Working on return together

ADVISORY REPORT ON THE EFFECTIVENESS AND DILIGENT IMPLEMENTATION OF MIGRANT DETENTION

Advisory report

Adviescommissie voor Vreemdelingenzaken

ACVZ
The Advisory Committee on Migration Affairs (*Adviescommissie voor Vreemdelingenzaken, ACVZ*) consists of ten experts. The ACVZ is an independent advisory body established by law. The Committee advises the government and Parliament on migration issues. It examines policy and legislation and indicates possible areas of improvement. The ACVZ issues practical recommendations aimed at solving both existing and anticipated problems.

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Summary

Detention is not the solution to the return problem

Foreign nationals who are not legally resident in the Netherlands are obliged to leave, preferably voluntarily, forced if necessary. They may need to be placed in detention for this purpose. We refer in this case to 'migrant detention' (hereinafter 'detention'). According to the law, a cautious approach should be adopted to the use of detention. After all, it is the most severe supervision measure possible that directly intrudes upon the right to liberty to which everyone is entitled. This should always be the guiding principle when seeking ways to achieve a more effective return policy.

Whether foreign nationals who are required to leave actually do so depends primarily on personal circumstances, which the Dutch government can only influence to a limited extent with policy. Such awareness is important with a view to mitigating overly high expectations of policy interventions in advance. It also means that more often imposing thorough detention measures and improving the detention process will not necessarily lead to a proportionate increase in returns of illegally resident foreign nationals. Personal circumstances may be linked to the situation in the country of origin (such as the experienced or expected lack of security, the lack of means of subsistence, etc.) or the situation in the Netherlands (such as the presence of a social network, better future prospects for the children, etc.). The unwillingness of the foreign national to cooperate may also prompt the country of origin to refuse to cooperate, even if there actually is no doubt about the nationality and identity of the foreign national.

Considerable differences in effectiveness according to destination, nationality and organisation

The annual number of detentions virtually doubled during the 2015-2019 period, from 1,999 individuals in 2015 to 3,729 in 2019. A total of 14,493 foreign nationals were placed in detention during that period (excluding border detention). Almost two-thirds left the Netherlands under supervision. That share rose from 2015 to 2017 and has more or less stabilised since then.

The initial rise in demonstrable returns from detention is partly attributable to an increase in the share of 'Dublin detentions', the purpose of which is to transfer the foreign national to an EU Member State that is responsible for examining the asylum application. In Dublin detentions the share of demonstrable returns is far higher (90 per cent) than in other detentions (50 per cent). It is easier to carry out a transfer from detention to another EU Member State than a return to the country of origin. The effectiveness of Dublin detentions barely depends on the nationality of the foreign national or the organisation imposing detention. Although a transfer from a Dublin detention leads to demonstrable return from the Netherlands, it says nothing about the return of the foreign national to their country of origin.

However, the effectiveness of non-Dublin detentions varies substantially, depending on the nationality of the foreign national or the organisation imposing detention. Compared to nine out of ten Albanians who demonstrably return to their country of origin immediately after detention, this applies to just one out of ten Moroccans and Algerians. This is attributable to cooperation from the foreign nationals themselves and from the countries of origin.

Non-Dublin detentions imposed by the Repatriation and Departure Service (DT&V) lead to demonstrable return substantially more often than detentions imposed by the Royal Netherlands Marechaussee (Military and Border Police, KMar) or the Migrant Police, Identification and Human Trafficking Department (AVIM). Detention measures imposed by the KMar or the AVIM are more often lifted due to avoidable deficiencies, such as making procedural errors or providing inadequate reasons for the measure. This is not surprising, given the difference between the nature of the work of the KMar and the AVIM, on the one hand, and the DT&V, on the other. The KMar and the AVIM experience the most time pressure and therefore often have less time to prepare their cases substantively than the DT&V.

Uncooperative foreign nationals are difficult to remove

Detentions exceeding two months are usually lifted without the foreign national demonstrably leaving the Netherlands. The lack of cooperation from the foreign national and/or the country of origin often plays an important role in this regard. The legal obligation to cooperate in return is unenforceable. Foreign nationals who fail to cooperate or insufficiently cooperate may therefore be practically non-removable.

Most detentions not lifted due to negligent conduct

Fourteen per cent of detentions are lifted due to negligent conduct. Eighty-six per cent of the detentions are lifted for reasons other than the thoroughness of the detention measure or the detention process.
The DT&V imposes thorough measures more often than the KMar and the AVIM. After detaining the foreign national, the organisations usually carefully assess whether continuation of the measure is not too stressful for the foreign national. Nevertheless, there is still room for improvement.

Chronic bottlenecks in implementing the detention process

Bottlenecks impede DT&V, KMar and AVIM officers from always being able to implement the detention process in the proper manner. Examples are poor cooperation and coordination, severe time pressure, the poor provision and exchange of information, a heavy administrative burden, complex laws and regulations and inadequate attention paid to knowledge development. These bottlenecks already came to light during our research on detention in 2012 and so officers have been contending with them for a long time.

The severe time pressure will be partially eliminated upon the entry into force of the Repatriation and Migrant Detention Act (*Wet terugkeer en vreemdelingenbewaring*). The debate in the House of Representatives on the Act has been paused because the amended bill has been declared controversial (there is currently only a caretaker government). The other bottlenecks have highlighted the need for the organisations involved to work together more effectively and the need to create the proper conditions to enable them to do so.

Recommendations on the effectiveness of detention (for details, see the advisory report)

1. Experiment more with less coercive supervision measures and improve the manner in which they are recorded

We have insufficient knowledge of the effectiveness of less coercive measures, such as imposing a reporting requirement, deposit (bail or bond) or surety. These measures are used to a limited extent in practice. The government should take account of the basic principle that detention should be used as a last resort. A reliable assessment should also be made of the effectiveness of detention in relation to the effectiveness of less coercive measures. For this reason, the government should experiment more with these types of alternatives. This should also be centrally recorded in a uniform manner.

2. Promote voluntary return from detention more actively

Voluntary return has preference over forced return because it is less stressful for the foreign national and less costly. A limited share of foreign nationals in detention still decides to leave voluntarily (although under supervision). For this reason, ways should also be considered of more actively approaching foreign nationals who are initially reluctant to return voluntarily and are placed in detention, and informing them of the options of still returning voluntarily.

3. Invest more in relations with countries of origin that fail to cooperate or insufficiently cooperate

This review confirms that there are a limited number of countries that fail to cooperate or cooperate to a limited extent in the forced return of their citizens. It also confirms the need to continue to engage in dialogue with these countries, however difficult that might sometimes be. In this context, the EU has more clout than the Netherlands alone, but given that this too is a lengthy process, the Netherlands itself should also, bilaterally, continue to work on improving relations with these countries.

Recommendations on the diligent implementation of detention (for details, see the advisory report)

4. Improve the facilities to ensure closer collaboration

All officers of the DT&V, the KMar and the AVIM should always have access to the necessary, current information so that they can properly perform their work. Basic facilities such as computers and printers should be available at locations where foreign nationals are interviewed and placed in detention.

5. Achieve closer collaboration between the organisations involved and promote the further development of knowledge and expertise

The organisations involved (DT&V, KMar and AVIM) have a considerable need to liaise more directly and frequently with each other. This is easier and more natural when people are located physically close to each other than remotely. Pooling knowledge and expertise, and short lines of communication between the officers of the organisations involved are essential to be able to properly implement the labour-intensive and operationally challenging detention process. In this advisory report we have outlined the contours of a number of scenarios for organising closer collaboration, such as collectively housing the organisations under one roof at a number of locations spread across the country. In addition, it is important to meet the considerable need to increase the exchange of knowledge on relevant developments in laws and regulations and case law, and for case consultations, particularly among officers of the KMar and the AVIM, both prior to and after detentions.

Contents

Chapter 1

Introduction

In this chapter we discuss the background to the request for advice and place it in the context of the return policy. We also explain the research question, discuss the added value of this review and describe the research methods and structure of this advisory report.

1.1 Background: in pursuit of a more effective return policy

The aim of the return policy is to minimise the illegal stay of foreign nationals. Under the Aliens Act (*Vreemdelingenwet)* foreign nationals who are not or no longer legally resident in the Netherlands are primarily personally responsible for their own return.[1] If they wish to leave voluntarily, they may seek assistance from the Repatriation and Departure Service (DT&V), the International Organisation for Migration (IOM) or non-governmental organisations (NGOs). In practice, many foreign nationals who are obliged to leave are unwilling to leave voluntarily. In that case they may be placed in detention and removed.[2] Such measures are far-reaching. An effective return policy is vital for the credibility of and public support for the migration policy in general.[3] The government also assumes that it has a mitigating effect on the number of residence applications being submitted with a low chance of success.[4]
If (the preparations for) the removal or the implementation of the asylum procedure are likely to be impeded because there is a risk of the foreign national absconding, or if an asylum applicant poses a threat to public order or national security, their liberty may be restricted or even denied. We refer to the latter case as 'migrant detention' (hereinafter 'detention').

Aside from the fundamental criticism of detention on the grounds of human rights, dissatisfaction with the functioning of the return policy has existed for some time on the grounds of a credible and effective migration policy. Consecutive governments have announced and implemented measures to improve the implementation and effectiveness of the return policy.[5] In January 2021, the Minister for Migration announced that it would be examined whether it would be possible to include foreign nationals in the Dutch asylum procedure and foreign nationals who fall under the scope of the Dublin Regulation in the asylum procedure at an earlier stage or to place them in detention shortly before return.[6] But as she pointed out in her 'return letter' dated 15 November 2019: "Return is a thorny and difficult issue".[7] The Advisory Committee on Migration Affairs (ACVZ) has frequently observed in the past that the effectiveness of the return policy is limited and has submitted multiple recommendations to improve policy.[8] In November 2019, we furthermore found that the substantial and often prolonged circulation of asylum applicants between EU Member States is possible primarily because many of them successfully abscond to prevent their Dublin transfer or return.[9] Among other things we called for a more coordinated approach at EU level and underlined the importance of supervision and enforcement to curb the improper use of asylum procedures and to promote the speedy return of asylum applicants

who submit applications with a low chance of success. This is possible only if they remain available to the authorities. Detention could be a necessary instrument for this purpose. In the letter referred to above, the Minister for Migration announced that various studies would be conducted that should contribute to a more effective return policy. On 2 April 2020, she requested the ACVZ to advise her on the diligent implementation and effectiveness of detention.[10] The ACVZ has submitted this advisory report in response to her request.

1.2 Research question: the diligent implementation and the effectiveness of detention

We have formulated the research question as follows:

To what extent can the thoroughness of the detention process, the thoroughness of the detention measures and the effectiveness of detention be improved?

By the detention process we mean the entire process from the apprehension and questioning, or taking over of the foreign national (from the criminal justice system) through to the lifting of the detention measure (See Section 4.1). By a thorough process we mean that all the steps in this process have been carried out in a correct and prompt manner. The detention measure is the decision imposing detention. A thorough measure means a decision that has been carefully and fully reasoned and contains no procedural errors. A thorough measure that has been imposed after a carefully completed process will in principle stand up in court.[11] From a policy perspective, detention is deemed effective if the foreign national has demonstrably (under supervision) left the Netherlands immediately after detention. A carefully completed process and a thorough measure are required to be able to carry out demonstrable return, but provide no such guarantee because it is also influenced by other factors.

1.3 The effectiveness of the return policy depends only partly on the diligent implementation of detention

The request for advice consists of two parts, which are not necessarily directly related to each other. The first part relates to the thoroughness of the detention process and the thoroughness of the detention measures. The second part relates to the possibilities for increasing the number of returns of foreign nationals from detention. A process that runs smoothly, is properly understood and implemented by everyone, and thorough and fully reasoned detention measures without procedural errors may lead to fewer detentions being lifted prematurely. However, these will not necessarily lead to an increase in demonstrable returns given that return is also influenced by other factors. In addition, due to its far-reaching nature, detention constitutes a component of the broader return policy that should be used cautiously.

Detention is a measure involving deprivation of liberty that directly intrudes on the right to liberty. It is therefore the severest supervision measure possible (last resort) that may be imposed on a foreign national. For this reason, strict conditions are attached to it. Detention is permitted only if it is necessary to prevent the foreign national from absconding from supervision in preparation for removal or to implement the asylum procedure, and only if less invasive measures such as imposing a reporting requirement, deposit (bail or bond), allowing a surety, or the surrender of a travel or identity document, cannot be used effectively. Detention should therefore be used cautiously (see Appendix 3). This means that the individual interests of the foreign national in preserving their liberty always should be carefully weighed against the government's interests in placing the foreign national in detention. When seeking ways to increase the effectiveness of return policy, this is always the guiding principle.

The return policy has been 'a thorny and difficult issue' for a very long time. In 2004, Van Kalmthout had already concluded on the basis of extensive field research that many foreign nationals who were required to leave were unwilling to return to their country of origin.[12] Later studies confirmed the view that relatively few foreign nationals who were required to leave returned voluntarily.[13] There may be various and highly diverse types of underlying reasons, which often occur concurrently. These reasons may be associated with the situation in the country of origin (the lack of security experienced or expected, the lack of an economic perspective, the absence of family or another social network, the lack of medical facilities, in short: little to return to), the situation here in the Netherlands (presence of family or another social network, better medical facilities, means of subsistence, limited or otherwise, future prospects for the children) and more personal circumstances (health, feelings of shame, having debts and no desire to return empty-handed). The extent to which foreign nationals find detention 'legitimate' is another factor that plays a role in the willingness to leave. That perception depends partly on migration motives and may vary between asylum, family and labour migrants.[14]

In facilitating the return of foreign nationals who are required to leave, not only is the cooperation of the foreign national important, but also that of the country of origin, particularly if the foreign national fails to cooperate or cooperates insufficiently in establishing their identity and nationality. Countries of origin generally only issue replacement travel documents if foreign nationals can prove or verify their identity and nationality.[15] Many foreign nationals who are unwilling to return fail to do so.

Due to the far-reaching nature (and the financial costs) of detention, traditionally the voluntary return of foreign nationals who are required to leave has preference in the return policy. That possibility applies not only prior to detention. During detention foreign nationals may also be eligible for return assistance if they still decide to leave voluntarily (although under supervision), unless they do not belong

to the target group or are excluded due to their nationality, criminal record or an entry ban (see Appendix 2).

It is evident from the above that forced return is an intractable process. Firstly, detention should be used cautiously due to its far-reaching nature. Secondly, the willingness of foreign nationals to return who are required to leave primarily depends on political, economic, social and cultural factors, and is also strongly influenced by personal experiences, expectations, motives and perceptions. The lack of willingness to return therefore tends to be a social rather than a legal issue, and the Dutch government can only influence the underlying individual circumstances to a limited extent with laws and regulations. This does not imply that it is not worthwhile and essential to endeavour to improve the effectiveness of the return policy. However, such awareness is important with a view to mitigating overly high expectations of legal policy interventions in advance. Carrying out forced return is not a matter of 'simply deporting' a foreign national. It requires a diligent approach tailored to the individual foreign national and the country of origin, an approach that extends beyond improving the detention process and improving the thoroughness of the detention measures.

Another important nuance applies when examining the effectiveness of detention. Another nuance is that it is difficult to determine to what extent carrying out forced or voluntary return is 'permanent'. This applies to Dublin transfers in particular. For that matter, other Member States likewise are often unsuccessful in facilitating the forced or voluntary return of Dublin claimants to their country of origin after taking them back or taking charge of them, if they have refused their asylum application. In the 2019 advisory report referred to above, we concluded that this constitutes one of the main reasons for the often prolonged circulation of rejected asylum applicants within the EU.[16] A successful Dublin detention does not necessarily say anything about the effectiveness of the Dutch or European return policy in the longer term. Foreign nationals who are removed after detention to their country of origin can also make another attempt to enter the EU and the Netherlands at some point. Moreover, it cannot be ruled out that foreign nationals who are required to leave and are placed in detention would still have left at some point even without detention.

1.4 Added value of this study

A considerable amount of research has already been conducted on the return policy and the use of detention. Many of those studies relate to the detention regime.[17] Other studies focus mainly on the far-reaching nature of the measure and the need to use it cautiously, and to use alternative supervision measures, where possible.[18] Research has also been conducted on factors that may influence the willingness of foreign nationals to return who are required to leave[19] and how they experience their detention.[20]
To our knowledge no recent research exists on the thoroughness of the detention process and detention measures from a policy perspective. There are two recent

reports that briefly discuss the effectiveness of detention measures: the policy review of Return[21] and the report from the Van Zwol Committee, which conducted research on long-term foreign nationals residing without a permanent right to stay.[22] The review concluded that it is difficult to determine the effectiveness of the return policy and its specific components.[23] The report from the Van Zwol Committee revealed that detention is an effective supervision measure, according to the DT&V.[24]

Our advisory report aims to make an in-depth contribution to the discussion about the usefulness and necessity of using detention, and the bottlenecks encountered in implementing the return policy.

1.5 Research methods, scope and limitations

We used the following methods to conduct our research:

- We conducted a literature review, a review of other sources and a case law study. This was aimed at obtaining further insight into the basic principles of the return policy, the legal conditions for detention, the functioning of the detention process and the factors influencing the willingness to actually return of foreign nationals who are required to leave.
- We held exploratory interviews with officers of the organisations directly involved (the Royal Netherlands Marechaussee (KMar), the Migrant Police, Identification and Human Trafficking Department (AVIM), the Repatriation and Departure Service (DT&V) and the Immigration and Naturalisation Service (IND), see the list of respondents). This was aimed at obtaining an initial impression of the bottlenecks encountered and the potential solutions.
- We distributed a survey among officers of the KMar, AVIM and DT&V, who place foreign nationals in detention. It was distributed to 102 AVIM officers ,30 KMar officers and 19 DT&V officers. The response rate was 39% (AVIM), 50% (KMar) and 79% (DT&V). This was aimed at obtaining more detailed insight into the bottlenecks encountered by the operational officers of the organisations cooperating in the immigration process when placing foreign nationals in detention and potential solutions to remedy them.
- We also analysed data from all system-wide detention cases for the 2015-2019 period based on a data file made available by the DT&V. This was aimed at obtaining detailed insight into the effectiveness of detention, the reasons for lifting detentions and any differences in this regard between the grounds for detention, between different groups of foreign nationals and between the three organisations that impose detention (KMar, AVIM and DT&V). For further information on the structure, the availability of the data requested and the limitations, please refer to Appendix 5.
- In conclusion, we performed a case file review at the IND. This was aimed at obtaining a more accurate picture of the implementation of the detention process, the thoroughness of the detention measures and the effectiveness of detention in practice, to supplement the data on a large group of foreign nationals placed in detention and the experiences of respondents. To that end,

we took a random sample from the DT&V data file referred to earlier, ensuring an even distribution across the years we examined and the authorities who imposed the detention. We selected a total of 80 cases, in which detention failed to result in demonstrable return. We studied the case files concerned, including any prior and subsequent detention procedures. Due to the limited size of the sample, the results of the case file review cannot be regarded as completely representative. That was not the intention either. The anonymised cases we have described in this advisory report were derived from the case file review. For further information on the design of the case file review and the case file selection criteria, please refer to Appendix 8.

