Directive
- <sup>105</sup> Dienst Justitiële Inrichtingen, Vreemdelingenbewaring in Getal - 2009-2013 (July 2014), at 22-23
- <sup>106</sup> Data provided by the Ministry of Security and Justice. Source: Custodial Institutions Agency (DJI)
- <sup>107</sup> Amnesty International, Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf, (September 2013), at 21
- <sup>108</sup> Questionnaire reply, law firm in Deventer (13 April 2015)
- <sup>109</sup> Adviescommissie voor Vreemdelingenzaken, Vreemdelingenbewaring of een lichter middel? [Aliens' detention or a less intrusive measure?] (May 2013), at 59. The ACVZ concluded that continuing detention only to enforce cooperation with return is disproportionate. See also jurisprudence from Administrative Jurisdiction Division of the Council of State, ECLI:NL:RVS:2013:BZ4428 (11 March 2013), para 2(2)
- <sup>110</sup> Abdi v. the United Kingdom [2013] Application no. 27770/08 (ECtHR)
- <sup>111</sup> Dienst Justitiële Inrichtingen, Vreemdelingenbewaring in Getal - 2009-2013 (July 2014), at 30
- <sup>112</sup> Data provided by the Ministry of Security and Justice. Source: Departure and Returns Service (DT&V)
- <sup>113</sup> Amnesty International, Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf, (2013), at 21
- <sup>114</sup> Adviescommissie voor Vreemdelingenzaken, Waar een wil is maar geen weg [Where there's a will but no way], (July 2013), at 35-36, 40
- <sup>115</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague, (31 March 2015)
- <sup>116</sup> Cited from VluchtelingenWerk Nederland, Als terugkeer niet mogelijk is: Over beleid en praktijk van 'buitenschuld' [When return is not possible: on the policy and practice of 'no-fault'] (September 2013), at 8
- <sup>117</sup> Ibid, at 11
- <sup>118</sup> INLIA, 'Landgebonden vertrek informatie geactualiseerd' (13 May 2013) Available here <http://www.inlia.nl/news/show/landgebonden-vertrek-informatie-geactualiseerd> [accessed 23 May 2015]
- <sup>119</sup> Interview with Ivan Niyazov (pseudonym), Rotterdam (31 March 2015)
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- <sup>121</sup> INLIA, 'IND pleegt inbreuk op soevereiniteit landen van herkomst' (2014). Available here <http://www.inlia.nl/news/show/ind-pleegt-inbreuk-op-soevereiniteit-landen-van-herkomst> [accessed 23 May 2015]
- <sup>122</sup> Private correspondence with a law firm in Amsterdam, 16 March 2015. Lawyer suspected an undisclosed change in policy at Dutch embassies abroad, because clients from Ethiopia and Ghana independently encountered similar problems
- <sup>123</sup> Zembla, 'Nederland gebruikt valse terugkeerdocumenten' [the Netherlands uses fake return documents] (2014). Available here <http://tinyurl.com/olrkqm2> [accessed 23 May 2015]
- <sup>124</sup> Ombudsman, '2012/143: Man klaagt tweemaal zonder succes uitgezet te zijn door slechte voorbereidingen DT&V', (2012)
- <sup>125</sup> D. Broeders, 'Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands' (2010) 2(12) Punishment and Society, at 180
- <sup>126</sup> R Mandal, "Discussion Paper no. 4: What Status Should Stateless Persons Have at the National Level?", Discussion papers series for the establishment of a UNHCR Handbook on the Determination of Statelessness (2010), at 20
- <sup>127</sup> Interview with Yusuf Adam, Amsterdam (30 March 2015)
- <sup>128</sup> Interview with Pamma Singh, Haarlem (21 April 2015)

