

March's Feature Article

The Implementation of the 2012 Committee of Ministers' Recommendation concerning foreign prisoners: findings of a study in foreign national only prisons in Norway and the Netherlands

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Foreign Prisoners in Europe

Both the number and proportion of foreigners in European prisons continues to rise. In 2013, there were over 150,000 foreigners in prison in the Council of Europe, representing nearly a quarter of the region's prison population. While for some countries this is not a significant issue (Eastern Europe), many prison systems have to deal with between 30 and 70% foreign nationals. The management of increasingly large and diverse foreign populations in overcrowded prison systems designed to deal with the needs of national prisoners is challenging.

From the prisoners' perspective, the de jure equality of rights granted by national law often does not translate in practice. In reality, foreign prisoners often experience de facto discrimination at all stages of the criminal justice and penal process due to the application of criteria that they cannot fulfil and the prioritisation of resources for national prisoners. Foreign prisoners are more likely to be deprived of their liberty and they also tend to experience greater hardships during their time in custody compared with national prisoners. Non-national prisoners face challenges and obstacles due to overt and covert discrimination, isolation, a lack of linguistic proficiency and delays in relation to decisions about legal status.

Given the continuing rise in the numbers of, and the worsening situation for, foreign prisoners in Europe, the Council of Europe's Committee of Ministers felt it was necessary to re-visit the issue and replace its 1984 Recommendation to member States concerning foreign prisoners.

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The 2012 Recommendation concerning Foreign Prisoners

The Committee of Ministers felt that a new recommendation should be adopted to provide humane and tangible long-term solutions based on European best practice and that it should address a range of issues including; the number of foreigners in detention, their treatment while imprisoned, policies aimed at preparing foreign prisoners for release and reintegration (including transfer to their country of origin), the training of staff and the facilitation and maintenance of social, legal and consulate support.²

The 2012 Recommendation³ adopts a human rights approach to the penological treatment of non-national, non-resident foreign prisoners, which dictates the application of the principles of equalisation and individualisation. It seeks to ensure the equal and individual treatment of foreigners throughout the criminal justice and penal process by focusing attention on three key areas: reducing the number of foreigners in European prisons, improving the regime foreign prisoners are subject to and enhancing reintegration measures taken in respect of different categories of foreign prisoners.⁴ Indeed the Recommendation's preamble highlights these goals, and emphasises the central objectives to alleviate the isolation experienced by such prisoners and facilitate treatment with a view to their social reintegration.

Study on the Implementation of the 2012 Recommendation

To gain some understanding of the issues that arise when trying to implement the 2012 Recommendation, empirical research was undertaken in two prisons that house foreign national prisoners only. The facilities selected (Kongsvinger Prison in Norway and Ter Apel Prison in the Netherlands) both cater for male foreign offenders from approximately 60 countries who no longer have a right to remain and are likely to be deported at the end of their sentence. The mandates of both facilities were created by Ministerial Decisions between 2012-2013 in response to political

² See the *Ad Hoc Terms of Reference for the Council for Penological Cooperation (PC-CP) relating to Detained Foreign Nationals*, PC-CP (2010) 01Rev2, Strasbourg, 23 April 2010, CM/Del/Dec(2010)1083/10/10.5E, adopted at the 1083rd meeting of Ministers' Deputies, 21 April 2010, Appendix 13, Item 10.5.

³ The Recommendation and its commentary were approved by the CDPC at its 62nd Plenary session in June 2012 and adopted by the Committee of Ministers on 10 October 2012 at the 1152nd meeting of the Ministers' Deputies.

⁴ For a more detailed analysis of the contributions the Recommendation makes to regional penal policy as well as a discussion of its gaps and limitations see R. Mulgrew, 'Foreign Prisoners in Europe: an analysis of the 2012 COE Recommendation and its implications for international penal policy' (2016) Vol. 12, No. 44 *Review of International Law and Politics* (forthcoming, April 2016).



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demands to deal with the number of foreign offenders likely to be deported⁵ and those who repeatedly return following deportation.