One of the limitations of this study is that we did not speak to any foreign nationals, nor their legal assistance providers, NGOs or other parties involved, such as courts or judges. The focus of this advisory report lies on the bottlenecks encountered by officers of the organisations cooperating in the immigration process when using and imposing detention on foreign nationals. When performing the case file review, however, we took note of the defence advanced by foreign nationals and their legal assistance providers in the detention proceedings and the judicial review of the detentions imposed. Based on personal experiences, individuals and organisations outside of those cooperating in the asylum and migration system may have a view of the effectiveness of detention and the thoroughness of the detention process and measures that differs from our findings.

We have only researched detentions pursuant to Section 59 (illegally staying foreign nationals and a number of categories of legally staying foreign nationals), 59a (Dublin claimants) and 59b (asylum applicants) of the Aliens Act (*Vreemdelingenwet*) 2000. Detentions in border procedures (pursuant to Sections 6 (asylum applicants) and 6a (Dublin claimants) of the Aliens Act have been excluded. The reasons being that these detentions only take place at Schiphol, they are the smallest in number, their legal nature is completely different and the process is organised differently.

Our research relates to detentions during the period 2015 until year-end 2019. The reason being that immigration system-wide data on detentions have been made available since 2015 and that the DT&V has also been imposing detention measures since then. The scope until year-end 2019 relates to the time at which we received the request for advice (April 2020) and the fact that 'detention practice' is faced with circumstances that are not representative of normal practice due to the onset of the COVID-19 pandemic.

1.6 Reading guide

In Chapter 2, we describe how often detention is used, the nature of the cases and the characteristics of the foreign nationals in question, how effective detention is and why detentions are lifted. In Chapter 3, we discuss the effectiveness of detention in further detail and dependence on the cooperation of the foreign

national and the country of origin in carrying out forced return. In addition, we have formulated recommendations aimed at further improving the effectiveness of detention. Chapter 4, focuses on the implementation of the detention process and the thoroughness of detention measures. At the end of this chapter, we provide a number of recommendations aimed at further improving implementation of the process and the thoroughness of detention measures. In the appendices (separate PDF file, in Dutch only), we have described the detention process and the legal conditions for detention and have discussed the design, limitations and results of the various research methods we have used in greater detail.

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[1] Section 61(1) Aliens Act.
[2] Section 63(1) Aliens Act.
[3] ACVZ, Terugkeer, de nationale aspecten (2005), ACVZ, Peaks and troughs. Towards a sustainable system for receiving asylum seekers, and housing and integrating permit holders (2017), Research and Documentation Centre (WODC), Terugkeerbeleid voor afgewezen asielzoekers. Evaluation of the return migration policy '99 under the Aliens Act 2000 (2004). See also *Parliamentary Papers II* 2016/17, 19 637, No. 2307 and *Parliamentary Papers II* 2019/2020, 33 199, No 32.
[4] *Parliamentary Papers II* 2019/2020, 33 199, No. 32, p. 15.
[5] See inter alia *Parliamentary Papers II* 1998/1999, 26 646, No. 1, 2001/2002, 19 637, Nos 609 and 648, 2003/2004 29 344, Nos 1 and 19, 2010/2011, 19 637, Nos 1396 and 1436, 2011/2012, 19 637, Nos 1483 and 1566.
[6] *Parliamentary Papers II* (2020-2021) 19 637, No. 2692.
[7] *Parliamentary Papers II* (2019-2000) 19 637, No. 2540.
[8] See inter alia ACVZ, The Strategic Country Approach to Migration (2015), Search for safe(r) countries (2018) and Secondary movements of asylum seekers in the EU (2019).
[9] ACVZ, Secondary movements of asylum seekers in the EU (2019).
[10] See Appendix 1.
[11] On 23 December 2020, the Administrative Jurisdiction Division of the Council of State referred a question for a preliminary ruling to the Court of Justice in Luxembourg. The Division has asked the Court of Justice whether European rules require the court to review of its own accord whether all the conditions for detention have been met, even if these conditions have not been raised by the foreign national. On 26 January 2021, the District Court of The Hague sitting in Den Bosch, referred additional questions for a preliminary ruling to the Court of Justice on the method and intensity of the judicial review of the detention measures. The District Court has requested the Court of Justice for a further explanation of Article 47 of the Charter of Fundamental Rights of the European Union in terms of the procedure a foreign national can use to contest the detention measure. The District Court has requested the Court of Justice to explain whether, from a legal protection perspective, the procedural safeguards provided for in this procedure suffice to qualify as an 'effective remedy'. The questions relate to the prohibition to examine and review the lawfulness of detention and the legal competence of the Division to be able to suffice with an 'abridged statement of the grounds'. If the Court of Justice finds the national legal practice in which the courts of second instance and final instance can suffice with abridged grounds in detention cases incompatible with Union law, the District Court has requested the Court of Justice to also answer this question for other procedures under immigration law. Both requests for a preliminary ruling were submitted outside the period to which our research relates (2015-2019). It cannot be ruled out that the Court of Justice's answer to these questions will have consequences for the format of the judicial review of detention cases, and consequently also for the number and share of detentions that are lifted in connection with deficiencies in the statement of reasons.
[12] A. Van Kalmthout, *Terugkeermogelijkheden van vreemdelingen in de vreemdelingen-bewaring* (2004).
[13] See inter alia J. Van Wijk, *Reaching out to the unkown. Native counselling and the decision-making process of irregular migrants and rejected asylum seekers on voluntary return* (2008), Netherlands Court of Audit, Asylum inflow 2014-2016: A cohort of asylym seekers (2018), Solid Road, *Hulp bij terugkeer naar Armenië. Een verkennend onderzoek naar factoren die van invloed zijn op vertrekplichtige Armeense gezinnen om al dan niet voor vrijwillige terugkeer te kiezen* (2018).
[14] A. Leerkes, M. Kox, 'Pressured into a Preference to Leave? A Study on the "Specific" Deterrent Effects and Perceived Legitimacy of Immigration Detention', in: *Law & Society Review*, Volume 51, Number 4 (2017).
[15] International relations | About DT&V | Repatriation and Departure Service.
[16] ACVZ, Secondary movements of asylum seekers in the EU (2019).

[17] See inter alia Council for the Administration of Criminal Justice and Protection of Juveniles,Advisory report on the detention of foreign nationals (2008), National Ombudsman, Penal regime or step towards deportation? (2012), Research and Documentation Centre (WODC), Van bejegening tot vertrek - Een onderzoek naar de werking van vreemdelingenbewaring (2013), Amnesty International, Geen cellen en handboeien! Het beginsel van minimale beperkingen in het regime vreemdelingendetentie (2018), National Ombudsman, Limits to Migration Detention (2020).

[18] See inter alia Amnesty International, Vreemdelingendetentie in Nederland: het moet en kan anders. Alternatieven voor vreemdelingendetentie (2011), Justitia et Pax, Effect door Respect. Alternatieven voor vreemdelingenbewaring in Nederland (2012), Advisory Committee on Migration Affairs (ACVZ), Migrant detention or a less intrusive measure? (2013), Amnesty International, Het recht op vrijheid. Vreemdelingendetentie: het ultimum remedium beginsel (2018).

[19] Research and Documentation Centre (WODC), Kiezen tussen twee kwaden. Determinanten van blijf- en terugkeerintenties onder (bijna) uitgeprocedeerde asielmigranten (2010), A. Leerkes, M. Galloway, M. Kromhout, Terug of niet? Determinanten van terugkeerintenties en -attitudes onder (bijna) uitgeprocedeerde asielmigranten (2011), K. Koser, K. Kuschminder, Comparative Research on the Assisted Voluntary Return and Reintegration of Migrants (2015), Regioplan, Terugkeer van vertrekplichtige vreemdelingen. Een verkenning van interventies om zelfstandige terugkeer te stimuleren (2015).

[20] Research and Documentation Centre (WODC), Van bejegening tot vertrek. Een onderzoek naar de werking van vreemdelingenbewaring (2013), A. Leerkes, Managing migration through legitimacy? Alternatives to the criminalisation of unauthorised migration (2016), A. Leerkes, M. Kox, 'Pressured into a Preference to Leave? A Study on the "Specific" Deterrent Effects and Perceived Legitimacy of Immigration Detention', in: *Law & Society Review*, Volume 51, Number 4 (2017).

[21] Ministry of Justice and Security, Beleidsdoorlichting begrotingsartikel 37.3. De terugkeer van vreemdelingen (2019).

[22] Report of the Committee of Inquiry on long-term foreign nationals residing without a permanent right of residence (2019).

[23] Beleidsdoorlichting Terugkeer, p. 6.

[24] Report from the Van Zwol Committee, Section 4.5.3.

Chapter 2

Scale, characteristics, trends and reasons for lifting detention

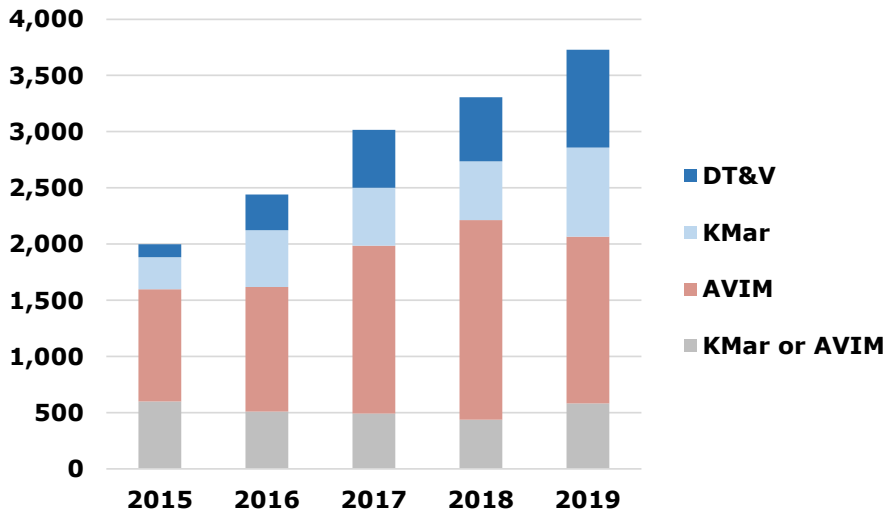
In this chapter we describe how often detention is used, the types of cases involved, the main trends and why detentions are lifted.

This chapter is based on the data analysis we performed. For a more detailed analysis, please refer to Appendix 5.

2.1 Scale, characteristics and trends

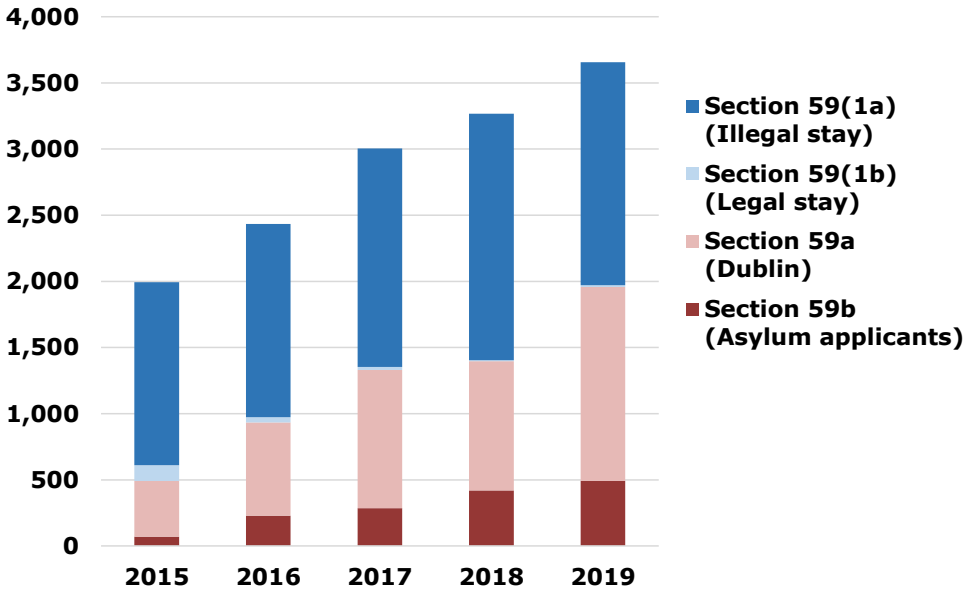
Detentions virtually doubled during the 2015-2019 period, illegally resident foreign nationals were mostly placed in detention, but detention involving Dublin claimants and asylum applicants reflected the strongest increase

Figure 1: Number of detentions broken down into organisation, 2015–2019



Organisation	2015	2016	2017	2018	2019	Total
DT&V	117	319	517	570	871	**2,394**
KMar	284	505	513	522	791	**2,615**
AVIM	997	1,108	1,494	1,776	1,484	**6,859**
KMar or AVIM	601	510	493	438	583	**2,625**
Total	**1,999**	**2,442**	**3,017**	**3,306**	**3,729**	**14,493**

Figure 2: Number of detentions broken down into legal basis, 2015–2019



Legal basis	2015	2016	2017	2018	2019	Total
Section 59(1a) (Illegal stay)	1,384	1,461	1,651	1,864	1,686	**8,046**
Section 59(1b) (Legal stay)	119	40	23	8	13	**203**
Section 59a (Dublin)	421	704	1,046	976	1,467	**4,614**
Section 59b (Asylum applicants)	70	229	285	420	491	**1,495**
Other or Unknown	5	8	12	38	72	**135**
Total	**1,999**	**2,442**	**3,017**	**3,306**	**3,729**	**14,493**

During the 2015–2019 period, 14,493 foreign nationals were placed in detention, excluding border detention. The number of detentions per year virtually doubled during that period, from 1,999 individuals in 2015 to 3,729 in 2019.
The AVIM is responsible for almost half of all detentions. The other (slightly more than) half were imposed in approximately equal numbers by the DT&V, the KMar, and the KMar or the AVIM. For the latter group, it cannot be reliably determined from the available data whether the KMar or the AVIM imposed detention.[25] Since becoming authorised to impose detention in 2015, the number of detentions imposed by the DT&V has risen sharply. In 2019, the DT&V imposed almost a quarter of all detentions. The number of detentions imposed by the KMar similarly reflected an upward trend during the period researched. The AVIM also placed more individuals in detention, but that upward trend ended in 2019 when the numbers declined to the 2017 level.

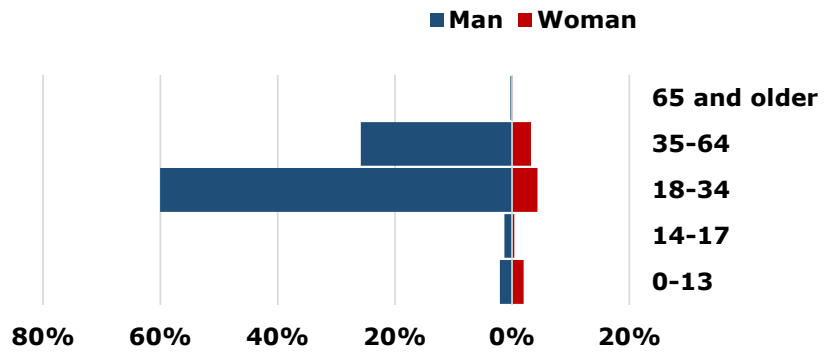
Over half of the cases involved illegally resident foreign nationals, around one-third of the cases involved Dublin claimants and around one-tenth of the cases asylum applicants, who do not fall under the scope of the Dublin Regulation. The detention of legally resident foreign nationals on ordinary grounds rarely occurs. Although the number of detentions of illegally resident foreign nationals has risen,

the share of this group has declined because of the more significant increase in the number of detentions of Dublin claimants.

In 571 out of the 14,493 detentions, no new physical placements in detention took place but instead a change in the legal basis. To avoid duplication, for the purpose of the further analysis of the nature of the cases, the results of the detentions and the reasons for lifting detention, we have excluded the converted detentions. The following percentages are therefore based on 13,922 detention procedures during the 2015–2019 period.

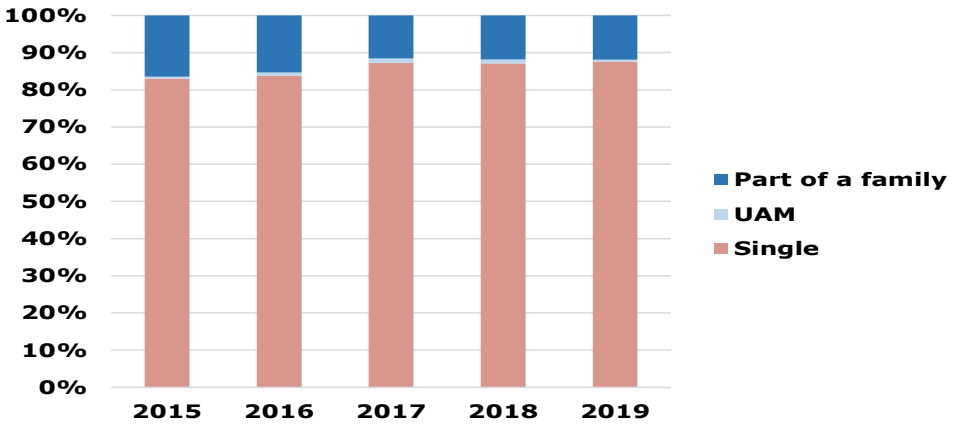
Mostly single men, hardly any unaccompanied minors (UAMs) in detention

Figure 3: Detentions broken down into age and gender of the individual in question, 2015–2019



Age	Man	Woman
65 and older	0%	0%
35-64	26%	3%
18-34	60%	4%
14-17	1%	0%
0-13	2%	2%

Figure 4: Detentions broken down into family composition of the individual in question, 2015–2019

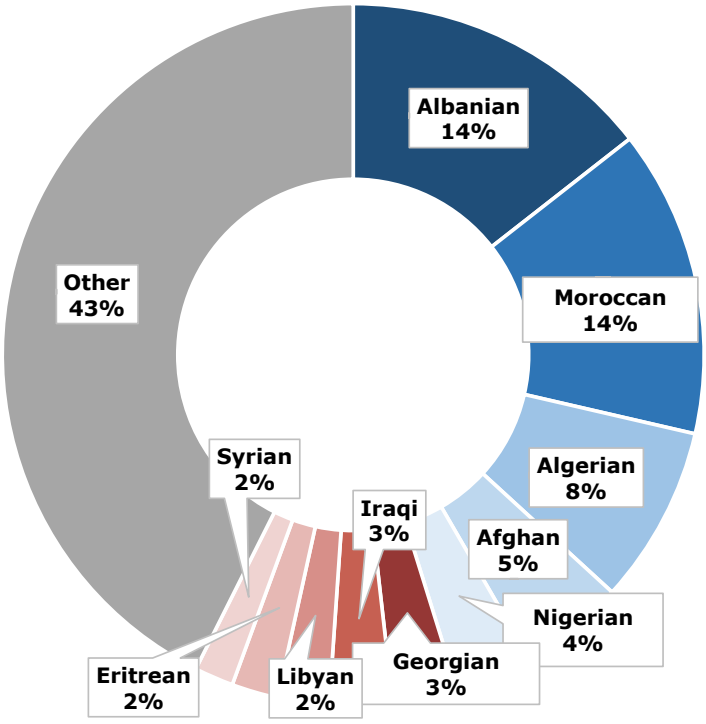


Family composition	2015	2016	2017	2018	2019	Total
Part of a family	16%	15%	12%	12%	12%	**13%**
UAM	1%	1%	1%	1%	1%	**1%**
Single	83%	84%	87%	87%	88%	**86%**
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

By far the most foreign nationals who were placed in detention were men (86%) in the 18–34 (60%) and 35–64 (26%) age groups. The vast majority (also 86%) of the foreign nationals who were placed in detention were single. This share rose slightly during the research period. Thirteen per cent of the detentions involved individuals who form part of a family. One per cent of the detentions involved unaccompanied minors (UAMs, 117 individuals during the 2015-2019 period, between 10 and 34 times per year).

