



Advisory report 'Foreign nationals detained under a hospital order. Deadlock due to conflicting legal systems'

Summary

In response to the request of the minister for Legal Protection, the Advisory Division of the Council for the Administration of Criminal Justice and Protection of Juveniles (hereinafter referred to as 'the RSJ') has issued a report on foreign nationals placed under a hospital order (in Dutch called *terbeschikkingstelling*)

In this advisory report, the RSJ examines the following main question:

In what way can a foreign national placed under a hospital order, whose residence in our country is or has become unlawful – after conviction and the decision of the Immigration and Naturalisation Service (IND) – receive appropriate treatment and return to his/her country of origin – promptly and safely – to avoid a dead-end situation or a deadlock in treatment?

The RSJ also examines the question whether and how the inflow of foreign nationals placed under a hospital order can be prevented and what potential alternatives there are to a hospital order.

The advice focuses on the hospital order, conditional termination of the order and the conditional hospital order.

Rationale

A group of foreign nationals placed under a hospital order is at risk of ending up in a dead-end situation. They are not allowed to stay in the Netherlands but cannot return to their country of origin, temporarily or permanently, for various reasons. At the same time, the treatment options in a forensic psychiatric hospital are limited because the requisite rehabilitation leave is not permitted. These foreign nationals have no right of residence and are therefore not allowed to rehabilitate in Dutch society.

There are also problems surrounding the repatriation to the country of origin of foreign nationals placed under a conditional hospital order and with conditional termination of a hospital order. If they are unable to be repatriated and the order ends (after a maximum period of nine years for a conditional hospital order), the foreign national is not entitled to a welfare benefit, housing and general and mental health care due to unlawful residence. This may cause a relapse in the disorder and consequently a higher risk of reoffending.

Summary and conclusion

The hospital order system is characterised by three elements that should be in balance: the protection of society, forensic treatment and legal protection of the convicted person. This also applies to foreign nationals detained under a hospital order. In the past three decades, greater emphasis has been placed on the protection of society (sharper focus on the consequences of sentences and non-punitive orders under immigration law) and less on legal protection. This has led to negative consequences for the position of foreign nationals detained under a hospital order and impeded forensic treatment (late start of treatment, no rehabilitation leave possible).

Hospital order

The basic principle is that a criminal sanction must be enforced. Under criminal law, it is often not possible to transfer the enforcement of the hospital order because this criminal measure does not exist in the legal system of the country of origin. Nor is it possible, for various reasons and in many cases, to repatriate foreign nationals, who have been detained under a hospital order, through termination of the hospital order by the minister of Justice and Security and removal of the foreign national. Cases have occurred in which countries of origin were unwilling or unable to cooperate with repatriation, or the foreign national refused to cooperate. Some countries do not have an appropriate facility for the treatment of a disorder. In those cases, safe repatriation and rehabilitation in the country of origin is not possible.

In the Netherlands, a hospital order imposed on foreign nationals (currently nearly 130 individuals) cannot be properly implemented. If the Immigration and Naturalisation Service (IND) terminates the right of residence, rehabilitation leave, which is an essential component of treatment under a hospital order, is no longer allowed.

If, at the same time, repatriation to the country of origin is not possible, a deadlock in treatment threatens to arise and the foreign national may be faced with a dead-end situation. This is undesirable and can also lead to inhumane situations. This applies in particular to cases in which foreign nationals wish to cooperate with their forensic psychiatric treatment and with their return.

The RSJ is of the opinion that foreign nationals without the right of residence who have been detained under a hospital order should in principle also be able to make use of rehabilitation leave, subject to the conditions that they cooperate with treatment and return. This entails not only widening supervised leave in preparation of return, but also further leave options. According to the RSJ, this is the only way to break the deadlock between criminal law and immigration law. Granting leave facilitates the enforcement of a criminal judgment and promotes the repatriation and outflow of those placed under a hospital order. Experience has shown that sometimes it is easier to repatriate individuals detained under a hospital order if they have received adequate treatment and have demonstrably improved.

Foreign nationals with a combined sentence (a prison sentence and a hospital order) may only begin the treatment programme if they have served their full prison sentence. A statutory provision (Fokkens) to begin treatment under a hospital order earlier in the case



of a combined sentence was abolished in 2010. Beginning the treatment promptly is conducive to its effectiveness and can contribute to prompt and safe rehabilitation and repatriation.

The Netherlands Public Prosecution Service's policy of adopting a cautious approach in demanding hospital orders for foreign nationals can contribute to limiting the inflow of foreign nationals detained under a hospital order and preventing undesirable situations. However, at the court hearing, the Public Prosecutor does not always have information from the IND on the consequences of a hospital order for the right of residence and from the International Transfer of Criminal Sentences department (a division of the Custodial Institutions Agency (DJI)) on repatriation options

The hospital order is demanded and imposed if this is necessary in the interests of protecting society. The law currently provides no adequate alternative for the hospital order. In a limited number of (lighter) cases (diminished responsibility) a form of forensic care, new or otherwise, in the penal institution may also suffice.