Despite these similar mandates, there are several differences in respect to their capacity, cooperation with immigration officials and permanency. Kongsvinger Prison should cater for persons with one or two years remaining on their sentence, while Ter Apel Prison caters for all sentence lengths. In terms of capacity, Kongsvinger can house 97 prisoners (20% of its target group), whereas Ter Apel prison can cater for 434 prisoners (sufficient for its current target group). Kongsvinger cooperates with external partners to facilitate immigration whereas in Ter Apel prison, these partnerships have been internalised – with officials working on immigration related issues being based within the prison. Finally, Kongsvinger Prison's mandate remains part of a pilot project, whereas Ter Apel Prison's role is permanent and set to expand with the addition of a new wing for pre-trial foreign detainees.

Interviews were conducted with central prison service officials and in both Kongsvinger Prison, Norway (4-8 October 2015) and Ter Apel Prison, the Netherlands (25-28 October 2015) with prison management, supervisors and staff, medical personnel and prisoners.⁶

Research Findings

This study explored obstacles faced by prison authorities in the implementation of the 2012 Recommendation. It also aimed to discover examples of best practice that could be shared with prison services and practitioners in the region. Accordingly, as a representative of the Europris and CEP Expert Group on Foreign Prisoners, I presented the findings of this study to the Council of Europe's member states at the fifth Plenary Session of the Council for Penological Cooperation (PCCP) in Strasbourg on 18 November 2015. These findings related to, inter alia, regime improvement, contact with the outside world, language barriers and reintegration.

a. Regime

The 2012 Recommendation urges prison authorities to ensure equal access to a balanced programme of activities (Rule 26.1). This, it notes, may necessitate taking specific measures to counter the difficulties foreign prisoners may face. The Recommendation stresses that access to activities should not be restricted because a prisoner may be transferred, extradited or expelled (Rule 26.2).

⁵ In Norway, one third of the prison population is comprised of foreign offenders. Of this group, half will be deported at the end of their sentence.

In the Netherlands, foreign offenders represent around 20% of the prison population. Of the 1916 foreign prisoners at the time of the study, 647 did not have permission to remain in the state, and the status of a further 312 prisoners had yet to be determined.

⁶ The author would like to express her sincere gratitude to everyone who facilitated and participated in her research.



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The research found that both prisons had adopted a flexible and innovative approach to adjusting the prison regime as required by Rule 26.1. What seemed to create more challenges in practice was the implementation of Rule 26.2. It seemed that both prisons could only offer a reduced regime of activities and opportunities because of the legal status of its population. For example, prisoners were not able to work or attend social events outside the prison or avail of temporary leave or other progression measures. Moreover, the prisons had reduced recreation programmes, visiting hours and education and training opportunities when compared to other prisons. These variations were attributed to different reasons in the different locations - security concerns due to previous escapes at Kongsvinger and for central budgetary decisions at Ter Apel.

The officials working in these prisons, however, were making concerted efforts to counter-act the detrimental impact of this more restrictive form of regime by, for example, fostering an increased sense of responsibility by granting flexible access to leisure facilities and facilities for prisoners to cook their own food and socialise together.

b. Contact with Outside World

Rule 22 of the 2012 Recommendation highlights the need to alleviate isolation by paying special attention to the maintenance and development of relationships with the outside world, and with children in particular. It urges efforts to optimise contact through visits from persons living abroad by arranging them in a flexible manner, for instance by allowing prisoners to combine entitlements.

Both prisons did this well – making adaptations to the usual regulations in relation to visits to allow prisoners to save up visits and take them together. The staff at Kongsvinger prison decorated the family visiting room in their own free time to make it welcoming and child-friendly. There had also been initiatives to facilitate communication via Skype and email.⁷ Both prisons had well-stocked libraries that housed collections of literature, music and other forms of media in a range of languages and the majority of prisoners had access to TV channels from their country or in a language they could understand.

However, there were notable problems at both prisons. Rule 16 recommends allocating foreign prisoners to prisons close to transport facilities to enable their families to visit them. Ter Apel prison's location does not make it easy to visit (two trains and two buses from Amsterdam where the main international airport is located). Another issue is the cost of telephone calls. This is the primary and often the only means a prisoner has to maintain a relationship with his family. Calls are often very expensive. While efforts have been made to allow for free video-conferencing using Skype – these facilities are limited and there are often technological problems and privacy issues.