Top five nationalities: Albanians, Moroccans, Algerians, Afghans and Nigerians

Figure 5: Detentions broken down into nationality of the individual in question, 2015–2019



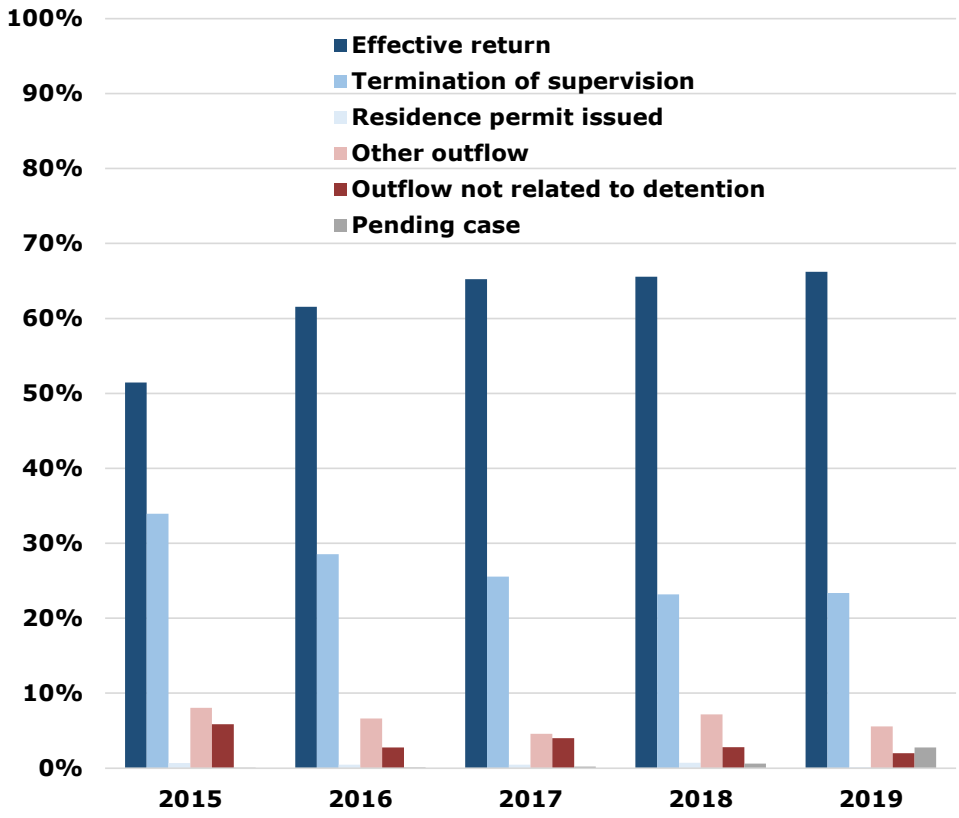
Nationality	2015-2019	
Albanian	2,012	14%
Moroccan	1,971	14%
Algerian	1,140	8%
Afghan	674	5%
Nigerian	495	4%
Georgian	418	3%

Iraqi	404	3%
Libyan	329	2%
Eritrean	298	2%
Syrian	251	2%
Other	5,930	43%
Total	**13,922**	**100%**

Albanians and Moroccans were placed in detention the most during the 2015–2019 period, followed at some distance by Algerians. Afghans and Nigerians complete the top 5. There are some annual fluctuations in the exact share of these five countries of origin, but no clear trend can be identified. Albanians, Moroccans and Algerians, whose countries of origin are designated as safe by the Netherlands, almost always formed the top 3 (the order varies per year) and Afghans and Nigerians were always among the top 5.

Effectiveness of detention more or less stable since 2017

Figure 6: Rate of return after detention, 2015–2019



	2015	2016	2017	2018	2019	Total
Effective return	51%	62%	65%	66%	66%	**63%**
Termination of supervision	34%	29%	26%	23%	23%	**26%**
Residence permit issued	1%	0%	0%	1%	0%	**0%**
Other outflow	8%	7%	5%	7%	6%	**6%**
Outflow not related to detention	6%	3%	4%	3%	2%	**3%**
Pending case	0%	0%	0%	1%	3%	**1%**
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

From a policy perspective, detention is effective if it results in the foreign national demonstrably leaving the Netherlands (forced or still voluntarily). It is difficult to determine exactly when the outcome of a return procedure is the immediate consequence of detention. If a foreign national is not removed from detention, but leaves demonstrably some time after it has been lifted, that return may be associated not only with detention but also with other facts and personal circumstances. The DT&V relates the outcome of the return procedure to detention if there are a maximum of 31 days between the lifting of detention and return. We have adopted that principle.

During the 2015–2019 period, almost two-thirds of the number of detentions were effective.[26] In those cases the foreign national demonstrably (under supervision) left the Netherlands ('effective return'). In absolute terms, this represents 8,778 individuals. The share of effective returns rose from 2015 to 2017 and stabilised after that period (an increase of 51% in 2015 to 66% in 2019).

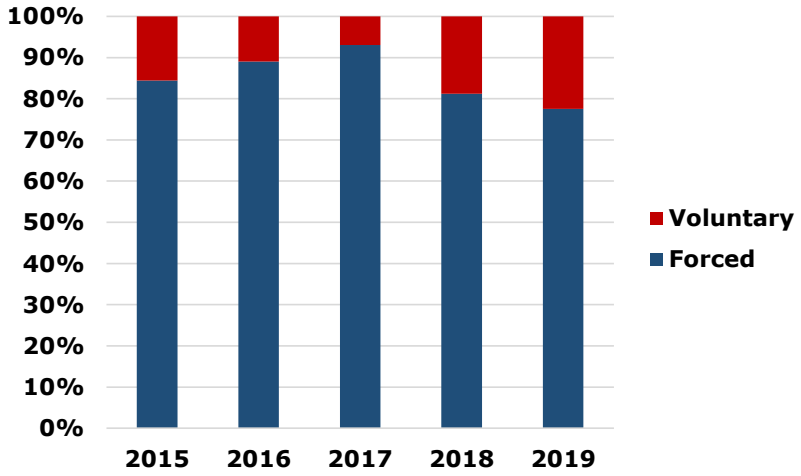
In around a quarter of the number of detentions, the foreign national received an order to leave the Netherlands, but it is not known whether the foreign national actually left the country because the individual is no longer on the government's radar. Those cases of 'termination of supervision' are recorded as voluntary return without supervision, although it has not been ascertained that the foreign national has actually left the Netherlands. The share of these cases declined from 34% in 2015 to 23% in 2019.

During the 2015–2019 period, 3,633 foreign nationals were no longer on the government's radar after their detention had been lifted.

The result 'other outflow' (6% of the detentions during the 2015–2019 period) means that the individual in question was no longer included in the DT&V's caseload because the individual had been granted temporary legal stay or, to a lesser extent, because supervision had been continued by another organisation cooperating in the immigration process.

Mostly forced returns from detention, but voluntary returns from detention have also risen

Figure 7: Type of effective return from detention, 2015–2019

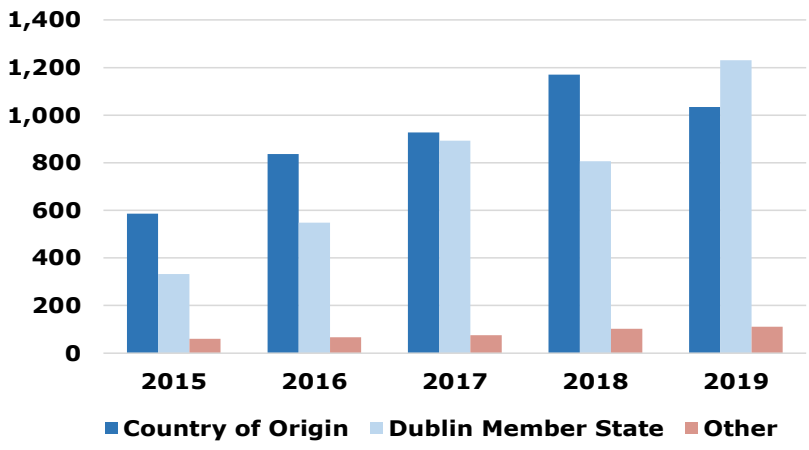


Type of effective return	2015	2016	2017	2018	2019	Total
Forced	84%	89%	93%	81%	78%	**84%**
Voluntary	16%	11%	7%	19%	22%	**16%**
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

By far the most (84%) foreign nationals who demonstrably leave the Netherlands after detention are removed from detention. Sixteen per cent in detention still opt to leave the Netherlands voluntarily (under supervision).[27] After declining from 16% in 2015 to 7% in 2017, that share again rose sharply to 22% in 2019. In other words: 15% (over 500) of the foreign nationals detained in 2019 still chose to leave voluntarily. This demonstrates the efforts aimed at encouraging voluntary return are more effective than before.[28]

Shift in destination: more often EU Member State than country of origin

Figure 8: Destination when returning from detention, 2015–2019

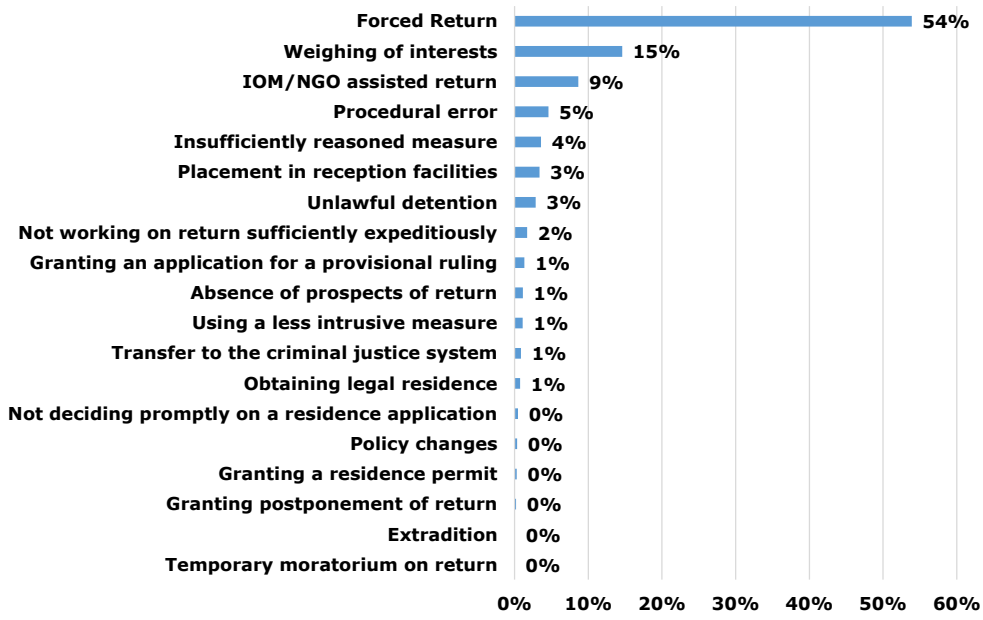


Destination	2015	2016	2017	2018	2019	Total
Country of Origin	586	837	927	1,170	1,034	**4,554**
Dublin Member State	332	548	893	806	1,231	**3,810**
Other	60	66	75	102	111	**414**
Total	**978**	**1,451**	**1,895**	**2,078**	**2,376**	**8,778**

During the 2015–2019 period, a small majority (52%) of the foreign nationals who left the Netherlands from detention returned to their country of origin. In 43% of the cases, the foreign national was transferred to another EU Member State under the Dublin Regulation. In absolute terms, both the number of returns from detention to the country of origin and the number of transfers from detention to other EU Member States has risen, but a significant shift has taken place between the shares of these two destination categories. The share of Dublin transfers rose from 34% in 2015 to 52% in 2019 and the share of 'returns to country of origin' declined from 60% in 2015 to 44% in 2019. This is linked to the sharper increase in the number of Dublin detentions identified earlier. In 2019, for the first time, the share of Dublin transfers from detention exceeded the share of detention cases involving return to the country of origin. Dublin transfers are almost always forced, whereas a substantial number of the foreign nationals who return to their country of origin from detention still leave voluntarily (although under supervision).

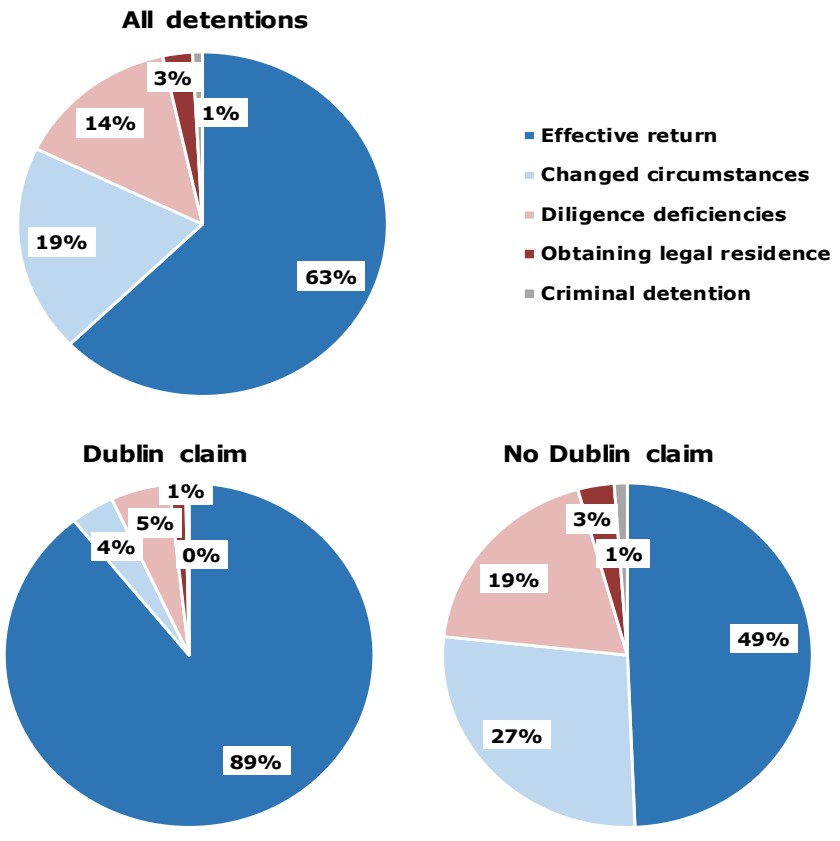
2.2 Reasons for lifting detentions

Figure 9: Reasons for lifting detentions, 2015–2019



Reasons for lifting detentions	2015-2019	
Forced Return	7,502	54%
Weighing of interests	2,033	15%
IOM/NGO assisted return	1,202	9%
Procedural error	640	5%
Insufficiently reasoned measure	499	4%
Placement in reception facilities	470	3%
Unlawful detention	399	3%
Not working on return sufficiently expeditiously	237	2%
Granting an application for a provisional ruling	186	1%
Absence of prospects of return	155	1%
Using a less intrusive measure	152	1%
Transfer to the criminal justice system	120	1%
Obtaining legal residence	106	1%
Not deciding promptly on a residence application	63	0%
Policy changes	47	0%
Granting a residence permit	41	0%
Granting postponement of return	28	0%
Extradition	8	0%
Temporary moratorium on return	2	0%
Unknown	2	0%
Detention not yet lifted	30	0%
Total	13,922	100%

Figure 10: Categories of reasons for lifting detentions, 2015–2019



Reasons for lifting	All detentions		Dublin claim		No Dublin claim	
Effective return	8,712	63%	4,152	89%	4,560	49%
Changed circumstances	2,707	19%	178	4%	2,529	27%
Diligence deficiencies	1,990	14%	239	5%	1,751	19%
Obtaining legal residence	361	3%	67	1%	294	3%
Criminal detention	120	1%	14	0%	106	1%
Unknown or detention not yet lifted	32	0%	0	0%	32	0%
Total	**13,922**	**100%**	**4,650**	**100%**	**9,272**	**100%**

Most frequent reason for lifting detention: demonstrable return

During the 2015–2019 period, almost two-thirds of the number of detentions resulted in the foreign national's demonstrable return. These detentions were also lifted prior to actual return. 'Effective return' therefore is the most frequent category of reasons for lifting detention. Over one third of the number of detentions was lifted without the foreign national demonstrably leaving. Why were those detentions lifted? The available data show that there are highly diverse reasons for doing so.[29] It should be noted that detentions are not only lifted by order of the court, but also on the initiative of the Minister for Migration (ex officio).

Various reasons for lifting non-effective detentions

By far the most frequent reason for lifting detentions without the foreign national demonstrably leaving the Netherlands (15%) is that it is assumed that the liberty interests of the foreign national are or has become greater than the Dutch State's interests in keeping the foreign national in detention ('weighing of interests'). The vast majority of the detentions are lifted ex officio for this reason (89%).

