TO CONFINE OR TO PROTECT?

Vulnerable people in immigration detention

SUMMARY

Amnesty International - Dokters van de Wereld - Stichting LOS - Meldpunt Vreemdelingendetentie

This report is a publication of Amnesty International the Netherlands, Médecins du Monde the Netherlands and the LOS Foundation - Immigration Detention Hotline

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The LOS Foundation (the Dutch acronym for 'Landelijk Ongedocumenteerden Steunpunt') is the knowledge centre for people and organisations providing assistance to undocumented migrants. The LOS Foundation devotes itself to the basic rights of these migrants and their children.

Médecins du Monde the Netherlands is part of the international Médecins du Monde, or Doctors of the World, network which is active on all five continents. Sixteen delegations and many volunteers around the world fight for the universal right to health and access to healthcare for people who are excluded from these rights.

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Deprivation of freedom is a particularly severe measure and the principle of policy should therefore be to ensure the right to freedom. To give substance to this principle of last resort, it is of great importance to propose alternatives to detention. That certainly applies to vulnerable people. They are more so than others, at risk that their (mental) health worsens in detention. Amnesty International, Doctors of the World and LOS Foundation – Detention Hotline therefore call for clear regulations that ensure that vulnerable people are not placed in immigration detention. To determine which people are vulnerable, a thorough vulnerability analysis based on individual circumstances must be conducted, whereby the expected deterioration of health is taken into account.

CASUS

An African gentleman, Mr. C, aged 47, is placed in detention in 2014. He suffers from diabetes and high blood pressure. During his detention, his diabetes proves difficult to control and his blood pressure is often too high. He has a lot of complaints, which he attributes to stress. The prison doctor deems likely that the disorder of diabetes is associated with reduced mobility and a different diet in detention. The Medical Advisor of the Imprisonments Department nonetheless declares him suitable for detention. The doctor who analysed C.'s medical records after his release, notes that regarding his health, the autonomy of C. during his detention was seriously undermined. For example, he was not allowed to keep his insulin on his own, while he injected himself already for ten years. The dependence inherent in the current implementation of detention, caused C. to react regularly with behaviour that went against his own health interests.

VULNERABILITY

In the context of this report, we see vulnerability as the reduced capacity of an individual or group to anticipate, withstand and recover from the impact of the negative consequences of an event. Vulnerability is caused by a combination of (personal) factors that may also be enhanced considerably by certain conditions. Multiple risk factors exist in detention whereby vulnerability can be created or strengthened. Research shows that detention can lead to a deterioration of health and well-being.

Descriptions of vulnerability in treaties, directives and Dutch legislation have almost always a categorical nature. This categorization may be useful to quickly identify certain groups of vulnerable people and to take measures to avoid both detention and health damage resulting from detention, but the risk exists that people who do not belong to the categories listed, are not recognized as vulnerable. It is therefore important that a mechanism exists to establish vulnerability on an individual basis.

SITUATION IN THE NETHERLANDS

It is not known how many people in detention should be classified as 'vulnerable'. The government publishes no figures. It is certainly the case that people with an illness, disability or mental health problems are also placed in detention. In the absence of an alternative form of care, medical or psychological problems even provide the reason for detention.

In recent years, several bodies have pointed out that the Netherlands should improve its policies towards people with mental health problems in detention. Dutch policy is insufficiently aimed at keeping vulnerable foreigners outside of detention. The willingness to cooperate on departure from the Netherlands weighs heavier on a decision regarding detention than whether someone is vulnerable or not.

The Dutch policy does not provide for a vulnerability test prior to imprisonment. This implies that there is not or hardly weighed whether special personal circumstances exist, which make detention disproportionately harmful for the individual. Because of this people are exposed to avoidable risks of adverse health effects.

There is a policy of mandatory detention for all asylum seekers who enter our country via Schiphol Airport. They follow their asylum procedure in detention. When there is a transfer to another European country under the Dublin Regulation, these applicants receive no substantive hearing of their asylum request. Therefore, there is often very little known about, for example, traumatic experiences in the country of origin or during transit to Europe.

Within 24 hours upon entering detention foreigners receive a medical intake that is focused on the necessary care in detention. A check on the identification of vulnerability and the question as to whether or not a person should be detained does not take place. The criteria for removal from custody on medical grounds are the same as those applicable to criminal detainees: someone is considered suitable for detention as long as the necessary care can be provided and the medical complaints can be treated in detention.

The Netherlands has separate policies for (families with) children and pregnant women. Since 2014, there are again more (families with) children placed in detention. They are placed in the closed family facility in Zeist, where although they are not locked up in cells - as was previously the case - one can still speak of detention (in principle for up to two weeks).