⁷ For example, Ter Apel promoted the emailprisoner.nl scheme in a number of foreign languages. Under the scheme, relatives or others can send an email and pay for the cost of printing it (40c).



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c. Language Barriers

The 2012 Recommendation contains a basic principle which states that foreign prisoners who so require shall be given appropriate access to interpretation and translation facilities and the possibility to learn a language that will enable them to communicate more effectively. Provisions in relation to language can be found throughout the Recommendation in relation to admissions, access to materials, learning a language to communicate in, interpretation in medical treatment etc.

There were numerous examples of good practice in both prisons, including access to an interpretation service through phone or video-conferencing; the use of pointing books; the placement of prisoners with others that can understand a language they speak; the use of display screens with information in the main languages spoken by prisoners and a commitment by staff and managers to learn a few phrases in the languages spoken by prisoners so they could greet prisoners in their own languages.

One problem that did arise was the fact that paper work and application forms were typically only available in the language of the detaining state. And while serious efforts were being made to overcome language barriers, there was inevitably a residual group of persons from minority linguistic groups that were isolated on account of their linguistic inabilities. This could also impact on the ability of staff to mentor such persons with knock-on effects for dynamic security: increased likelihood of disciplinary action or an escalation of tensions.

d. Reintegration

The 2012 Recommendation contain a basic principle (Rule 9) which states that the prison regime should prepare foreign prisoners for release and social reintegration. Rule 29.2 notes the need to ensure that educational and vocational training is effective and, therefore, that prison authorities should consider the facilitation of working towards qualifications that are recognised and can be continued in the country in which the foreign offender is likely to reside after release. The need to facilitate social reintegration is also discussed in relation to allocation decisions (Rule 17) and the need to ensure preparation for release (status decisions, temporary leave, contact with support) begins in good time (Rule 35). Importantly for the population in these particular prisons, Rule 35.4 states that if a prisoner is going to be expelled, efforts should be made to contact authorities in the State to which he is being sent to ensure support both immediately upon return and to facilitate reintegration into society.

There were examples of good practice in relation to providing more relevant forms of work and training in Kongsvinger Prison. Adjustments had been made to the education programme (teaching in English and providing English language lessons), training (moving away from theoretical or Norwegian qualifications to more practical qualifications that had significance in other countries) and shorter practical courses had been introduced to cater for their target population. Despite these measures, difficulties were encountered on account of the fact that some persons serving their sentences at Kongsvinger Prison were ultimately released back into Norwegian society rather than being deported.



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Moreover, while staff were willing and eager to develop their knowledge about the work and welfare systems in the countries prisoners would be deported to and make contact with the relevant authorities in such States, they did not have the financial resources to do so.

Ter Apel Prison also seemed to face obstacles when trying to implement the Recommendation in this regard. The prison did not have access to the normal fund for reintegration focused training and, consequently, the standard of education and training programmes they could offer was reduced. This, combined with a reduced recreation programme, meant that the restrictive regime became monotonous for prisoners serving long sentences. And although prisoners could access information about reintegration on the prison computers, this information was restricted to information about reintegration within the Netherlands which was not relevant for the population catered for.

Recommendations

This paper has provided an overview of some of the issues faced by prison authorities in dealing with foreign prisoners in Europe and the realities involved with implementing the 2012 Recommendation. To conclude, the following section includes some of recommendations for action to improve the regime for foreign prisoners and facilitate the implementation of the 2012 Recommendation that were presented at the PCCP 5th Plenary.

- Make efforts to internationalise catering menus and increase the range of food stuffs available for prisoners to purchase
- Facilitate the use of modern technology to facilitate free or relatively inexpensive communication
- Make information, application and request forms available in the main language groups of the prison population
- Ensure visiting rooms are available for family visits and that they are decorated and equipped appropriately
- Ensure all regimes are focused on reintegration even if this is into a society in another country
- Adjust training and education for the population
- Allocate funds and personnel to work on establishing contacts and links with the States to which the majority of prisoners will return



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Link to the PCCP Presentation

<http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202015/Presentation%20R.%20Mulgrew%20Recommendation%202012%2012%20FINAL.pdf>