Of the other detentions that have failed to lead to demonstrable return, 5% were lifted due to 'procedural errors', 4% because the measure was insufficiently reasoned, 3% because the foreign national was once again placed in COA reception facilities,[30] another 3% because detention was unlawful and 2% because of failure to work on return sufficiently expeditiously.

In conclusion, there are a number of reasons in around 1% of the cases that each can lead to the lifting of detention without the foreign national demonstrably leaving: granting a request for a provisional ruling, the absence of prospects of return within a reasonable period, using a less coercive supervision measure, transfer to the criminal justice system and still/once again acquiring legal stay. Other reasons represent less than 1% of the number of detentions lifted.

Reasons for lifting detention are unable to be clearly related to the detention process or detention measures

Based on the current practice of recording data, it is not possible to relate the reasons for lifting detention completely clearly to the detention *process* or the detention *measures*. Reasons relating to aspects of thoroughness may therefore relate to both. In view of this limitation, we have clustered the reasons for lifting detentions that have failed to lead to the foreign national's demonstrable return into three groups:

1) Due diligence deficiencies in the detention process or detention measures (procedural errors, insufficiently reasoned measure, unlawful detention, not working on return sufficiently expeditiously, using a less coercive measure,[31] not deciding promptly on a residence application) → 14% of all detentions lifted.
2) Obtaining legal stay (granting an application for a provisional ruling, obtaining legal stay, granting a residence permit, granting postponement of return) → 3% of all cases in which the detention measure is lifted.
3) Other changed facts and circumstances (weighing of interests, placement in COA reception facilities, the absence of prospects of return within a reasonable period, policy changes, the entry into force of a temporary moratorium on returns)[32] → 19% of all detentions lifted.

Below we discuss the extent to which these categories occur in Dublin and non-Dublin detentions and we relate the reasons for lifting the detention to the foreign national's family composition and nationality.

Dublin detentions: few differences in the share of due diligence deficiencies according to family composition and nationality

Detentions lifted on account of due diligence deficiencies in the detention process or detention measures (category 1: 5%), on account of obtaining legal stay (category 2: 1%) or on account of other changed facts and circumstances (category 3: 4%) occur relatively infrequently in Dublin detentions. The share of detentions lifted on account of due diligence deficiencies in the detention process or detention measures (category 1) hardly differ between single adults, individuals who form part of a family and UAMs. The fact that there nevertheless are differences in the rate of demonstrable returns depending on the family composition can be accounted for by the relatively large number of detentions lifted in cases involving individuals who form part of a family and to a lesser extent UAM due to other changed facts and circumstances (category 3), and to a lesser extent because the foreign national subsequently obtained a form of temporary legal stay (category 2).[33] The reasons for lifting Dublin detentions reflect slight differences when looking at the top five most frequently occurring nationalities, except for Afghans. In the case of Afghans, Dublin detentions are relatively often lifted on account of obtaining temporary legal stay and other changed facts and circumstances.[34]

Non-Dublin detentions: differences between categories of reasons for lifting detention according to family composition and nationality

Detentions lifted on account of due diligence deficiencies in the detention process or detention measures (category 1: 19%), on account of obtaining legal stay (category 2: 3%) on account of other changed facts and circumstances (category 3: 27%) occur far more frequently in non-Dublin detentions than in Dublin detentions. In non-Dublin detentions, the share of detentions lifted on account of due diligence deficiencies in the detention process or detention measures (category

1) is substantially higher in cases involving UAMs (36%) than in cases involving single adults (20%) and individuals who form part of a family (9%).

Non-Dublin detentions lifted on account of obtaining a temporary right of stay (category 2) occur substantially more frequently in cases involving individuals who form part of a family (9%) than single adults (2%) and UAMs (1%). Non-Dublin detentions lifted on account of changed facts and circumstances (category 3) occur the most frequently in cases involving single adults (28%), followed by UAMs (24%) and individuals who form part of a family (20%).[35]

Even when looking at the top five of the most frequently occurring nationalities, there are substantial differences between the categories of reasons for lifting non-Dublin detentions. The lifting of the detention on the grounds of the weighing of interests occurs in an above-average number of cases involving Moroccans and Algerians. Over half of the detentions of these two nationalities were lifted for that reason. In total 'other changed facts and circumstances' represented 59–60% of the number of detentions lifted in cases involving these nationalities. This is 29% for Afghans, 21% for Nigerians and the detentions of Albanians were hardly ever lifted for this reason.[36] The considerable difference in the reasons for lifting detention between Moroccans and Algerians, on the one hand, and Albanians, on the other, is attributable to the difference in the average length of detention (see also the following chapter). Moroccans and Algerians are more frequently held in detention for a longer period than Albanians. This is because return to Albania generally proceeds smoothly, whereas return to Morocco and Algeria generally proceeds with difficulty. The longer detention continues, the more likely it is that the facts and circumstances on which the detention is based will change. The lower share of the category 'changed facts and circumstances' in the detentions of Afghans relates to other circumstances: a relatively large number (20%) of these detentions are lifted on account of placement in a reception facility (on account of the submission of a new asylum application, for which a decision will not be made within the maximum detention period). In addition, subsequently obtaining a temporary right to stay (15%) occurs in an above-average number of cases involving Afghans, just as in Dublin detentions.

2.3 Conclusion: effectiveness of detention more or less stable since 2017

The annual number of detentions almost doubled during the 2015-2019 period. Most foreign nationals who are placed in detention do not have or no longer have legal stay in the Netherlands, but the share of detentions of Dublin claimants and asylum applicants has risen sharply. By far the most foreign nationals who are placed in detention are male and single. Hardly any UAMs are placed in detention. Albanians, Moroccans, Algerians, Afghans and Nigerians are placed in detention the most.

The objective of the policy of placing foreign nationals in detention is to ensure that they remain available in order to carry out their actual return or the asylum procedure. In terms of carrying out actual return, detention is effective from a policy perspective if that objective is achieved, either voluntary (after all) or forced. During the 2015–2019 period, almost two-thirds of all detentions resulted in effective return. From 2017 onwards, the effectiveness has more or less been stable.
Most detentions were therefore lifted because the foreign national demonstrably left the Netherlands. Non-effective detentions were lifted for numerous and diverse reasons. Those reasons cannot be clearly related to the detention process or detention measures. We have clustered them into three groups: 1) due diligence deficiencies in the detention process or detention measures 2) obtaining legal stay and 3) other changed facts and circumstances.

In Chapter 3, we discuss the effectiveness of detention measures more in-depth and zoom in on the cooperation of the foreign national and/or the country of origin, which is often decisive in the context of weighing interests and assessing the prospects of return (aspects of category 3 of the reasons for lifting detention).
In chapter 4, we discuss in greater detail the reasons for lifting detention associated with implementing the detention process and/or the thoroughness of the detention measures (category 1 of the reasons for lifting detention). As a consequence of lifting these detentions, the foreign national often vanishes from the government's radar screens. Detentions lifted on account of obtaining temporary legal stay (category 2) and some detentions lifted on account of other changed circumstances in category 3) (such as subsequent or repeat placement in COA reception facilities) are not problematic outcomes from a policy perspective because in those cases supervision is continued in another form. For this reason, we have not further discussed detentions lifted in those cases.

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[25] We have deduced from the case file review that the majority of cases in the latter category comprises detention measures imposed by the AVIM and that the AVIM is responsible for more than half of these detentions.
[26] The figures differ slightly because the method used to calculate the effectiveness figures differs from the method that is often used for the DT&V's management reports and for the Immigration Services Report. See Section 5.1 of Appendix 5 for a further explanation of the method used.
[27] It should be noted that the term 'voluntary' is relative in the context of detention. As in the case of forced return, the Transport and Support Department (DV&O) of the Custodial Institutions Agency (DJI) transports these foreign nationals from the detention centre to Schiphol and transfers them to the KMar at Schiphol.
[28] See figure 8 and the text below it in Appendix 5. We have attributed the initial decline to the curtailment of the support for the voluntary return of foreign nationals from the Western Balkans, Morocco and Algeria and foreign nationals who are allowed to travel to the Netherlands without a visa. See *Parliamentary Papers* II 2014/15, 19 637, No. 2027, 2015/16, 29 344, No. 129 and 2016/17, 19 637, No. 2257. In the course of 2018, a limited support contribution was again made available to these groups of foreign nationals because the curtailment led to a decline in the number of demonstrable returns. See *Parliamentary Papers II*, 2017/18, 29 344, No. 134.
[29] See Section 5.1 in Appendix 5 for a further explanation of the limitations of the data used on reasons for lifting detention.
[30] In those cases the foreign national submitted an asylum application during or just before detention, on which a decision cannot be issued within the general asylum procedure.
[31] The entry 'using a less coercive measure' does not necessarily relate to the thoroughness of the process and the detention measure. Indeed, even during the detention, a situation

may occur in which the detention is required to be lifted because a less coercive measure can be used if, for instance, someone still presents an identity document. It cannot be deduced from the available data whether those cases concerned an unconsidered decision or new circumstances. This reason for lifting the detention can therefore be classified under both categories 1 and 3. This makes little difference to the overall picture: 'Using a less coercive measure' accounting for 1% is by far the least frequent reason for lifting the detention in category 1.

[32] Detentions lifted while the foreign national continues to be held in criminal detention do not come under any of these clusters and form a stand-alone category.

[33] See figure 19 and the text below it in Appendix 5.

[34] See figure 20 and the text below it in Appendix 5.

[35] See figure 19 and the text below it in Appendix 5.

[36] See figure 20 and the text below it in Appendix 5.

Chapter 3

The effectiveness of detention

In this chapter, we discuss the effectiveness of detention measures in greater detail, also in relation to other supervision measures. We examine to what extent there are differences in effectiveness between detentions imposed by the KMar, the AVIM and the DT&V. We discuss the dependence on the cooperation of the foreign national and the country of origin in carrying out forced return in further detail and outline what the consequences are of the fact that detention does not always lead to return.

Sections 3.1 and 3.2 are based on the data analysis we performed. Section 3.3 is based on the case file review we conducted at the IND.

3.1 Introduction

From a policy perspective, detention is effective if the foreign national demonstrably leaves the Netherlands.[37] The Minister of Migration's request for advice relates specifically to the effectiveness of detention. However, in view of the nature of detention as a measure of last resort, the principle of purpose limitation is also linked to the extent to which the liberty of the foreign national is infringed. Detention is permitted only if the objective cannot be achieved with a less coercive supervision measure. Therefore the question about the extent to which the objective is achieved the most efficiently using detention is equally relevant. In order to assess that form of efficiency, information is also required on less coercive supervision measures, such as imposing a reporting requirement or deposit (bail or bond), allowing a surety, or the surrender of a travel or identity document. The Ministry of Justice and Security has no reliable data on such measures because they are imposed and recorded by separate authorities. The information is not recorded in a uniform manner, even though several measures are often imposed concurrently (such as a reporting requirement and a measure restricting personal liberty), the duration of measures may vary and records are not always kept of whether the measures are also complied with (as in the case of imposing a measure restricting personal liberty).[38] For this reason, we have only discussed the effectiveness of detention in this section. However, we have related demonstrable return after detention to the demonstrable return of the total group of foreign nationals who are required to leave.

In this advisory report we have neither included any information on the effectiveness of detention in the Netherlands compared to the effectiveness of detentions in other EU Member States. Although studies have been conducted on the extent to which Member States use detention as a component of the return policy[39] and on the differences in return ratios of foreign nationals who have exhausted all legal remedies between the Member States,[40] but no data exist on demonstrable returns from detention at EU level.

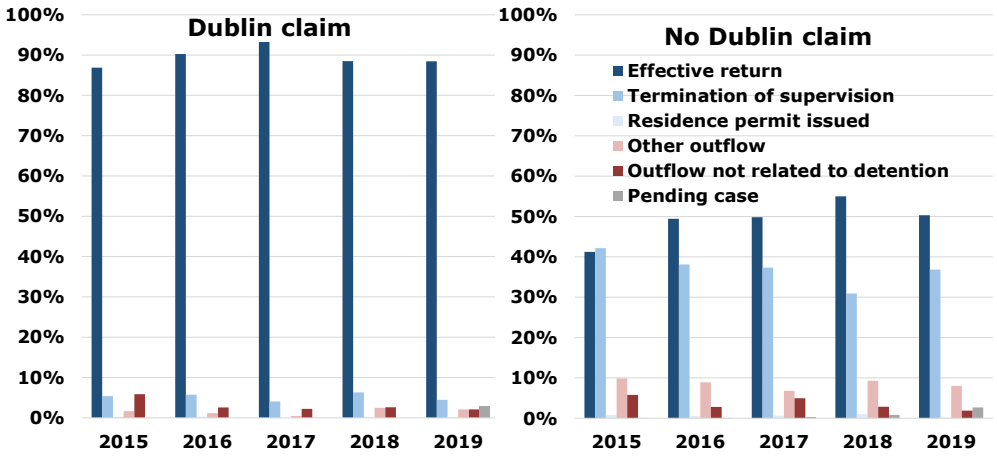
It should be noted that another aspect is also relevant to effectiveness: the financial costs. Detention (pursuant to Section 59 of the Aliens Act 2000) costs

298 euros per day on average.[41] Based on those costs, we have calculated that the costs of all detentions during the 2015–2019 period amounted to over 180 million euros, or over 36 million euros per year.[42]

3.2 The effectiveness of detention measures

Dublin detentions far 'more effective' than non-Dublin detentions

Figure 11: Rate of return after detention with and without a Dublin claim, 2015–2019



Dublin claim	2015	2016	2017	2018	2019	Total
Effective return	87%	90%	93%	88%	88%	**90%**
Termination of supervision	5%	6%	4%	6%	4%	**5%**
Residence permit issued	0%	0%	0%	0%	0%	**0%**
Other outflow	2%	1%	0%	3%	2%	**2%**
Outflow not related to detention	6%	3%	2%	3%	2%	**3%**
Pending case	0%	0%	0%	0%	3%	**1%**
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

No Dublin claim	2015	2016	2017	2018	2019	Total
Effective return	41%	49%	50%	55%	50%	**50%**
Termination of supervision	42%	38%	37%	31%	37%	**37%**
Residence permit issued	1%	1%	1%	1%	0%	**1%**
Other outflow	10%	9%	7%	9%	8%	**9%**
Outflow not related to detention	6%	3%	5%	3%	2%	**4%**
Pending case	0%	0%	0%	1%	3%	**1%**
Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Detentions for the purpose of transfer to another EU Member State are far 'more effective' than detentions for the purpose of return to the country of origin: 90% versus 50% during the 2015–2019 period. It is not surprising that return from detention to another EU Member State based on an accepted Dublin claim is relatively more frequently successful than carrying out forced return from detention to the country of origin because upon acceptance of the claim the other Member State merely acknowledges its responsibility for examining the asylum

application. Any procedure for return to the country of origin will then still have to be carried out there. Although a Dublin detention resulting in a transfer of the foreign national to another EU Member State therefore leads to demonstrable return from the Netherlands in the short term, that return says nothing about the intended return of the foreign national to the country of origin if the asylum application is rejected. Of all Dublin detentions, 5% resulted in 'voluntary return without supervision', compared to 37% of non-Dublin detentions. The fluctuations in the percentages of both 'return' categories were limited during the 2015–2019 period.

Considerable differences in effectiveness between nationalities in non-Dublin detentions

There are considerable differences between the effectiveness of detention when looking at the top five of the most frequently occurring nationalities. Those differences are primarily attributable to differences in the effectiveness of non-Dublin detentions. Compared to the 2015-2019 period when 92% of the Albanians placed in detention demonstrably left the Netherlands immediately after detention, this applied to only 12% and 13% of the Algerians and Moroccans respectively, to 38% of the Afghans and 50% of the Nigerians.

The differences in the effectiveness of the detention of Dublin claimants are not as large. The effectiveness is around 90% for Albanians, Moroccans, Algerians as well as Nigerians.[43] By contrast, the detention of Afghan Dublin claimants is less effective: 66% for the entire research period.[44]

Detention is the most effective during the first two months

Most detentions were lifted within one (69%) or two months (80%). Detentions resulting in demonstrable return were more frequently lifted within one (81%) or two months (93%) than detentions that failed to result in achieving that objective (47% and 57%). This means that the share of demonstrable returns is far higher among detentions lifted within two months than among detentions lifted after two months: 73% versus 20%. The effectiveness of detentions exceeding two months therefore is more limited. The share of demonstrable returns declined fairly steadily every month that the detention continued by around 10 percentage points on average, from 74% in the first month to 18% in the seventh month and longer. However, the sixth month reflects a dip with just 4% demonstrable returns due to the large number of detentions lifted on account of the weighing of interests at the end of the initial maximum period of detention.[45]

In Dublin detentions the share of detentions lifted within one or two months is above average whereas in non-Dublin detentions that share is lower. Moreover, in Dublin detentions there hardly is any difference in the length of detention between the detentions lifted with and without demonstrable return. In both cases, the detention was lifted 8 to 10 times within one month and virtually all detentions were lifted within two months.[46] This can be clearly explained by the applicable periods of detention.[47]

However, in non-Dublin detentions there is a considerable difference between the time of lifting the detention where the detentions that were lifted resulted in demonstrable return or otherwise. After two months hardly any detentions were lifted on account of demonstrable return. From that time onward, detentions were lifted mostly for reasons other than demonstrable return. The lifting of these detentions peaked at around six months.[48] As stated, this is the initial maximum period of detention for illegally staying foreign nationals.[49] Continuing the detention of non-Dublin claimants after two months therefore is hardly effective on the whole.[50]

However, the picture of the time at which non-Dublin detentions are lifted varies depending on the nationality of the foreign national. This is logical, given that the effectiveness of these detentions also varies considerably by nationality. Almost all detentions of Albanians, which almost always resulted in demonstrable return, were lifted within one month, whereas around half of all Moroccans and Algerians who were not Dublin claimants spent at least five months in detention. Although the demonstrable return of these nationalities from detention is usually carried out within the first two months, in their case, particularly Algerians, there is a greater spread over time. Thirty-five per cent of the Algerians who demonstrably leave the Netherlands from detention have spent at least four months in detention. In absolute terms, however, the numbers are small given that even then most detentions fail to lead to demonstrable return. The detentions of Afghans and Nigerians were usually lifted within one month, with a considerable share in the second and third months as well. The differences between the time at which detentions were lifted that resulted in demonstrable return or otherwise are limited for these nationalities. There is no peak of around six months in the number of detentions lifted without demonstrable returns, unlike the detentions of Algerians and Moroccans.[51]

There also are differences between the length of detention when looking at the family composition of foreign nationals who have been placed in detention. Individuals who form part of a family and UAMs generally spend the shortest time in detention. In 95% and 94% of those cases respectively, detention was lifted within two months. This applies to 77% of the detentions of single adult foreign nationals. Again, non-Dublin detentions mainly account for the differences here. The percentages are 92%, 92% and 68% there. The largest difference in non-Dublin detentions are the detentions lifted without the demonstrable return of the foreign national. Of those detentions involving single adult foreign nationals, 49% were lifted within two months, compared to 87% for individuals who form part of a family and 89% for UAMs. Looking at non-Dublin detentions that actually resulted in demonstrable return, demonstrable return was carried out within two months in 97% of the cases involving UAMs,[52] in 96% of the cases involving individuals who form part of a family and in 88% of the cases involving single adults.[53]

Detention is also effective in relation to other supervision measures

As pointed out earlier, no reliable data are available on the effectiveness of other, less coercive supervision measures. However, it is possible to compare the share of demonstrable returns after detention against the share of demonstrable returns of all foreign nationals who were required to leave. The comparison shows that in the return procedures concluded during the 2018-2019 period, the share of demonstrable returns among foreign nationals who were placed in detention is around twice as high as among the total group of foreign nationals who were required to leave: 67% versus 33%. The share of 'voluntary return without supervision' is substantially higher among the total group than among foreign nationals who were placed in detention: 45% versus 23%.[54] In Dublin detentions, the difference between the share of demonstrable returns of foreign nationals who were placed in detention and the total group of foreign nationals who were required to leave is even larger: 93% versus 37%.[55] This comparison says nothing about the effectiveness of other stand-alone measures, but it does say something about the effectiveness of all supervision measures combined. Their effectiveness is not as large as detention because the effectiveness of all measures combined (including detention) is lower than that of the individual detention measures.

