European Network on Statelessness

PROTECTING STATELESS PERSONS FROM ARBITRARY DETENTION

IN THE NETHERLANDS

ASKV steunpunt vluchtelingen

SUMMARY OF FINDINGS

An estimated 10 million people are stateless worldwide, which means that according to the 1954 Statelessness Convention they are "not considered as a national by any State under the operation of its law". Citizenship has often been described as the 'right to have rights'. Statelessness in turn is a corrosive condition that impacts almost every aspect of daily life. In the Netherlands, already more than 10% of all asylum claims in 2014 were lodged by stateless persons, and as the number of applications surged during 2015 the scope of the problem is only set to expand. In the immigration detention context in particular, the protection needs of those who cannot be returned to their presumed country of origin often significantly overlap with those of the stateless.

In recent years the Netherlands has witnessed considerable changes, both in relation to addressing statelessness and the use of immigration detention. The 2011 UNHCR report Mapping Statelessness in the Netherlands presented recommendations on the identification and registration of stateless persons, compliance with the Statelessness Conventions and improvements in the protection of stateless persons. While the Dutch government initially rejected all key recommendations from this report, a subsequent report by the Advisory Committee on Migration Affairs (ACVZ), which reiterated UNHCR's findings and recommendations, led to a change in position. The government has announced the future establishment of a statelessness determination procedure among other proposed changes.

LAW AND POLICY CONTEXT

The right to a nationality and/or protection of stateless persons is reinforced by a range of international and regional instruments, to which the Netherlands is party, including the ICCPR, CERD, CRC and CEDAW, the 1954 and 1961 Statelessness Conventions and the European Convention on Nationality. The practice of (administrative) detention is also regulated by a variety of instruments, including the ICCPR, the European Convention on Human Rights and the EU Returns Directive, all of which protect against arbitrary detention.

However, the national legal framework of the Netherlands falls short of its international and regional obligations. The Aliens Act 2000 which governs the administrative deprivation of liberty, does not address the specific vulnerabilities of the stateless. Article 59 of the Act allows for detention for the purpose of removal in the public interest or national security. While detention is only permitted where a real prospect of removal exists, detention is to cease when "the alien indicates he wishes to leave the Netherlands and the opportunity to do so exists". As a result of sustained criticism, Article 59 is likely to be amended in late 2015. It is expected that as a result, detention will only be allowed as a measure of last resort after it has been established that no less intrusive measures can be used. Furthermore, the annex to the new draft Return and Detention law places an "investigative duty" to consider alternatives with the authority imposing detention, states that "detention shall be as short as possible" and provides that detention of vulnerable groups requires additional motivation. The problematic provision that opportunity to depart from the Netherlands must exist before detention is lifted has also been deleted. If adopted, this and other proposed legislative changes will bring national law more in line with regional and international obligations. Nonetheless, there remain several key areas of concern specifically pertaining to stateless persons or those at risk of statelessness.

DATA ON STATELESSNESS AND DETENTION

In 2014, the Central Bureau for Statistics counted 1,978 stateless people. However, on account of flawed registration procedures, these figures should be interpreted with considerable caution. This also applies to a large group of persons of 'unknown nationality': 80,643 recorded in 2014. While an unidentified number of stateless persons (or people at risk) may be hidden within these figures, the vast majority are immigrants who were undocumented at the time of registration with their municipality. At the same time, it must be emphasised that efforts to pin down exact numbers of stateless detainees are frustrated by the current absence of a dedicated determination mechanism.

The immigration detention capacity of the Netherlands, which peaked at more than 3,000 cells – detaining 12,485 persons in 2007, is set to decrease to 933 places by 2016. 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. This study also uncovered certain profiles of persons whose unclear nationality status made them considerably more vulnerable to disproportionately long detention and re-documentation periods (see chapter 3d of the full report).