CASUS

In December 2014, a mother and her two children aged 4 and 3 years were arrested in the Family Location (a restrictive accommodation for families without residence permit). Later that day they are transferred to the Closed Family Provision in Zeist, because the Repatriation and Departure Service (DT & V) wants to expel them. The delegate appeals against the detention measure. And with success: the court finds that the interests of the children have wrongly not been taken into account. The family is released. Despite this statement, the family is moved again in January 2015 to the Closed Family Provision. The judge again calls for their release. The family has always cooperated with the government and has never gone "undercover". Despite the fact that the family has always been under supervision of the authorities, in March 2016 the family is placed in detention for the third time. In the detention center, the lawyer finds a broken woman who can only cry.

Jurisprudence on Dutch practice

In the current Dutch practice, the individual assessment and thus the legitimacy of the decision on detention often reveal shortcomings. Several courts have noted this weakness in their legal decisions. Also in cases related to prolonging of detention vulnerability is not sufficiently taken into account according to various court rulings.

LEGISLATIVE PROPOSAL: LAW ON RETURN AND IMMIGRATION DETENTION

Successive secretaries of state and ministers have made commitments to develop policies regarding vulnerable people. In 2013, the Minister promised that a new law with lighter supervisory measures and an ultimate remedy character 'will be more explicitly anchored to vulnerable groups'.

The Lower House is deliberating right now about this new Act: Law on return and immigration detention. The most important is the addition of Article 58a in the Aliens Act 2000. The new article provides that when someone is regarded vulnerable, it should be reflected in the decision to detain how these conditions are taken into consideration in the decision process. If detention in connection with the particular or vulnerable position of the individual would be disproportionate, the detention should not take place.

Article 58a is a step forward, yet the expectation is not high that this bill will provide more protection than is currently the case. The Explanatory Memorandum is clear that there are no categories of vulnerable people who will be excluded a priori from custody. The Explanatory Memorandum also states that the norm of 'some restraint' in detention of vulnerable foreigners, is now already standard practice.

Moreover, the bill does not prescribe a vulnerability test prior to detention and remains (like now) based on the very limited test of detention (un)suitability. The starting point in this context is whether the necessary care can be provided within the detention setting, which ignores the potential (long-term) effects of detention and the severity of the suffering caused by the detention.

It is positive that the bill in Article 35 explicitly imposes a duty of care to the director of the detention center to pay particular attention to vulnerable people in custody. But also here, it appears that vulnerability is not a reason in itself for not detaining someone.

WHAT SHOULD BE DIFFERENT

For vulnerable people, detention by definition is a disproportionate burden. Laws to prevent their detention or release from detention in a timely manner is therefore of great importance.

To this end, it is necessary in the first place, that vulnerability is recognized in a timely manner. A thorough vulnerability test can be an important tool. For the Dutch practice a vulnerability test should be developed whereby relevant elements of existing screening tools can be used. Examples are the *Special Vulnerabilities Assessment* as used in the US and the *Tool for identification of persons with special needs* developed by the European Asylum

Support Office (EASO), an EU institution that plays a crucial role in the development of a Common European Asylum System. One can also look at screening tools from the areas of (forensic) care and welfare. Whichever instrument is chosen, its effect depends on sincere individual attention. Many tools work with cut-off scores and give little or no room for tacit knowledge and appraisal of the professional.

Monitoring should also take place during detention to determine whether detainees experience no (further) damage, for example, due to a vulnerability that has not previously been diagnosed or a vulnerability caused by the detention itself. Monitoring on vulnerability needs to take place at the intake of entry, but also regularly afterwards. Until a specially developed screening tool is developed, the current medical intake can suffice with some modifications suitable for testing vulnerability of people placed in detention. If it appears that people are vulnerable or develop vulnerability, detention must be lifted and people must be offered the necessary care outside prison, so that no further damage to health takes place and unnecessary suffering can be avoided.

CASUS

The 37-year-old African gentleman Mr. C. was previously in Africa in prison. In 2015, he arrives at Schiphol Airport and asks for asylum. He comes directly in border detention. He soon reported several pains that persist throughout his detention. After two months, he says that he was structurally beaten when he was in prison in his country of origin. After four and a half months of detention he says he has nightmares and is experiencing stress symptoms. He can find few distractions and worries a lot. He worries about the continuation of the detention. During his detention it is established that he suffers from a chronic physical illness. Lack of information about his health situation makes him very nervous. He spends almost one year in detention. One evening he was totally unexpected released from detention.