The figures on the rate of demonstrable return therefore suggest that in relation to other measures detention is a more effective, and consequently also an efficient, measure. The number of return procedures concluded involving detention represents around 16% of the total number of return procedures concluded. As a result, the use of detention has a limited effect on the total return figures.

3.3 Differences in the effectiveness of detention between the KMar, AVIM and DT&V

Three organisations place foreign nationals in detention: the KMar, the AVIM and the DT&V. The KMar is vested with that authority as part of its border control and Mobile Security Monitoring duties. The AVIM is authorised to place foreign nationals in detention when carrying out the domestic supervision of foreign nationals and the DT&V when implementing the return policy and supervising the return process.

There is a key difference between the detentions imposed by the DT&V and the detentions imposed by the KMar or the AVIM. The DT&V is responsible for placing foreign nationals in detention who are staying in the reception facilities provided by the Central Agency for the Reception of Asylum Applicants (COA). Therefore their place of residence is known. In addition, they have usually already completed one or more residence and return procedures and often are already included in the DT&V's caseload. Their identity, nationality and residency status are usually already known. This means that the DT&V can generally prepare those detentions. The KMar and the AVIM usually place foreign nationals in detention they encounter when carrying out their supervisory duties. Those foreign nationals often have no fixed address and the information on their identity and nationality usually has to be retrieved. As a result, the KMar and the AVIM are usually unable to prepare

detentions in the same way as the DT&V: they are usually 'spontaneously' confronted with them.[56] The difference between the nature of the work of the DT&V, on the one hand, and that of the KMar and the AVIM, on the other hand, has consequences for the way in which they are able to carry out their work.

DT&V detentions have the highest effectiveness, the effectiveness of AVIM and KMAR detentions has increased

During the 2015–2019 period, almost 80% of the foreign nationals who were placed in detention by the DT&V, demonstrably left the Netherlands immediately after detention. That percentage was around 60% for AVIM and KMar detentions. Of all DT&V detentions, around 7% resulted in 'voluntary return without supervision'. That percentage was considerably higher for AVIM and KMar detentions: between 25 and 32%. A substantial share of the AVIM and Kmar detentions were therefore lifted without the foreign national demonstrably leaving the Netherlands. In many of those cases the foreign national was no longer on the government's radar after detention had been lifted.[57]

The effectiveness of DT&V detentions was fairly stable during the research period. By contrast, the effectiveness of AVIM detentions increased considerably. Demonstrable returns after detention rose from 42% in 2015 to 65% in 2019 while the percentage of 'voluntary returns without supervision' declined from 45% to 27%. The effectiveness of KMar detentions also increased, but to a lesser extent: the percentage of demonstrable returns rose from 48% to 58% while the percentage of 'voluntary returns without supervision' declined from 34% to 31%. Despite the increase in the effectiveness of AVIM and KMar returns, the difference with the effectiveness of DT&V detentions is considerable. That difference can partly be explained by the difference in the composition of the organisations' detention cases. Dublin detentions comprise over half of the DT&V's detention cases, compared to around a quarter of the detention cases of the AVIM and the KMar.[58] As we observed earlier, there is a considerable difference between the effectiveness of Dublin detentions and detentions for the purpose of returns to the country of origin (90% versus 50%). Against this background, it is not surprising that a larger share of the DT&V detentions are effective than the detentions imposed by the KMar and the AVIM.

Difference in effectiveness of non-Dublin detentions, but not in the effectiveness of Dublin detentions.

In terms of the effectiveness of Dublin detentions, there are hardly any differences between the DT&V, the AVIM and the KMar. Demonstrable returns in the form of a transfer to another EU Member State following a Dublin detention accounted for a share of roughly 90% for all three organisations. 'Voluntary returns without supervision' following a Dublin detention accounted for a share of roughly 5% and varied during the research period from 2% (DT&V) to 9% (KMar).

In terms of the effectiveness of non-Dublin detentions, there are considerable differences between the organisations. During the 2015–2019 period, 67% of the DT&V detentions of non-Dublin claimants resulted in demonstrable return and 11%

in 'voluntary return without supervision'. For the AVIM and the KMar, the share of demonstrable returns represented between 44% and 50% and the share of 'demonstrable returns without supervision' between 35% and 42%. In the case of detentions of non-Dublin claimants imposed by the AVIM and the KMar in particular, the detention was lifted relatively frequently without demonstrable return and after that the foreign national was no longer on the government's radar screens.[59] We believe that this is associated with a difference in the nature of the cases between the DT&V, on the one hand, and the KMar and the AVIM, on the other. The Dutch government often already has more information about foreign nationals who are placed in detention by the DT&V (procedural history) than about foreign nationals who are placed in detention by the KMar or the AVIM. This provides more reference points for an additional investigation into an individual's nationality and identity, and applying for replacement travel documents. The DT&V also has more time to prepare cases and to discuss them beforehand (for example during the Local Consultations on Return (LTO)), which could lead to a more targeted selection of cases. The KMar and the AVIM lack the time to do so because detentions imposed by these organisations are usually the result of their supervisory activities. Furthermore, avoidable prematurely lifted detentions contribute negatively to effectiveness. We discuss the differences between the three organisations in this context in the following chapter (Section 4.4).

In Section 3.1 we found that the effectiveness of detention differs considerably by nationality. Although the composition of the population placed in detention by the DT&V differs from that of the population placed in detention by the AVIM and the KMar, this does not explain the differences in effectiveness between the organisations. The differences largely remain intact when looking at the effectiveness by nationality.[60]

3.4 Picture arising from the case file review: detention is often lifted due to the lack of cooperation from foreign nationals

The results of the data analysis provide insight into the effectiveness of detention. They also provide insight into the question why not all detentions have resulted in demonstrable return. To obtain a more concrete picture of the factors that play a role and the context, we analysed 80 IND case files, in which detention was lifted at some point without the foreign national demonstrably leaving the Netherlands immediately after that.[61]

In Section 2.2 we found that detentions are lifted for numerous and highly diverse reasons. As stated, the most frequent reason for lifting detentions without the foreign national demonstrably leaving is the weighing of interests (15% of the total number of detentions lifted, 39% of the number of detentions lifted without demonstrable return). This reason falls into the category of reasons for lifting detention 'other facts and circumstances' (category 3), on which the Dutch government has less direct influence than the reasons relating to the

implementation of the detention process or the thoroughness of the measures (category 1). This similarly applies to detentions lifted because there are no prospects of return, or no longer any prospects (1% of the total number of detentions lifted, 3% of the number of detentions lifted without demonstrable return). The lack of cooperation from the foreign national and/or the country of origin plays role in many of the detentions lifted on the grounds of the weighing of interests or the absence of prospects of return.

No countries of origin are known that fail to cooperate in the voluntary return of foreign nationals, who are able to verify their nationality and identity. In other words: if the country of origin has no doubts about the nationality and identity of the foreign national who wishes to return voluntarily (rather than forced), it will issue a replacement travel document for that purpose.[62] However, if the country of origin has doubts about the alleged nationality and identity, after a personal interview with the foreign national for instance, the individual will be asked to provide supporting documents to verify his or her nationality and identity. If the foreign national makes sufficient efforts, this will usually be successful. If the individual fails to provide supporting documents to verify his or her alleged nationality and identity, which are subject to doubt, the country of origin will not issue a replacement travel document because it is uncertain whether the foreign national actually comes from that country.

Forced return is a more complicated matter. Contrary to voluntary return, there are countries of origin who for reasons of principle do not cooperate or cooperate to a very limited extent in the forced return of their citizens.[63] They are unwilling to cooperate in taking back alleged citizens who are required to leave against their will. For this reason, they request foreign nationals to sign a 'statement of voluntary return'. If foreign nationals refuse to do so, or otherwise indicate that they will not cooperate in their return, these countries do not issue replacement documents. However, the refusal to issue a laissez-passer in forced return cases more frequently relates to the doubts about the alleged nationality and identity of the foreign national because the individual has failed to present supporting documents. Obviously, a combination of these circumstances may occur. In both cases the cooperation of the foreign national is crucial.

Below we describe the picture that has emerged from the case file review of foreign nationals and countries of origin cooperating in forced return.

Many foreign nationals who are not or no longer are legally staying in the Netherlands do not leave voluntarily, nor do they cooperate in their forced return. The reports of the return interviews we examined during the case file review show that refusal may take various forms, and that this can also change in the course of time. Sometimes the foreign national states from the outset that he will not cooperate and will persist in doing so:

'I'm not going back to my country. I have no future there. I'm not going to the authorities. I won't do anything at all and will bide my time until I'm free. I don't want to talk about my country anymore. If that's what the next interviews are also about, you don't need to summon me for an interview any more.

In this case, the court ruled several times on appeal and the application for judicial review that due to the refusal of the foreign national to cooperate actively and fully, it could not be assumed that there was no prospect of return within a reasonable period. Indeed, it had not been ruled out that the authorities would issue a laissez-passer within a reasonable period if the foreign national would cooperate. He was primarily held personally responsible for the period of time in detention. In this case, the IND lifted the detention two weeks before the expiry of the six-month period because the interests of the foreign national in being released, despite his refusal to cooperate, would outweigh the interests of the Dutch government in keeping him in detention.

A foreign national sometimes cooperates in certain activities that the DT&V is required to perform to carry out removal, such as a presentation in person to the authorities of the alleged country of origin, but makes no further efforts and adopts a more passive attitude:

'I don't believe that I have an obligation to return to my country and should make every effort to do so. My detention is unlawful, there can't be any laws that allow this. I came to the Netherlands for protection. If the Netherlands doesn't want to protect me, you must release me. I'll find my way to another country. It doesn't matter to me that my fingerprints are known. I won't be checked anyway. I'm never going back to my country again. I went to the embassy because you wanted me to. You have all the information. I've done enough. You don't need to come here any more and ask me the same questions each time. I don't have any documents and can't do anything. If the embassy doesn't issue a laissez-passer, you have to release me.'

In this case the court also ruled up to three times that the detention was lawful and that the DT&V was working on the removal sufficiently expeditiously. Three months later, this detention was also lifted ex officio because the DT&V doubted whether continuing the detention any further would still lead to return within a reasonable period. The authorities of the alleged country of origin had stated that they were unable to confirm the nationality of the foreign national due to a lack of information, further enquiries with other EU Member States had failed to produce results and for three months the DT&V had constantly pointed out to the foreign national that he was personally responsible for returning.

According to settled case law of the Administrative Jurisdiction Division of the Council of State, the Dutch State's interests in continuing detention during the first six months of detention in principle outweigh the interests of the foreign national in being released. Yet just as there may be special circumstances that result in allocating greater weight to the interests of the foreign national within that period

and the detention will have to be lifted, it may be the case that even after the six-month period there are more compelling reasons for continuing the detention.

Fuad is a single man. The police apprehended him because he was unable to identify himself. He had been placed in detention for a few months earlier that year. That detention was lifted because he refused to have his fingerprints taken. As a result, his presentation in person to the authorities of his alleged country of origin failed to produce results. However, the police now managed to take his fingerprints. They showed that Fuad was not the person he claimed to be. He is known under different aliases. He had entered the Netherlands with a valid passport containing a valid visa. The AVIM then placed him in detention again. The DT&V provided his passport number to the authorities and submitted another application for a laissez-passer for him. Fuad refused to cooperate in a presentation in person to the diplomatic representation, but that was now no longer necessary according to them. The DT&V's return interviews with Fuad proceeded with difficulty. He refused to cooperate and adopted a passive attitude. The DT&V followed up more than twenty times with the authorities to remind them of the laissez-passer application. They informed the DT&V that a further investigation was required. The court ruled on appeal and the applications for judicial review that the DT&V was working on the removal expeditiously and that Fuad should be expected to fully and actively cooperate. Six months later, the DT&V decided to extend the detention by 12 months at the most because the laissez-passer was not forthcoming, despite all the efforts made. The DT&V tried to make an appointment with the diplomatic representation several times to personally discuss Fuad's case but was unsuccessful. The court ruled that there were prospects of return and that Fuad was contributing to the length of the detention due to his lack of cooperation on the investigation into his identity and nationality. The IND decided to lift the detention after all because a laissez-passer for Fuad had still not been issued, despite the fact that he had been presented to the authorities on two earlier occasions, they had a copy of his passport and several attempts had been made to discuss his case with them personally. Despite the fact that he refused to cooperate in his return, in view of the length of the detention, a weighing-up of the interests led to a conclusion in Fuad's favour. A few months later, the Netherlands received a Dublin claim for Fuad from Germany. The Netherlands accepted the claim, but this failed to result in a transfer because Fuad absconded from supervision in Germany. Some time later, the police arrested Fuad in the Netherlands for giving a false identity. After the criminal proceedings, he was again placed in detention and the DT&V submitted a new laissez-passer application for him to the authorities. Fuad continued to refuse to cooperate and the authorities put the laissez-passer application on hold for investigation. Just before the expiry of the six-month period, the IND also lifted this detention after weighing all the interests. Fuad was arrested by the police a few weeks later on suspicion of committing a criminal offence. After his release from pre-trial criminal detention, despite his illegal stay, he was not placed in detention immediately after that because of the short period of time since the previous detention. Less than a year later, the police arrested Fuad once again on suspicion of committing a criminal offence. He was placed in detention immediately after the criminal proceedings and the DT&V submitted a new laissez-passer application to the authorities. Fuad argued that it was arbitrary because he had not been placed in detention last time, but that a different assessment had been made at that time. The court did not concur and emphasised that he was not cooperating on his obligation to leave the country, had never taken any action to obtain identification or travel documents and that he had refused all contact with the authorities. The court also ruled that the DT&V would continue to work expeditiously on his forced return. The IND lifted this detention because Faud still had to serve a prison sentence. After serving his prison sentence Fuad was not placed in detention again.*

*All names in the cases described are fictitious.

We have deduced from the case file review that detentions that have been terminated at some point on the grounds of the weighing of interests without the foreign national demonstrably leaving the Netherlands are usually lifted because foreign nationals fail to cooperate or insufficiently cooperate. If the return procedure is not actively frustrated, it is often passively obstructed by foreign nationals saying that they will cooperate, but not making any effort demonstrating that they are doing so. The reports of the return interviews we examined in the context of the case file review show that young single men in particular are often fully aware of what they should do to avoid their removal: providing different identities, withholding documents, not cooperating in establishing their nationality and identity, and pointing out to the authorities of the countries of origin that do not cooperate or cooperate to a very limited extent in forced return that they will not cooperate in their return. The above case demonstrates that the latter can even be effective if the authorities can't have any reasonable doubts about the nationality and identity of the foreign national.

During the case file review, we came across one case involving a foreign national who had been placed in prolonged detention several times, in which the final detention nevertheless eventually led to his removal.[64] This case shows moreover that obtaining the cooperation of the country of origin can be an intractable matter, even if documentation substantiating the alleged nationality and identity is available.

Wahid is a middle-aged man. He came to the Netherlands more than twenty years ago. Wahid never had residence status. He lived mainly on the streets, received food from the food bank and occasionally slept at friends' homes. He was sentenced for committing serious crimes and served several long-term prison sentences. The IND therefore declared him an undesirable migrant. His stay in the Netherlands was therefore liable to punishment and Wahid had also been criminally detained several times for that reason. Following criminal detention, Wahid was placed in immigration detention. By that time, he had already been in detention six times, but that failed to lead to removal. Wahid had never made any efforts to leave voluntarily, nor had he cooperated in forced return. He did not have a valid passport and had used different aliases when in contact with the Dutch government. The DT&V had copies of his old, expired passport and identity card. The DT&V submitted a laissez-passer application to the authorities of his country of origin and presented Wahid to them in person. The authorities confirmed his nationality. They had previously issued a laissez-passer for him, but that had also failed to lead to removal. The DT&V held several return interviews with Wahid during his detention and contacted the authorities several times to enquire about the status of issuing the laissez-passer. In Wahid's opinion, there was no prospect of return. However, the court ruled that based on the confirmation of his identity and nationality, the fact that the authorities had previously issued a laissez-passer for him and the DT&V's efforts, it could not be assumed that the authorities would not issue another laissez-passer for him. Just before the expiry of the six-month period, after weighing all the interests, the IND lifted the detention.
Less than a year later, Wahid was again placed in detention, for the eighth time, again following criminal detention. The DT&V submitted a new laissez-passer application to the authorities of the country of origin. In the appeal against his detention, Wahid argued once again that there was no prospect of removal within a reasonable period, given the DT&V's previous

fruitless efforts. The court did not concur with him: his previous detention had been lifted after the interests had been weighed, rather than the absence of prospects of removal. The court emphasised that it was not the case that the authorities of the country of origin did not issue any laissez-passers at all and that the DT&V was at liberty to make another attempt to obtain a laissez-passer for him. The conclusion could not be drawn from the information on the progress of the DT&V's efforts whether, once again, the authorities would not issue a laissez-passer. In addition, the court pointed out that Wahid had not taken any action to obtain documents himself and to accelerate his return. Due to Wahid's lack of cooperation, the DT&V was allowed to await the outcome of the ongoing procedure with the authorities of his country of origin. They ultimately issued the laissez-passer and the DT&V booked a flight. Wahid had submitted an application for a regular residence permit just before that. The IND rejected the application within two days and Wahid was finally deported.

