

Time pressure in making immigration detention decisions

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English summary

The aim of the research is to determine to what extent the decision in which a foreign national is placed in immigration detention can be split in the announcement and the formal immigration detention decision. The background to this research question is that the Royal Netherlands Marechaussee (Kmar) and the Aliens Police Department (AVIM) find that they have insufficient time to make a well-motivated decision to detain a foreign national. An immigration decision must be taken and motivated within a period of six hours.

Two approaches were taken to answer the main research problem. First, legal research was conducted to determine whether the decision-making process can be split in the announcement and the formal immigration detention decision. It was investigated whether and to what extent this is in accordance with the right to liberty as protected by Article 5 of the European Convention on Human Rights, the EU Returns Directive, and domestic Dutch immigration law. Second, besides this legal analysis, the existence of other possibilities was investigated which might mitigate the perceived shortage of time to make well-motivated decisions. By interviewing experts and practitioners, the researchers identified and listed the causes of the perceived shortage of time and possible solutions.

In the interviews, all respondents acknowledged that the six hours of detention available for making a motivated decision creates a situation of time pressure. The extent to which this is problematic depends mostly on the extent to which the responsible official is able to prepare the foreign national's case file before the formal six-hour period of detention commences. Since the Return and Departure Service (DT&V) were already involved earlier in the immigration procedure of a foreign national, they often already have a case file and can therefore prepare the immigration detention decision in advance. However, this is not the case in the work of the Kmar and AVIM as these organisations are often confronted with foreign nationals without lawful residence who are spontaneously apprehended. Officials working at these organisations perceive the shortage of time as a more urgent problem. This manifests itself particularly at the moment that groups of foreign nationals are apprehended at the same time.

Over the past decade, the demands placed on the administration to motivate an immigration detention decision have increased significantly as a result of jurisprudence. However, the detention period of six hours has not been extended to reflect this legal development. Besides the perceived shortage of time, this demands greater specialisation of the officials responsible for making immigration detention decisions. Based on the interviews, we conclude that the training these officials undergo to be competent to make immigration detention decisions is not sufficiently oriented towards the practice of taking such decisions. The availability of specialist knowledge to the officials who are making immigration detention decisions could also be improved.

Within the current legal framework, the possibilities to extend the available time for making an immigration detention decision are limited. Immigration detention is an infringement of the human right to liberty and should therefore always have a solid legal basis. Thus, any extension of the detention period before a formal immigration detention is taken requires a legislative amendment. This also applies to the idea of splitting the announcement and the formal decision on immigration detention. The current formulation of Article 50(2) of the Aliens Act does not allow for this; therefore an amendment of this provision would be necessary to make a split between announcement and formal decision. Even if the Aliens Act were to be amended, it appears that splitting announcement and formal decision is not in line with the EU Returns Directive as interpreted by the Court of Justice of the EU and the Dutch Council of State. We conclude that within the current legal framework, it is not possible to split the announcement and formal immigration detention decision.

Other solutions for the perceived shortage of time should be sought. Extending the detention period before a formal decision is taken from six to nine hours would alleviate the shortage of time. The pending amendment of the Aliens Act provides for this, but the proposal has been severely delayed and will not enter into force before 2023. Most respondents have stated that extending the detention period to nine hours would decrease the experienced time pressure. The perceived shortage of time is especially problematic when confronted with larger groups of foreign nationals who are apprehended at the same time. The current provision in the Aliens Act to extend the detention period cannot be used for that. This is a bottleneck that needs to be solved. It could be possible to address this in the pending amendment of the Aliens Act.

Another problem that has been identified is that the picket service of the lawyers responsible for assisting foreign nationals in immigration detention procedures is not available after 20.00 hrs. Synchronisation of the availability of the picket service and the times in which immigration detention procedures are conducted could solve this problem. The research shows that the Kmar and the AVIM hardly ever make use of alternatives for immigration detention. By having a more active policy on alternatives for immigration detention, it could be possible to make more use of this option and thus decrease the

number of times that responsible officials need to start the intensive and complex immigration detention procedure. From the interviews with the respondents, the researchers got the impression that training on immigration detention decisions at the Police Academy is insufficiently oriented towards the practice of taking immigration detention decisions. It is recommended to investigate whether training could be improved in this area. Another solution could be to improve the availability of expert knowledge between the agencies that are competent to make immigration detention decisions.

The research shows that splitting the announcement and formal immigration detention decision is not possible within the current legal framework. However, the underlying problem of a lack of time in the practice of taking an immigration detention decision is real. The time available for making an immigration detention decision of six hours has not been extended, although there is now a greater requirement to motivate such decisions.