- <sup>129</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague, (31 March 2015)
- <sup>130</sup> UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level, HCR/GS/12/03 (2012), available at: <http://www.refworld.org/docid/5005520f2.html> [accessed 23 May 2015]
- <sup>131</sup> See European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2015)
- <sup>132</sup> Aliens Act Implementation Guidelines 2013, Article A5/6
- <sup>133</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr 1721, at 5
- <sup>134</sup> Amnesty International, Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf (September 2013), at 11
- <sup>135</sup> See European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2015)
- <sup>136</sup> ACVZ, Advies over het wetsvoorstel Wet terugkeer en vreemdelingenbewaring [Advice on the draft Returns and Detention Law] (6 March 2014), at 9
- <sup>137</sup> For a more in-depth overview, see No Children in Cells Coalition [Geen Kind in de Cel], 'Papa, hebben we iets ergs gedaan?' ['Daddy, did we do something bad?'] (January 2014). For the government's response and announced changes, see Letter from the State Secretary of Security and Justice, *Invoering screening en nieuwe locatie voor kinderen* [Introduction of screening and new child-friendly location] (28 May 2014)
- <sup>138</sup> Dienst Justitiële Inrichtingen, *Vreemdelingenbewaring in Getal - 2009-2013* (July 2014), at 23-24. This policy only applies to UMAs who have been convicted for a crime or who have previously evaded supervision. Other children are placed in the care of the Central Agency for the Reception of Asylum Seekers
- <sup>139</sup> No Children in Cells Coalition [Geen kind in de cel], 'Geen Kind in de Cel: van theorie naar praktijk' (2014)
- <sup>140</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague (31 March 2015). In 2013, a total of 89 families with 165 children were held in detention for an average of 5 days, usually while the authorities prepared for their deportation
- <sup>141</sup> No Children in Cells Coalition [Geen kind in de cel], 'Geen Kind in de Cel: van theorie naar praktijk', (2014)
- <sup>142</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr 1721, at 15
- <sup>143</sup> Adviescommissie voor Vreemdelingenzaken, Vreemdelingenbewaring of een lichter middel? [Aliens' detention or a less intrusive measure?], May 2013, p. 43.
- <sup>144</sup> Interview with Ivan Niyazov (pseudonym), Rotterdam (31 March 2015)
- <sup>145</sup> Interview with Mohammed Al-Fadhly, Amsterdam (18 April 2015)
- <sup>146</sup> Draft annex to the Return and Detention Law, at 38
- <sup>147</sup> See European Network on Statelessness, Protecting Stateless Persons from Arbitrary Detention: A Regional Toolkit for Practitioners (2015)
- <sup>148</sup> Article 16(3) of the EU Return Directive
- <sup>149</sup> Inspectie Veiligheid en Justitie, *Monitor Vreemdelingenketen II*, (May 2015), at 40
- <sup>150</sup> Amnesty International, Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf (September 2013), at 15-16
- <sup>151</sup> Letter from the State Secretary of Security and Justice, Tweede Kamer, vergaderjaar 2012-2013, 19 637, nr 1721, at 21
- <sup>152</sup> HP/deTijd, 'Vreemdelingen in detentie voortaan door scan', 5 March 2015. Available here <http://www.hpdetijd.nl/nieuws/vreemdelingen-in-detentie-voortaan-door-scan/> [accessed 25 May 2015]
- <sup>153</sup> Interview with Hazem Haboush, Amsterdam, (24 April 2015)
- <sup>154</sup> Amnesty International, Médecins Sans Frontières and Stichting Landelijk Ongedocumenteerden Steunpunt, 'Als iemand lijdt, moet hij dan naar een isoleercel?' ['If someone suffers, should he be placed in solitary confinement?'] (2015)
- <sup>155</sup> Ibid, at 51-55
- <sup>156</sup> ACVZ, Advies over het wetsvoorstel Wet terugkeer en vreemdelingenbewaring [Advice on the draft Returns and Detention Law] (2014), at 7. Also: interview with Amnesty International (12 March 2015)
- <sup>157</sup> Interview with Amnesty International (12 March 2015)
- <sup>158</sup> Interview with Senior Officials from the Ministry of Security and Justice and DT&V – The Hague (31 March 2015)
- <sup>159</sup> Draft annex to the Return and Detention Law, at 24
- <sup>160</sup> Aliens Act 2000, Article 59(3), author's translation, emphasis added
- <sup>161</sup> A Brand, 'Immigration Detention and the Rule of Law (National Report: Netherlands)', Bingham Centre for the Rule of Law, (2013), at 29
- <sup>162</sup> Article 5.4.3 Aliens Decree 2000. Article A5/6.14 Aliens Act Implementation Guidelines is very similar
- <sup>163</sup> Interview with Hazem Haboush, Amsterdam, (24 April 2015)
- <sup>164</sup> A Brand, 'Immigration Detention and the Rule of Law (National Report: Netherlands)', Bingham Centre for the Rule of Law, (2013), at 15
- <sup>165</sup> Interview with Mohammed Al-Fadhly, Amsterdam (18 April 2015)
- <sup>166</sup> Interview with Ivan Niyazov (pseudonym), Rotterdam (31 March 2015)
- <sup>167</sup> Questionnaire reply, law firm in Deventer (13 April 2015)
- <sup>168</sup> Article A5/6.7 of the Aliens Act Implementation Guidelines. Author's translation, emphasis added
- <sup>169</sup> Research and Documentation Centre [Wetenschappelijk Onderzoek- en Documentatiecentrum, or WODC], Van bejegening tot vertrek (2013), at 18
- <sup>170</sup> Interview with Angela and Christina Avakian, Tilburg (23 April 2015)
- <sup>171</sup> United Nations High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (2014), at 41

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The logo for the Oak Foundation, featuring a stylized globe icon to the left of the text "OAK FOUNDATION".

The logo for the Institute on Statelessness and Inclusion, featuring a stylized "isi" acronym to the left of the text "Institute on Statelessness and Inclusion".



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Our Network has developed rapidly since we launched in 2012, attracting 103 members in over 39 European countries (see shaded area of map). Our London-based Secretariat coordinates ENS's law & policy, awareness-raising and capacity-building activities. For information about Network activities or membership enquiries contact ENS Director Chris Nash ([chris.nash@statelessness.eu](mailto:chris.nash@statelessness.eu)).



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