3.5 Analysis and conclusions

From a policy perspective, detention can be an effective measure for keeping foreign nationals available who are obliged to leave and pose a risk of absconding in order to prepare for and carry out return. During the 2015–2019 period, almost two-thirds of all detentions resulted in demonstrable return. As the use of less coercive supervision measures is not recorded in a sufficiently reliable manner, we are unable to provide any information on the effectiveness of detention in relation to stand-alone alternative supervision measures. When comparing the share of demonstrable returns after detention against the share of demonstrable returns of all foreign nationals who are required to leave, detention appears to be a more effective measure than all supervision measures combined.

Considerable difference in 'effectiveness' between Dublin and non-Dublin detentions

More Dublin claimants have been placed in detention in recent years, both in absolute and relative terms. The purpose of 'Dublin detentions' is not immediate return to the country of origin, but transfer to another EU Member State that has declared that it is responsible for examining the asylum application. Those transfers are generally easier to organise than making arrangements with countries of origin to take back citizens. Dublin detentions thus are far more likely (90%) to lead to demonstrable return than detentions imposed for the purpose of immediate return to the country of origin (50%). However, it should be noted that after taking back or taking charge of a Dublin claimant, often other Member States are also unsuccessful in later forcing them to return to their country of origin if their asylum application has been rejected. In 2019, we found that this constitutes one of the main reasons for the often prolonged circulation of rejected asylum applicants within the EU.[65] Although a Dublin detention is an effective supervision measure for the Netherlands in the short term, it says nothing about the effectiveness of the return policy at EU level, and says little about the effectiveness of the Dutch and European return policy in the longer term. Dublin transfers often just form a temporary interruption of the travel movements of asylum applicants through the EU. Quite often they return to the transferring Member State at some point after their transfer.[66] It is clear from these observations that with regard to

the effectiveness of detention, Dublin and non-Dublin detentions should be examined and communicated separately.
In terms of the rate of demonstrable returns, there are no major differences in Dublin detentions when differentiating by nationality or organisation imposing the detention measure.

Non-Dublin detentions less effective, considerable differences according to nationality

Non-Dublin detentions are not only less effective than Dublin detentions. They also show that there are large variations in effectiveness, depending on the nationality of the foreign national or the organisation imposing the detention measure. Compared to nine out of ten Albanians who demonstrably depart for their country of origin immediately after detention, this applies to just one out of ten Moroccans and Algerians.[67] This is attributable to cooperation from both the foreign national and the countries of origin. Albanians are often well-documented. There is no doubt about their nationality and identity, as a result of which the country of origin also provides good cooperation in forced return. The case file review showed that, by contrast, many Moroccans and Algerians claim that they do not hold identity and/or source documents, nor do they actively make any effort to obtain them or reobtain them. It is not primarily or necessarily the nationality that determines the effectiveness of the detention, but rather the lack of documents and the lack of cooperation in forced return.

DT&V detentions more effective than KMar and AVIM detentions

Detentions imposed by the DT&V substantially more often lead to demonstrable return (roughly 80%), and are therefore more effective than detentions imposed by the KMar or the AVIM (around 60%). The difference in effectiveness can be partly explained by the fact that the DT&V imposes relatively more Dublin detentions. After all, they are the most 'effective'. Yet even when looking at non-Dublin detentions, detentions imposed by the DT&V substantially more often lead to demonstrable return (67%) than detentions imposed by the KMar or the AVIM (between 44% and 50%). A relevant circumstance in this context might be that foreign nationals who are placed in detention by the DT&V more often have a procedural history and an investigation has already been conducted into their nationality and identity during those earlier procedures. This means that, unlike many foreign nationals who the KMar and the AVIM 'spontaneously' encounter during their supervisory duties, there more often already are concrete reference points for establishing nationality and identity and the additional investigation that may need to be carried out. Another factor that plays a role are the differences in detentions lifted prematurely on account of deficiencies in the detention process (see Chapter 4).

The longer the length of detention, the less effective it is

The longer the length of the detention, the less effective it is. The date show that detentions exceeding two months are usually lifted without the foreign national demonstrably leaving the Netherlands. This does not imply that there may not be

any well-founded reasons for prolonging the detention. The decisive factor is that there still is a prospect of removal and that there are no alternative departure return possibilities. In a substantial minority of the long-term detention cases, the foreign national still demonstrably returns to the country of origin from detention.

Some uncooperative foreign nationals are practically non-removable, an unknown number of whom have a criminal record

Where the detention is lifted after some time because there no longer is any prospect of removal within a reasonable period, as a result of which, after weighing the interests of the foreign national and those of the Dutch government, continuation of the detention is considered unreasonable, such detentions are often lifted because the foreign national fails to cooperate in return. It emerged from the case file review that this may take many forms and is often successful. The failure of the foreign national to cooperate may also prompt the country of origin to refuse to cooperate, even if there can't be any reasonable doubt about the individual's nationality and identity.

Some of the foreign nationals who manage to avoid forced return have been sentenced multiple times for committing criminal offences, including serious crimes in some cases. During the case file review we came across relatively many cases involving foreign nationals from safe countries who had been sentenced several times for committing criminal offences during their often long stay in the Netherlands, including serious offences, and after that had been placed in migrant detention several times for a longer period, which failed to result in demonstrable return from the Netherlands. The exact number of foreign nationals involved cannot be deduced from the available data, but the share was substantial in the IND detention cases we analysed.[68] A fairly large share of them, often at intervals, were involved in a continuing cycle of criminal detention, migrant detention, release, disappearance from the radar of the authorities, committing criminal offences, criminal detention, migrant detention, etc. No data are available on the share of foreign nationals with a criminal record in the group of foreign nationals who were required to leave, nor in the group of foreign nationals who were required to leave and had been placed in detention and failed to cooperate or insufficiently cooperated in their return. It is highly likely that the share of foreign nationals with a criminal record in our case file review is larger than the share in the total group of foreign nationals who were required to leave. This is associated with the prioritisation of the AVIM's supervisory duties. Foreign nationals who have been found during criminal supervision and are not subject to further prosecution (or only fined) and do not have legal stay constitute the first priority,[69] foreign nationals who pose a risk to public order but who have not yet been sentenced the second priority and foreign nationals who cause a nuisance the third priority. In this context, it is also important to note that the AVIM is responsible for the most detentions.[70] This group of foreign nationals of unknown size puts pressure on public support for migration. The legal obligation to cooperate in return that also applies to them is unenforceable. As a consequence, from a practical point of view, they may be non-removable. This problem has existed for years. Our research

confirms that placing foreign nationals in detention more often and/or longer is not the solution to this problem.

3.6 Recommendations

In Section 1.3 we already briefly outlined the complexity of the return problem. Detention should be used as cautiously as possible given that it is the severest supervision measure possible, which seriously intrudes upon the right to liberty to which everyone is entitled. Detention may only be used to prevent foreign nationals who are obliged to leave from absconding, never to force them to cooperate in their return. In a democratic state governed by the rule of law, this guiding principle should be continuously and actively safeguarded.

The return of foreign nationals who are required to leave depends moreover on numerous and highly diverse circumstances, which the Dutch government is usually unable to influence directly through policy interventions. This study confirms the Dutch government's considerable dependence on the cooperation of foreign nationals and countries of origin in its efforts to further improve the effectiveness of the return policy. That dependence feels the most uncomfortable in the case of uncooperative foreign nationals with a criminal record who are required to leave. Our research has not yielded any indications that the current supervision framework under administrative law provides insufficient possibilities to also place these foreign nationals who are required to leave in detention. In their case too, the problem primarily is that they do not leave voluntarily and that the foreign national and the country of origin fail to cooperate or insufficiently cooperate in forced return. Solutions will therefore also have to be sought for this specific group of foreign nationals in encouraging them to cooperate. After all, even after implementing process improvements or improving the thoroughness of detention measures, detentions may still be lifted on account of the lack of or insufficient cooperation from the foreign national or the country of origin. However, also the possibilities for encouraging such cooperation are limited. Consequently, first and foremost, this calls for a sense of reality. A completely infallible return policy is a utopia.[71] Under that proviso, we have formulated the following recommendations.

Recommendation 1: Experiment more with imposing less coercive supervision measures and improve the manner in which they are recorded

- Launch one or more multi-year pilots for imposing less coercive supervision measures on different groups of foreign nationals who are required to leave, and monitor and evaluate their use.
- Set up a central registration system on the use of less coercive supervision measures.
- Ensure that this registration system includes the function to generate figures.

The law requires detention to be used solely as the supervision measure of last resort. This means that the use of less coercive measures such as a reporting requirement or deposit (bail or bond) should always be considered first and that clear reasons should be given as to why their use will not be effective. Based on this study, the impression has arisen that less coercive measures are imposed relatively infrequently in practice. There is no clear picture of such measures because there are no reliable data. In order to obtain greater insight into the effectiveness of detention in relation to other less coercive supervision measures, these would also need to be used on a larger scale and their use should be centrally recorded in a uniform manner. Only then can a reliable effectiveness assessment be performed at the level of measures. To that end, the measures should be recorded in or be able to be transferred to a central information system from which figures can be generated. This should be supervised by the DT&V as the primary return organisation.

Recommendation 2: more actively promote voluntary return from detention

- Examine in consultation with the International Organisation for Migration (IOM) ways of more actively approaching foreign nationals who are not immediately receptive to still leaving voluntarily (under supervision) and inform them of the options for doing so.
- Examine whether a temporary waiver of the exclusion of the right to reintegration assistance for foreign nationals of Moroccan or Algerian nationality who are obliged to leave has a positive impact on their rate of return.

In view of the far-reaching nature, the complexity and the high financial costs of forced return, the basic principle underlying policy is that the voluntary return of foreign nationals who are required to leave has preference over forced return. Voluntary return from detention is possible, is less stressful for the foreign national, can be arranged more speedily and therefore is less expensive. In Section 2.2, we showed that during the 2015–2019 period 9% of the foreign nationals in detention still chose to return voluntarily (under supervision). During the first return interview, the DT&V points out to the foreign national the possibility of still leaving voluntarily with the IOM's assistance, but that is as far as it goes if the foreign national fails to cooperate or cooperates insufficiently in forced return. Foreign nationals who already are somewhat receptive to voluntary return will primarily be reached in this manner. Given the limited share of foreign nationals in detention who still choose to leave voluntarily, ways should be considered of also more actively approaching foreign nationals in particular who are initially reluctant to return voluntarily and are placed in detention, and informing them of the options of still returning voluntarily. This is a task for the IOM rather than the DT&V, and the question is whether this can be organised in a manner that is compatible with the independent nature of the IOM, but it would be worthwhile taking a closer look at this.

A foreign national who has been placed in detention and who still wants to leave voluntarily is, in principle, eligible for basic support to facilitate return and reintegration assistance (see Appendix 2). Foreign nationals who come from a number of countries located close to the EU designated as safe by the Netherlands, including the 'difficult return countries' Morocco and Algeria, however, are excluded from reintegration assistance.[72] An exception may only be made in the case of vulnerable foreign nationals. The purpose of exclusion was to eliminate improper incentives for travelling to the Netherlands and to reduce the potential magnetic effect of financial assistance as far as possible. The curtailment of the basic support to facilitate return for Moroccans and Algerians, among others, which was implemented in 2016, was partly reversed in 2018 because it led to a decline in demonstrable returns. From that perspective, we recommend examining whether initially a temporary waiver of the exclusion of the right to reintegration assistance for foreign nationals of these two nationalities would have any impact on their rate of return.

In addition to these points, the amount of the reintegration assistance should be thoroughly reviewed in general. In response to a recent evaluation of the Grant Scheme providing support for voluntary return, the Minister for Migration emphasised that the amount should be of a socially responsible level and that support for migrants should not constitute a reason for coming to the Netherlands. This is a legitimate guiding principle. The Minister for Migration pointed out that more knowledge on this topic could increase the effectiveness of return and reintegration, and announced that she would look into the possibilities of conducting a further review jointly with the Ministry of Foreign Affairs. Whether adjustment of the level of reintegration assistance is desirable or necessary should be properly assessed as soon as the results of the review are available.

Recommendation 3: Invest more in relations with countries of origin that fail to cooperate or insufficiently cooperate

- Invest in a broader cooperative relationship.
- Consider more unconventional measures such as making a lump sum available to countries of origin for each foreign national they have taken back.

This study confirms that there are a number of countries that fail to cooperate or cooperate to a limited extent in the forced return of their citizens. It also confirms the need to continue to engage in dialogue with these countries, however difficult that might sometimes be. In this context, the EU has more clout than the Netherlands alone, but given that this too is a lengthy process, the Netherlands itself should also, bilaterally, continue to work on improving relations with these countries. We reiterate in this context our earlier call to consider their interests and to make the cooperation interesting for them as well. Many countries of origin have no interest in taking back their citizens, especially individuals with a criminal record. Therefore, ways should be found of making it more attractive for these countries to take back these citizens. In this context ongoing investments should

be made in a coherent, broad cooperative relationship, in which the focus lies not only on combating illegal migration and improving cooperation in forced return, but a commitment should also be made to strengthen economic cooperation.[73] To break the deadlock that has existed for a long time now, partly on account of the high financial costs, more unconventional measures should also be considered such as making available a lump sum per foreign national who has returned to their country of origin.

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[37] If there is a risk of asylum applicants absconding, they may be placed in detention to ensure that the asylum procedure can be carried out properly, to prevent them from obstructing the return procedure or to protect national security and public order. See Chapter 4, Section 4.2. In practice this group primarily consists of illegally staying foreign nationals who apply for asylum after detention to avoid removal.

[38] Page 72 of the policy review of the budget article on return includes a table containing a number of measures imposed during the period 2014–2017 on foreign nationals who were required to leave and the extent to which this resulted in the demonstrable return of the foreign national. This concerns (demonstrable return from) detention, staying in the freedom-restricting location, staying in a family location, staying in the secure family facility, and demonstrable return after imposing a reporting requirement or a deposit (bail or bond). According to the table, in 2017 a reporting requirement was imposed 447 times on foreign nationals who were required to leave. In 140 cases (31%) the foreign national left voluntarily (of which 120 times to the country of origin), in 230 cases (51%) the foreign national vanished from the government's radar after that. What happened in the other cases is unable to be deduced from the table. However, it is stated under the table that foreign nationals who were subject to a reporting requirement were still placed in detention later. It is therefore not clear in how many cases in which a reporting requirement was imposed whether the reporting requirement partly contributed to demonstrable return. It should be noted that a deposit was used once a month on average and that in most cases this resulted in the demonstrable return of the foreign national.

[39] European Migration Network, The effectiveness of return in EU Member States, 2017.

[40] Maastricht University, Dealing with (non-)deportability A comparative policy analysis of the post-entry migration enforcement regimes of Western European countries, 2019.

[41] *Parliamentary Papers II* 2019/20, 35 300 VI, No. 2.

[42] The DT&V data file used (containing data until 1 June 2020) shows that all foreign nationals who were placed in detention during the 2015–2019 period and whose detention was lifted before 1 June 2020 collectively spent 607,172 days in detention. The cost of those detentions therefore amounted to 607,172 days x 298 euros = 180,937,256 euros (2020 price level); 181 million: 5 years = 36.2 million euros per year. The costs were in fact slightly higher because detentions that had not been lifted on 1 June 2020 were not included in the calculation because the length of detention was not known at that time. This is less than 1% of the detentions during the 2015–2019 period and therefore has a negligible impact on the overall picture.

[43]The 'Five-Track Policy' for the asylum procedure was introduced on 1 March 2016. Since that time, the IND has been fast-tracking the processing of different types of asylum applications based on different tracks. The IND processes applications from asylum applicants from safe countries of origin and from asylum applicants who are beneficiaries of international protection in another Member State in Track 2. Since mid-2016, the Netherlands itself has been handling specific Dublin cases involving asylum applicants from safe countries of origin, *to which return can be carried out in the short term* (such as Albania), (in Track 2), even if there are indications that another Member State is responsible.

[44] See figure 15 and the text below it in Appendix 5.

[45] See figure 25 and the text below it in Appendix 5.

[46] See figure 26 and the text below it in Appendix 5.

[47] See Appendix 5, Section 4.4.3.

[48] See figure 26 and the text below it in Appendix 5.

[49] See Appendix 4, Section 4.4.1.

[50] Based on the policy-based definition of effectiveness within the meaning of demonstrable return. A detention can also have an effect in other ways, for example, because after some time the foreign national eventually realises that return really is imminent and therefore still leaves voluntarily (without supervision).

[51] See figure 28 and the text below it in Appendix 5.

[52] This is associated with the shorter detention periods applicable to minors, see A5/2.4 Aliens Act 2000.

[53] See figure 27 and the text below it in Appendix 5.

[54] See figure 29 and the text below it in Appendix 5.