Conditional hospital order and conditional termination of a hospital order

The group with a conditional hospital order or conditional termination of a hospital order comprises a separate category of foreign nationals. This concerns around 30 foreign nationals who currently have legal residence but under immigration law may potentially not be allowed to stay in the Netherlands. There have never been any cases in which the implementation of these hospital orders has been successfully transferred to the foreign national's country of origin. The law does not provide any possibility to enable the minister and the court to terminate these forms of hospital orders for the purpose of repatriation to the country of origin. Therefore, no efforts are actively being undertaken to repatriate this group of foreign nationals. A statutory provision for termination of the hospital order by the minister, subject to the condition that an appropriate facility has been arranged in the country of origin, can contribute to safe rehabilitation and return. Under the Benefit Entitlement (Residence Status) Act (Koppelingswet), foreign nationals without a right of residence no longer have access to regular health care after the hospital order has ended. This poses risks to both the foreign national and to society.

Growing number of foreign nationals under a hospital order; measures are required

The number of foreign nationals detained under a hospital order is relatively small (around 160 individuals in mid-2020, 130 of whom with treatment in forensic psychiatric hospitals. However, deadlocks and dead-end situations have a significant impact on and negative consequences for treatment and repatriation, and in individual cases may lead to the violation of human rights. The number of foreign nationals detained under a hospital order has risen in recent years, whereas only a limited number can return to their country of origin. Measures are required to be able to implement an imposed hospital order, to prevent dead-end situations and to promote prompt and safe rehabilitation and repatriation.



Recommendations

The legal systems of criminal law and immigration law converge when it comes to issues relating to the treatment and return of foreign nationals who have no right of residence and have been detained under a hospital order. The objectives of these legal systems differ and conflict with each other in terms of execution. This may result in a deadlock. Furthermore, transfer of the order is usually not possible because legal systems differ and the Dutch hospital order does not exist in the criminal law of the country of origin. International conventions or the lack of a convention can influence achievement of the objectives of immigration law and criminal law. If repatriation is not possible, this may in individual cases lead to a deadlock in treatment under a hospital order. Given that it is a small group, the RSJ is not proposing any major changes in the law. The recommendations will not solve the problems regarding the inflow, treatment and outflow of foreign nationals without the right of residence detained under a hospital order, but can contribute to reducing the problems and preventing dead-end, inhumane situations.

Please find below the main recommendations of the RSJ:

1. Facilitate rehabilitation leave to prevent a dead-end situation. This is subject to the conditions that the foreign national cooperates with treatment (including accepting medication and abstaining from addictive drugs) and return. Consider granting the foreign national a temporary residence permit for the duration of treatment to facilitate the use of rehabilitation leave.
2. Allow the treatment of foreign nationals, with a combined sentence, detained under a hospital order to start earlier, after they have served one third of their prison sentence, to increase the effectiveness of the treatment and to accelerate safe rehabilitation and repatriation.
3. Ensure that Public Prosecutors can indicate what the IND's intention will be regarding the right of residence in the event that the suspect will be sentenced to a hospital order, whether with or without a prison sentence, so that this can be taken into account in the court decision.

Furthermore, the RSJ puts forward the following recommendations with regard to:

- *Reducing the inflow of individuals placed under a hospital order:*
 - Create the opportunity for convicted persons, whose right of residence has or will be terminated, to undergo extensive forensic psychiatric treatment when serving their prison sentence (rather than treatment under a hospital order after the detention phase).
 - Do not attach any consequences under immigration law to the hospital order if a punishment has not been imposed (absence of criminal responsibility by reason of mental disorder).



- *Treatment:*
 - Immediately after the final judgment, provide clarity on the consequences under immigration law and on the decision relating to termination of the right of residence.
 - Organise a care conference in the event of impending deadlocks, attended by the individual detained under a hospital order, his or her lawyer, the hospital, the IND and the Custodial Institutions Agency (DJI) and any other authorities, where necessary, such as the Repatriation and Departure Service (DT&V) and the Probation Service, in order to jointly seek solutions.

- *Outflow:*
 - Focus efforts primarily on the route of termination of the hospital order by the minister if, based on earlier experiences with the country of origin, it is already clear that the route of transfer under criminal law (under the Measures Involving Deprivation of Liberty and Conditional Penalties (Mutual Recognition and Enforcement) Act (WETS)/Enforcement of Criminal Judgments (Transfer) Act (WOTS)) will not be successful, but the country does have an appropriate facility.
 - Invest diplomatically and financially in countries of origin (such as Morocco, Surinam, Somalia) to ensure appropriate facilities (treatment, counselling) so that treatment can be continued in those countries after termination of the hospital order by the minister (following advice from CART) and after return based on the Aliens Act (Vreemdelingenwet). Invest in offering the foreign national prospects in terms of work and education.
 - Provide for the legal possibility of termination of the conditional hospital order and conditional termination of the hospital order by the minister and the court, subject to the conditions that an appropriate facility has been arranged and the foreign national does not return to the Netherlands. This regulation will enable foreign nationals to return safely, with counselling and treatment in the country of origin. Using the expertise and network of the hospitals (Veldzicht and Van Mesdag), the Probation Service (International Office) can arrange for an appropriate facility in the country of origin.
 - Ensure that foreign nationals placed under a conditional hospital order and with conditional termination of the hospital order remain entitled to facilities (such as a welfare benefit, health care and housing) for the duration of the hospital order, if their right of residence has been terminated and there is still no prospect of removal. Consider granting foreign nationals who want to cooperate with the conditions and return to the country of origin a temporary residence permit for the duration of the order.
 - Strengthen collaboration with cooperating organisations with central control and a mandate.
 - Provide for central control and coordination regarding the activities of the cooperating organisations concerned abroad.

The advisory report (in Dutch) is published on the website of the RSJ.