In the United Kingdom physicians under the Detention Centre Rules (Rule 35) have the obligation to report (in consultation with the patient) when continuing detention or a particular detention circumstance will have a detrimental effect on the health of the detained foreigner. The purpose of this rule is to call people who are particularly vulnerable, to the attention of those responsible for the decision on (continued) detention. The information from the medical professionals should be considered when deciding whether continued detention is appropriate in individual cases.

CONCLUSIONS AND RECOMMENDATIONS

Research shows that detention can damage the (mental) health of people. Even previously healthy people can get complaints by the nature and duration of the detention. Vulnerable people are - more than others - at risk of health damage. Vulnerability often proves to be a combination of factors that also may be enhanced by certain circumstances. Not always are these factors identified and recognized, so the health of the detainee can deteriorate rapidly.

Under international treaties and principles, an infringement of the fundamental right to liberty has to meet stringent requirements. To make a proper assessment in an individual case whether detention is necessary and proportionate, a thorough individual risk assessment is necessary whereby interests are weighed and assessed, and a proposal for a lighter alternative must be assessed. After establishing the grounds for detention and determining that the same goal cannot be achieved with a lighter measure, it must be examined as a third step if there are special personal circumstances which make detention disproportionately harmful for the individual. Under the current policy, the individual risk assessment, and thereby the legitimacy of the decision to detain, shows severe shortcomings.

The new bill “Law return and detention” in Article 58a of the Aliens Act 2000 pays attention to the position of vulnerable people. That is a first step, but according to the bill and the Explanatory Memorandum it is clear that vulnerable people still can be detained, and that only when it is "unreasonably burdensome", detention should be waived. In determining whether this is the case, one still continues to take into judgement whether care can be provided in the institution. This disregards the potential (long-term) effects of detention.

An individual and thorough analysis of vulnerability should be decisive for the decision to, as an exception, detain someone. This "vulnerability test" should not only take place prior to detention, but also regularly during the period of detention.

Based on the above considerations, we come to the following recommendations[1]:

RECOMMENDATIONS

FOR THE LEGISLATOR:

- **Ensure in legislation that vulnerability is a decisive reason to refrain from detention.**
- **Undertake for this purpose:**
  - **That prior to any decision to detention a thorough individual vulnerability analysis is carried out and performed by trained professionals.**
  - **That this vulnerability test focuses on the personal circumstances which make detention disproportionately burdensome and on the risk of physical or psychological harm by imprisonment. Use a broad definition of vulnerability and take into account circumstances that may amplify or cause vulnerability.**
  - **That during the detention, periodically or upon change in the situation of a detainee, a thorough individual vulnerability analysis is performed by trained professionals.**
  - **That the staff at the detention centre must make notification of an identified vulnerability. If done properly Rule 35 (UK) can serve as an example.**
  - **That special alternatives to detention are developed targeting vulnerable people so that they can be released with the necessary care and support.**
- **Adjust factors (such as buildings, rules and activities) in the detention regime so that exacerbation of vulnerability remains minimized as much as possible. This requires the existence of a regime that truly is based on the principle of minimum restrictions, allowing people not be further restricted in their freedom than strictly necessary for the purpose of detention (forced expelling). Provide for detention locations whereby it is actually possible to provide maximum freedom of movement and which have no penal appearance.**

1 See also the recommendations in previous reports by Amnesty International (2011): The detention of foreigners in the Netherlands; Amnesty International (2013): Human rights as a yardstick; Amnesty International, Médecins du Monde and LOS Foundation – Detention Hotline (2014): Restrained care. Health care in detention; Amnesty International, Médecins du Monde and LOS Foundation – Detention Hotline (2015): Isolation in immigration detention.

RECOMMENDATIONS

FOR POLICY MAKERS/IMPLEMENTERS:

- Ensure that the vulnerability test is undertaken as early as possible in the process:
  - prior to arrest;
  - immediately or as soon as possible after arrest in case of unplanned arrest.
- Develop for this purpose a thorough vulnerability test. Make use of the experiences gained from previously developed screening tools such as the EASO developed *IPSN tool*, the *Special Vulnerabilities Assessment* and the *Easycare Two-step Oder persons Screening*.
- Utilise - as long as a specially developed screening tool is not yet available - the current medical intake used by nurses in the detention centres in such a way so that is tested for other than only medical factors of vulnerability. Do not only use this instrument for assessing the necessary care, but also to assess whether release from detention is warranted.
- Ensure that the vulnerability test is done by professionals with medical knowledge and offer staff training to identify vulnerability and a decline in mental or physical condition in detention.
- Ensure a good working system in which notifications about vulnerability by staff and external contacts such as lawyers, support organizations and family members are taken seriously and investigated.

DOKTERS VAN DE WERELD

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