[55] See figure 30 and the text below it in Appendix 5. The calculation methodology differed slightly from the earlier comparison for all cases because the categories 'permit granted' and 'other outflow' have been excluded due to the lack of data, which has a slightly upward effect. If the same methodology is used as that of the comparison of all cases, the figures are 72% versus 42%. The difference with Dublin cases still remains large.
[56] The situation is different in detention cases involving foreign nationals who come from the criminal justice system. The expiry date of criminal detention is often already known at an early stage. A considerable amount of information is often already known about the foreign national too in cases involving the conversion of a ground for detention. This also applies to specific enforcement actions relating to foreign nationals who have been encountered earlier and are subject to a reporting requirement or whose place of residence is known. Information about the foreign national is also already known in incoming Dublin transfers.
[57] See figure 11 and the text below it in Appendix 5.
[58] See note 251 in Section 5.3 of Appendix 5.
[59] See figures 12 and 13 and the text below it in Appendix 5.
[60] See the text under figure 15 in Appendix 5.
[61] When selecting the files – based on a random sample – we ensured that the cases selected were evenly distributed across the years that we researched and the authorities imposing the detention. See Appendix 8 for a further explanation of the design of the case file review.
[62] Beleidsdoorlichting begrotingsartikel 37.3. De terugkeer van vreemdelingen, 2019, p. 24, Report of the Committee of Inquiry on long-term foreign nationals residing without a permanent right of residence, 2019, 53.
[63] Idem, pp. 25 and 54.
[64] Detentions lifted with demonstrable return were not selected for the random sample. This relates to a different detention of the same foreign national but is not the selected detention.
[65] ACVZ, Secondary movements of asylum seekers in the EU (2019).
[66] Idem.
[67] It should also be borne in mind that foreign nationals who have been apprehended and transferred from the criminal justice system are not placed in detention because the prospect of removal is deemed not to exist. These cases usually involve foreign nationals who have previously (and more often) been placed in detention, which has failed to lead to demonstrable return.
[68] Of the 80 detention case files, 37 cases (46%) involved a transfer and apprehension after release from prison or criminal detention.
[69] Foreign nationals who are prosecuted and are not or no longer legally staying are automatically placed in migrant detention following criminal detention if this is legally possible.
[70] The AVIM is responsible for almost half of all detentions. The other (slightly more than) half were imposed in approximately equal numbers by the DT&V, the KMar, and the KMar/AVIM. For the latter group, it cannot be reliably determined from the data file whether the KMar or the AVIM imposed detention. We have deduced from the case file review that the majority of cases in the latter category comprises detention measures imposed by the AVIM and that the AVIM was also responsible for more than half of these detentions. See Appendix 5, Section 5.2.
[71] ACVZ, Secondary movements of asylum seekers in the EU (2019), see also the Report of the Committee of Inquiry on long-term foreign nationals residing without a permanent right of residence (Van Zwol Committee) (2019).
[72] This also applies to foreign nationals sentenced for committing serious crimes or whose asylum application has been rejected pursuant to Article 1F of the Geneva Convention on Refugees and foreign nationals who are subject to a travel ban of more than five years.
[73] ACVZ, The strategic country approach to migration (2015), ACVZ, Secondary movements of asylum seekers in the EU (2019), Legal channels for migrant workers - An exploratory study (2019).

Chapter 4

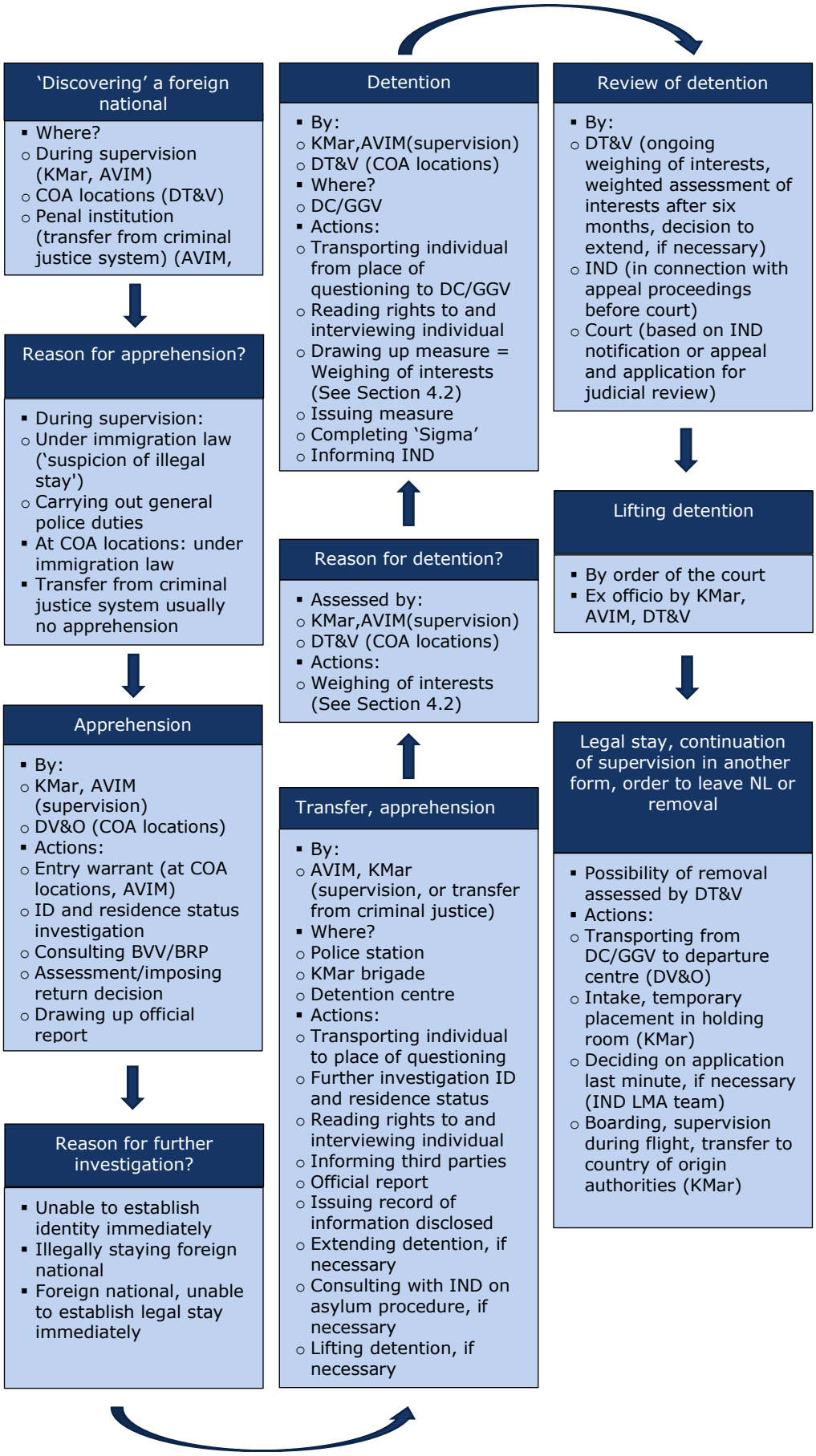
The diligent implementation of detention

In this chapter we discuss the reasons for lifting detentions relating to the implementation of the detention process and the thoroughness of the detention measures in greater detail. Again, we look at the differences between the KMar, the AVIM and the DT&V. We describe the bottlenecks encountered by the officers of these organisations and show the consequences.

The effectiveness of detention is determined not only by the extent to which the foreign national and the country of origin cooperate in the individual's return. Other facts and circumstances also play a role in this regard, including the implementation of the detention process and the thoroughness of the detention measures. Before analysing the data in the data file on the reasons for lifting detention in this connection (Sections 4.3 and 4.4), we briefly outline what the detention process looks like (Section 4.1) and what the most important legal conditions are for imposing detention measures (Section 4.2). Based on the interviews we conducted and the survey we distributed, we describe the bottlenecks encountered by operational officers of the KMar, the AVIM and the DT&V in Section 4.5. In Section 4.6 we outline the picture of the thoroughness of detention measures that has emerged from the case file review. In Section 4.7 we draw conclusions and in Section 4.8 we formulate a number of recommendations.

4.1 The detention process

Figure 12: The detention process


'Discovering' a foreign national
▪ Where?
○ During supervision (KMar, AVIM)
○ COA locations (DT&V)
○ Penal institution (transfer from criminal justice system) (AVIM,
Reason for apprehension?
▪ During supervision:
○ Under immigration law ('suspicion of illegal stay')
○ Carrying out general police duties
▪ At COA locations: under immigration law
▪ Transfer from criminal justice system usually no apprehension
Apprehension
▪ By:
○ KMar, AVIM (supervision)
○ DV&O (COA locations)
▪ Actions:
○ Entry warrant (at COA locations, AVIM)
○ ID and residence status investigation
○ Consulting BVV/BRP
○ Assessment/imposing return decision
○ Drawing up official report
Reason for further investigation?
▪ Unable to establish identity immediately
▪ Illegally staying foreign national
▪ Foreign national, unable to establish legal stay immediately
Detention
▪ By:
○ KMar,AVIM(supervision)
○ DT&V (COA locations)
▪ Where?
○ DC/GGV
▪ Actions:
○ Transporting individual from place of questioning to DC/GGV
○ Reading rights to and interviewing individual
○ Drawing up measure = Weighing of interests (See Section 4.2)
○ Issuing measure
○ Completing 'Sigma'
○ Informing IND
Reason for detention?
▪ Assessed by:
○ KMar,AVIM(supervision)
○ DT&V (COA locations)
▪ Actions:
○ Weighing of interests (See Section 4.2)
Transfer, apprehension
▪ By:
○ AVIM, KMar (supervision, or transfer from criminal justice)
▪ Where?
○ Police station
○ KMar brigade
○ Detention centre
▪ Actions:
○ Transporting individual to place of questioning
○ Further investigation ID and residence status
○ Reading rights to and interviewing individual
○ Informing third parties
○ Official report
○ Issuing record of information disclosed
○ Extending detention, if necessary
○ Consulting with IND on asylum procedure, if necessary
○ Lifting detention, if necessary
Review of detention
▪ By:
○ DT&V (ongoing weighing of interests, weighted assessment of interests after six months, decision to extend, if necessary)
○ IND (in connection with appeal proceedings before court)
○ Court (based on IND notification or appeal and application for judicial review)
Lifting detention
▪ By order of the court
▪ Ex officio by KMar, AVIM, DT&V
Legal stay, continuation of supervision in another form, order to leave NL or removal
▪ Possibility of removal assessed by DT&V
▪ Actions:
○ Transporting from DC/GGV to departure centre (DV&O)
○ Intake, temporary placement in holding room (KMar)
○ Deciding on application last minute, if necessary (IND LMA team)
○ Boarding, supervision during flight, transfer to country of origin authorities (KMar)

The detention process consists of:

- finding a foreign national
- examining if there is a reason for apprehension
- apprehending the foreign national (to establish his or her identity, nationality and residence status)
- examining if there is a reason for further investigation
- transferring the foreign national to and holding up the foreign national at a place of questioning (to conduct a further investigation into his or her identity, nationality and residence status)
- examining if there is a reason for detention
- transporting the foreign national to the detention centre
- imposing the measure
- the judicial review of the detention by the court
- lifting the detention (ex officio or by order of the court)
- the return of the foreign national, ordering the foreign national to leave the Netherlands (without the individual returning under supervision), obtaining or continuing the right to stay, placement (back) in the COA reception facility or continuing supervision in another manner.

During this process the officers of the organisations involved have to conduct an investigation, carry out various administrative tasks in various information systems, make one or more legal decisions and actively work on the return.

For a more detailed description of the process and the organisations involved, please refer to Appendix 3.

4.2 Legal conditions for detention

Detention is a measure involving deprivation of liberty that directly intrudes upon the right to liberty. For this reason, strict conditions are attached to it. Detention is permitted only if it is necessary to achieve the intended purpose and only if less coercive measures are unable to be used effectively. Examples include imposing a reporting requirement or a deposit (bail or bond), allowing a surety or the surrender of a travel or identity document.

The purpose of detention is not always the same. Detention may be imposed for the purpose of removal to the country of origin, transfer to another EU Member State under the Dublin Regulation or to be able to carry out the asylum procedure properly, to prevent obstruction of the return procedure or to protect public order or national security. Specific conditions therefore also apply to placing different groups of foreign nationals in detention: illegally staying foreign nationals, legally staying foreign nationals pursuant to a 'regular' residence application, foreign nationals who fall under the scope of the Dublin Regulation and legally staying foreign nationals pursuant to an asylum application (that falls outside the scope of the Dublin Regulation). All of these groups have a separate legal basis each with

one or more separate requirements in the Aliens Act. This also means that a new detention measure must be imposed for each change in the legal basis.
Detention for all these groups is permitted only if there is a risk, significant or otherwise, of the foreign national absconding, as a result of which the intended purpose cannot be achieved without the detention. This risk forms the factual basis of the detention. It has been elaborated into 'substantial' and 'light' grounds. In view of the intended purpose, there should always be a prospect of removal within a reasonable period for all foreign nationals, excluding asylum applicants.

Given that detention is the most invasive supervision measure (last resort), when imposing the measure and allowing the detention to continue an assessment must always be made (on an ongoing basis) between the liberty interest of the foreign national and the Dutch State's interest in implementing the return policy. UAMs and families with minor children may only be placed in detention if there are compelling reasons for doing so. In their case, an even more thorough assessment of interests must be made.

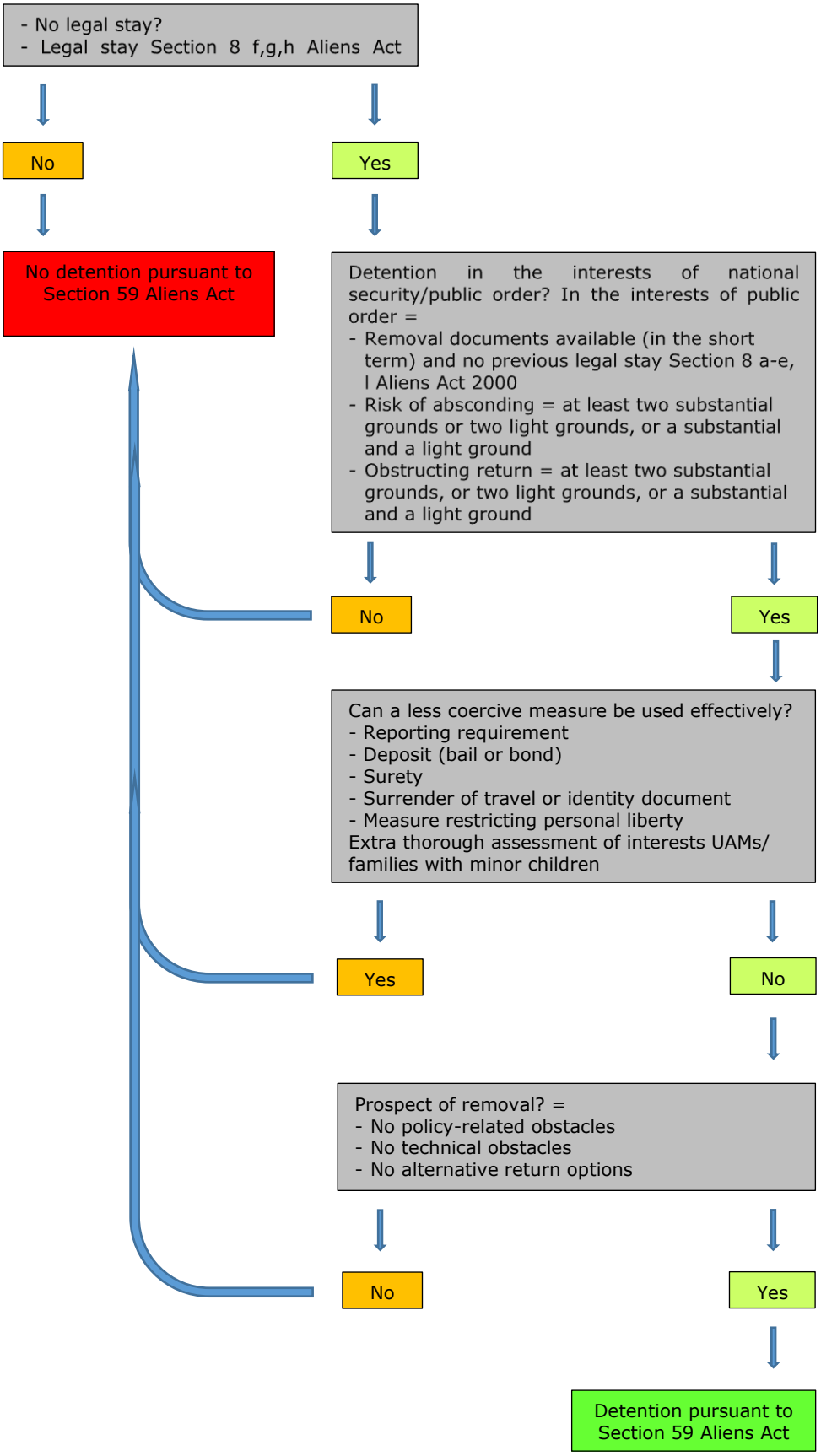
The statement of reasons for a detention measure therefore consists of:

- stating and explaining the correct legal basis;
- stating and explaining the factual grounds based on which a risk of absconding is assumed and therefore the reasons for the necessity of the measure;
- explaining the reasons why no less coercive supervision measure can be used effectively;
- weighing the interests of the foreign national against the interests of the Dutch State;
- explaining the reasons for the existence of prospects of removal within a reasonable period.

The legal and substantive requirements imposed on detention under EU law and the explanation of these requirements in case law mean that it is not easy to justify detention measures.

Based on the general requirements for detention and the specific conditions applicable to the detention of the different groups of foreign nationals, we have created the following schematic diagrams of the substantive detention process by group. For a more detailed description, please refer to Appendix 4.

Figure 13: Weighing of interests for the detention of illegally staying foreign nationals and legally staying foreign nationals (non-asylum and/or Dublin)



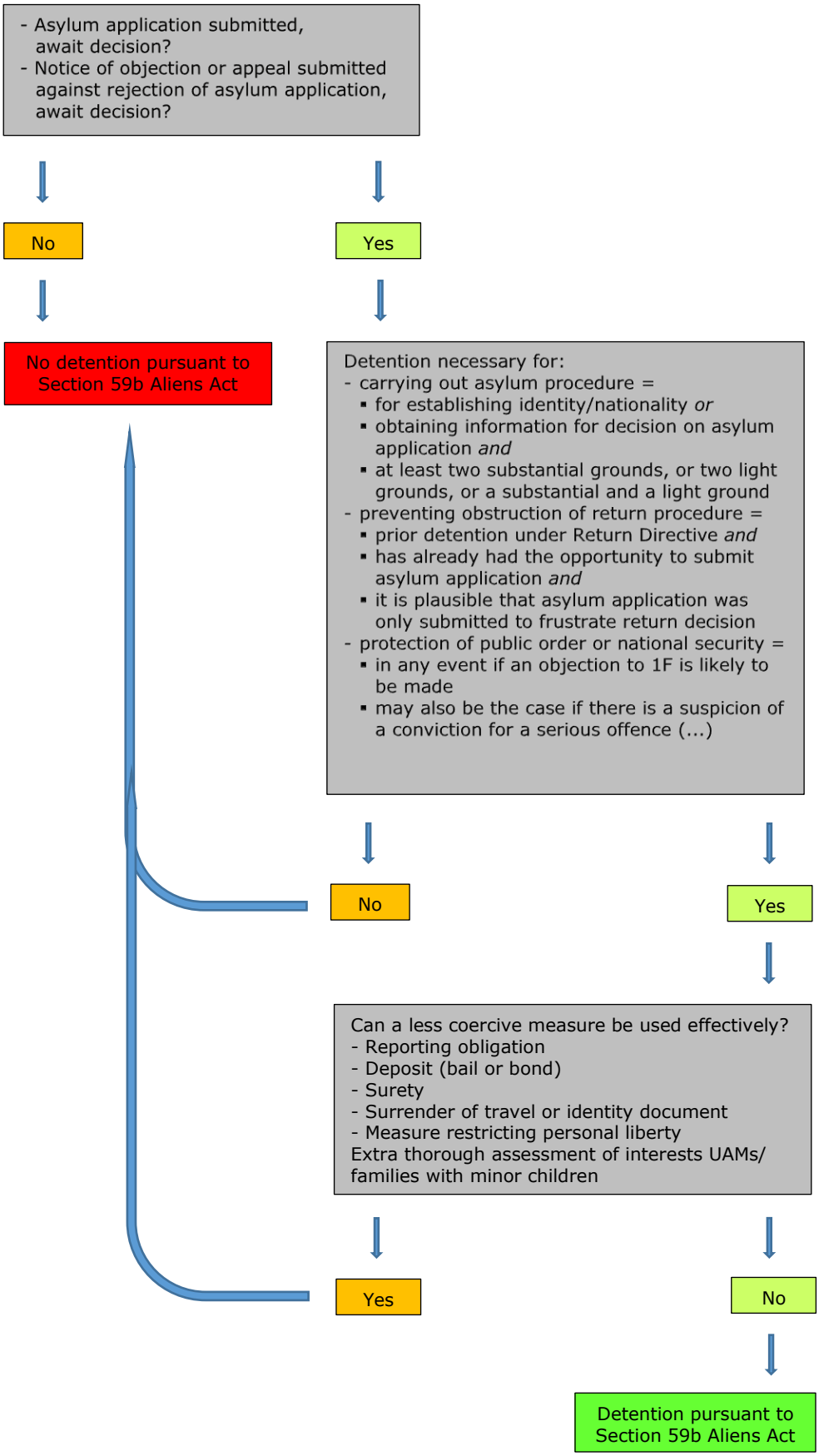
For determining the possibilities to detain illegally staying foreign nationals and legally staying foreign nationals (non-asylum and/or Dublin) the following weighing of interests should be made.