KEY ISSUES OF CONCERN

Based on desk research, legal analysis and stakeholder interviews, the following key areas of concern were identified with regard to the detention of stateless persons in the Netherlands:

a) Identification & determination procedures

Although a new procedure has been announced, no details are known other than that (unlike other countries that have such procedures) statelessness determination will not automatically result in the granting of residence status. This is a significant concern, as access to all social services and general participation in society is linked up with lawful stay. Until the determination procedure is in place, the most fitting procedural recourse for stateless persons to regularise their residence is the so-called 'no-fault procedure' [buitenschuldprocedure], which grants a one year renewable regular residence permit to persons who cannot leave the country despite their best efforts. The procedure has 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.

b) Decision to detain and procedural guarantees

There are reasonable procedural safeguards in place. Once a return decree is issued, the process of removal is initiated by detaining authorities who submit their decision to detain to a court for review within a couple of weeks of making it. The court is obliged to rule on the decision within two weeks. After six months have passed, another judicial review is mandatory, if the detaining authority decides to extend detention for a maximum of twelve more months. Detainees can ask a judge to re-examine the lawfulness of their incarceration at any time. However, evidence suggests that both administrative and judicial decisions to detain do not always involve a thorough (or realistic) assessment of whether deportation is possible, or how quickly.

c) Length of detention

The EU Return Directive provides a number of clearly delineated instructions on the maximum length of detention, all of which have been transposed into national legislation: detention 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", a criteria which appears to disadvantage stateless persons. However, because the imminent prospect of deportation is so pivotal in Dutch legislation and jurisprudence, this does not seem to be the case. Problematically, the 'prospect of deportation' is often defined liberally by both the authorities and the judiciary, regularly leading to lengthy detention without achieving the stated purpose of removal

d) Removal and re-documentation

While the state holds that voluntary return is always possible, this is often not the case in practice. This position is especially problematic because it also influences the decision to detain. Immigration authorities often assume return to be feasible for an entire population based on a single individual who received travel documents from the state in question. Furthermore, the impact of non-cooperation by diplomatic missions in removal proceedings appears to be underestimated by removing (and detaining) authorities.

e) Alternatives to detention

The government has committed to increasing the use of alternatives. This is crucial to avoid any arbitrariness in the decision to detain, since unnecessary detention is arbitrary per se. 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 specify how the duty to consider alternatives will be guaranteed in individual cases, including for stateless persons.

f) Children, families and vulnerable groups

There have been major changes in the past four years. In 2011, the government announced that unaccompanied minors will no longer be detained. In 2014, the government stated that no child should be detained and announced that a new closed facility with a special child-friendly regime would be opened in 2015. 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.

g) Conditions of detention

Conditions of detention are a significant cause for concern, with detainees being under lock and key for 16 hours a day, without any clarity as to how long they will be held. Unlike criminal detainees, those in administrative detention cannot work or access education. Visits are strictly regulated and visitors need to present a valid ID, something that stateless visitors may not be able to do. Until March 2015, strip- and cavity searches were standard practice. A particularly distressing practice is the use of solitary confinement, either as a disciplinary measure; or as a method of maintaining order.

h) Conditions of release and re-detention

Released detainees are not given a legal status. This heightens the likelihood of repeat detention, with 27% of all people in alien detention centres having been held at least once before. 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. Even though time limits exist for each individual detention period, this practice makes the total detention duration theoretically limitless, especially for those like the stateless who are difficult to deport.

CONCLUSIONS AND RECOMMENDATIONS

In spite of several positive developments in the detention field, 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. 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 repeat detention, still unable to be returned to any other country. 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 has highlighted, "for detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory". 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.

ABOUT THE PROJECT

The European Network on Statelessness (ENS), a civil society alliance with 103 members in over 39 European countries, is undertaking a 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.

The project will deliver a series of country reports (including this report) 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 who are 'unreturnable' and therefore often at risk of statelessness. The methodology for all country reports follows a common research template – combining desk-based analysis alongside interviews with relevant stakeholders (civil society and government) as well as stateless persons.

In addition the project has developed a regional toolkit for practitioners on protecting stateless persons from arbitrary detention – which sets out regional and international standards that states must comply with. The toolkit, along with the full version of this and other country reports, will be available on the ENS website at www.statelessness.eu

Please refer to the full version of this report for citation purposes and for more detailed acknowledgements. This report has been researched and written by Karel Hendriks (karel@askv.nl), coordinator at ASKV Refugee Support.

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