The first thing to be determined is whether the foreign national has no legal stay or has legal stay pursuant to section 8 f, g, or h of the Aliens Act. If that is not the case the foreign national may not be detained on the basis of section 59 of the Aliens Act. If it is the case it should be determined whether the detention is in the interests of national security or public order. Detention is in the interest of public order if:

- removal documents are available in the short term and the foreign national has no previous legal stay pursuant to section 8 a-e, or l of the Aliens Act
- there is a risk of absconding. Such a risk is being assumed if there are at least two substantial grounds or two light grounds, or a substantial and a light ground for detention
- the foreign national is obstructing his return. Obstruction is being assumed if there are at least two substantial grounds, or two light grounds, or a substantial and a light ground.

If detention is not in the interest of national security or public order, the foreign national cannot be detained on the basis of section 59 of the Aliens Act. If it is, it should be determined if a less coercive measure can be used effectively (e.g. a reporting requirement, deposit (bail or bond), surety, surrender of travel or identity document, imposing a measure restricting personal liberty). If UAMs or families with minor children are concerned an extra thorough assessment of interests should be made in this regard. If a less coercive measure can be used effectively, detention is not permitted. If no less coercive and effective measures are available, it should be determined if there is a prospect of return. A prospect of return is being assumed if there are no policy-related nor technical obstacles and if there are no alternative return options. If there is no prospect of return the foreign national may not be detained. If there is a prospect of return the foreign national may be detained on the basis of section 59 of the Aliens Act.

Figure 14: Weighing of interests for the detention of asylum applicants (non-Dublin)



For determining the possibilities to detain asylum applicants (non-Dublin) the following weighing of interests should be made.

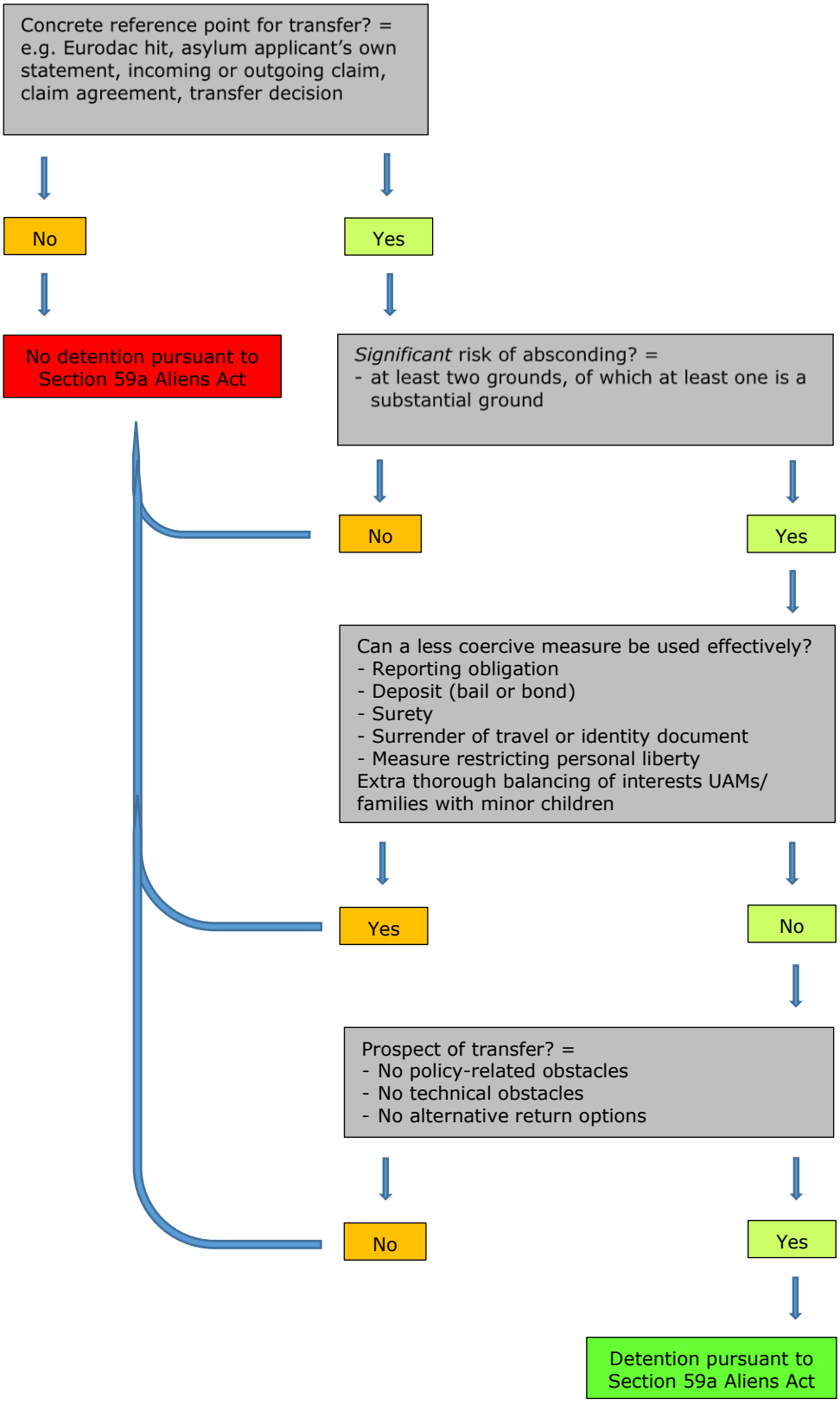
The first thing to be determined is whether an asylum application has been submitted and the decision may be awaited or a notice of objection or appeal has been submitted against the rejection of the asylum application and the decision may be awaited. If that is not the case the foreign national cannot be detained on the basis of section 59b of the Aliens Act. If it is the case it should be determined whether the detention is necessary for:

- carrying out the asylum procedure. That is assumed if it is necessary for:
  - establishing the identity and/or nationality of the foreign national, *or*
  - obtaining information for the decision on the asylum application, *and*

  there are at least two substantial grounds, or two light grounds, or a substantial and a light ground for detention
- preventing obstruction of the return procedure. Obstruction is being assumed if:
  - there was a prior detention under the Return Directive, *and*
  - the applicant has already had the opportunity to submit an asylum application, *and*
  - it is plausible that the asylum application was only submitted to frustrate the return decision
- protection of public order or national security. That is being assumed if:
  - an objection to section 1F of the Refugee Convention is likely to be made
  - there is a suspicion of a conviction for a serious offence (…)

If the detention is not necessary for one of these reasons, the foreign national cannot be detained on the basis of section 59b of the Aliens Act. If detention is deemed to be necessary for one of these reasons, it should be determined whether or not a less coercive measure can be used effectively (e.g. a reporting requirement, deposit (bail or bond), surety, surrender of travel or identity document, imposing a measure restricting personal liberty). If UAMs or families with minor children are concerned an extra thorough assessment of interests should be made in this regard. If a less coercive measure can be used effectively, detention is not permitted. If no less coercive and effective measures are available, the foreign national may be detained on the basis of section 59b of the Aliens Act.

Figure 15: Weighing of interests for the detention of foreign nationals who fall under the scope of the Dublin Regulation



For determining the possibilities to detain foreign nationals who fall under the scope of the Dublin Regulation the following weighing of interests should be made.

The first thing to be determined is whether there is a concrete reference point for a transfer (e.g. a Eurodac hit, the asylum applicant's own statement, an incoming or outgoing claim, aclaim agreement or a transfer decision). If that is not the case, the foreign national may not be detained on the basis of section 59a of the Aliens Act.
If there is a concrete reference point for a transfer, it should be determined if there is a *significant* risk of absconding. That is being assumed if there are at least two grounds for detention, of which at least one is a substantial ground. If there is no significant risk of absconding the foreign national may not be detained on the basis of section 59a of the Aliens Act.
If there is a significant risk of absconding, it should be determined whether a less coercive measure can be used effectively (e.g. a reporting requirement, deposit (bail or bond), surety, surrender of travel or identity document, imposing a measure restricting personal liberty). If UAMs or families with minor children are concerned an extra thorough assessment of interests should be made in this regard. If a less coercive measure can be used effectively, detention is not permitted.
If no less coercive and effective measures are available, it should be determined if there is a prospect of transfer. A prospect of transfer is being assumed if there are no policy-related nor technical obstacles and if there are no alternative return options. If there is no prospect of transfer the foreign national may not be detained. If there is, the foreign national may be detained on the basis of section 59a of the Aliens Act.

4.3 Avoidable reasons for lifting detention

In Section 2.2, we found that the reasons for lifting detentions in the data registration system cannot be completely clearly related to the implementation of the detention process or (the thoroughness of) the detention measures. We have therefore clustered the reasons that may relate to both due diligence deficiencies in the process and the measure into one category (category 1).

A good detention measure contains no procedural errors and has been carefully and fully reasoned. A carefully considered decision will stand up in court as a rule, but not necessarily: the facts and circumstances may change after the decision has been made in such a way that the detention will still have to be lifted, for instance, because the foreign national is still or once again granted legal stay (category 2 of reasons for lifting detention). It may also be the case that the court, despite the fact that all the facts and circumstances put forward have been carefully addressed in the measure, arrives at a different weighing of interests (component of category 3 of reasons for lifting detention).

In Chapter 2 we found that detentions are lifted for numerous and highly diverse reasons. As stated, the most frequent reason for lifting detentions without achieving the intended purpose is the weighing of interests (15% of the total number of detentions lifted, or 39% of the number of detentions lifted without demonstrable return). In Chapter 3 we found that many of those cases involved a lack of cooperation from the foreign national and/or the country of origin. Changed personal circumstances or medical reasons can also play a role in the weighing of interests. This has nothing to do with the thoroughness of the detention measure. If no, or no proper weighing of interests has taken place, the lifting of detention is associated with the thoroughness of the measure. The DT&V records those cases as 'detention measure insufficiently reasoned'.

Of the reasons for lifting detention stated in Section 2.2, procedural errors (5%), deficiencies in the statement of reasons (4%), worked on return insufficiently expeditiously (2%) and not decided promptly (<1%) are associated with the thoroughness of the detention process and/or detention measures. A detention lifted on account of still using a less coercive supervision measure (1%) may also relate to a due diligence deficiency.

The entry 'procedural error' is used for procedural errors, including applying an incorrect legal basis for imposing a detention measure. The case file review revealed that the reason for lifting detention chosen by the DT&V may differ from the reason formulated by the KMar or the AVIM in the particular model (M113) and, moreover, that this is not always properly recorded.[74] What we can say with certainty about this reason for lifting detention is that it is associated with the thoroughness of the detention process or the detention measure.

The DT&V uses the entry 'unlawful detention' for deficiencies in the process prior to detention (unlawful apprehension or unlawful transfer and unlawful holding up). This entry therefore relates to due diligence deficiencies in the process rather than deficiencies in the detention measure.

The entry 'worked on return insufficiently expeditiously' is used if the detention had to be lifted because officers have not worked on removal sufficiently expeditiously. The entry 'not decided promptly' is used if the IND has not been able to make a prompt decision on a residence permit application.[75] Both entries relate to deficiencies in the process after the detention measure had been imposed.

The entry 'using a less coercive measure' does not necessarily relate to the thoroughness of the process and the detention measure. Indeed, even during the detention, a situation may occur in which the detention is required to be lifted because a less coercive measure can be used if, for instance, someone still presents an identity document. It cannot be deduced from the available data in which cases an unconsidered decision has been made or new circumstances have arisen. This reason for lifting the detention can therefore be classified under both categories 1 and 3. This makes little difference to the overall picture: 'Using a less coercive measure' accounting for 1% is by far the least frequent reason for lifting the detention in category 1.

Differences in avoidable reasons for lifting detention according to the nationality of the foreign national

In Section 2.2 we found that there were considerable differences in the reasons for lifting detention within the top five of the most frequently occurring nationalities and that those differences mainly occur in non-Dublin detentions. There also are considerable differences in the specific categories of reasons for lifting detention that are associated with the thoroughness of the detention process or the detention measure. Deficiencies in the detention process or the detention measure (category 1) frequently occur among the nationalities with the lowest share in demonstrable returns: Moroccans and Algerians, accounting for 23–24% of all non-Dublin detentions lifted. These are mainly procedural errors, followed at some distance by deficiencies in the statement of reasons. Unlawful detentions, not working on removal expeditiously and detentions lifted in connection with the use of less coercive measures also occur, but far less frequently.[76]

Afghans and Nigerians have a far higher share in demonstrable returns following detention than the detentions of Moroccans and Algerians. Nevertheless, the share of the non-Dublin detentions of Afghans and Nigerians lifted due to deficiencies in the detention process or the detention measure (18–24%) is roughly equivalent to that of Moroccans and Algerians.[77] 'Demonstrable return' is by far the most frequently occurring category of reasons for lifting the non-Dublin detentions of Albanians (91%). Detentions of Albanian foreign nationals are considerably less frequently lifted (7%) on account of a deficiency in the process or measure.[78]

14% of the number of detentions lifted directly avoidable

During the 2015–2019 period, in total 14% of the number of detentions lifted was associated with a due diligence deficiency in the process and/or the measure (category 1). A decline occurred during that period: amounting to 12% in 2019 compared to 22% in 2015. This is because the share of procedural errors declined substantially from 7% to 3%, deficiencies in the statement of reasons declined from 7% to 2%, not working on return sufficiently expeditiously declined from 2% to 1% and the use of a less coercive measure declined from 3% to1%. The lower share of unlawful detentions, on the other hand, after initially declining, was up slightly (from 3% to 4%), as was the share of cases in which the IND was unable to decide promptly on an application for a residence permit (from 0% to 1%).[79] This means that during the 2015–2019 period, in total in 14% of the number of detentions, the lifting of the detention could have been directly avoided, in other words, in 38% of the number of detentions without demonstrable return. When looking at the final year of our research period, the detentions lifted that were directly avoidable account for 12% and 25% respectively.

4.4 Differences in avoidable reasons for lifting detention between the KMar, AVIM and DT&V

There are substantial differences between the KMar, the AVIM and the DT&V in terms of the reasons for lifting detention associated with the thoroughness of the detention process and/or detention measures. In DT&V detentions, deficiencies in the process and measures constituted the reason for lifting 4% of the detentions, whereas that share amounted to 16% and 20% respectively for the AVIM and the KMar. The difference is attributable to the fact that procedural errors, deficiencies in the statement of reasons, and unlawful detentions regularly occur at the AVIM and KMar and hardly occur at the DT&V.[80] The case file review showed that measures imposed by the DT&V are usually reasoned in far greater detail than measures imposed by the KMar and the AVIM. Those of the AVIM appear to be reasoned in more detail than those of the KMar. Moreover, the DT&V generally discusses in more detail and more precisely the arguments put forward by the foreign national in response to the intended detention.

With regard to the reasons for lifting Dublin detentions, the differences between the three detention authorities are small. This contrasts with the lifting of non-Dublin detentions. The share of detentions lifted by the DT&V on account of deficiencies in the process and measure for this group of foreign nationals is considerably lower (6%) than the AVIM (20%) and the KMar (23%).[81]

A limitation in recording the available data is that only four reasons for lifting detention include who issued the order to lift the detention. Three of the four reasons come under the category of reasons for lifting detention associated with the thoroughness of the process and/or measures. The information shows that the vast majority of the detentions lifted on account of the weighing of interests and the large majority on account of using a less coercive measure are lifted ex officio. A small majority of the number of detentions lifted on account of a deficiency in

the statement of reasons and a large majority of the detentions lifted on account of an unlawful detention are ordered by the court.[82]

Another limitation is that only two of the reasons for lifting detention stated in the DT&V's registration system organisation include who is *responsible* for the deficiency that has resulted in the detention being lifted. This shows that the AVIM is responsible for at least around half of the number of procedural errors and the KMar for at least over one fifth. The DT&V is responsible for at least more than half of the number of detentions lifted on account of not working on return sufficiently expeditiously.[83] This is not surprising given that between imposing the measure and the actual removal, the DT&V is the only organisation that performs return procedures and it is primarily about this process. With regard to 'not acting sufficiently expeditiously', the DT&V is followed at some distance by the IND. An example is a detention of a Dublin claimant that had to be lifted because the IND was unable to carry out the transfer to the responsible Member State promptly.

Earlier we found that the relatively long detention of Moroccans and Algerians only accounts for a small part of the explanation for the relatively high number of deficiencies in the process or the measure (category 1) of the reasons for lifting the detention. Another part of the explanation might be the fact that the DT&V is responsible for a relatively small share of the non-Dublin detentions of Moroccans and Algerians: 2–3% compared to 12% of all detentions. We had already found that the DT&V makes relatively few directly avoidable errors, which means that this could have an upward effect on the share of avoidable errors in the detentions of Moroccans and Algerians. Nevertheless, this is not an adequate explanation either because the DT&V is also strongly under-represented in imposing detention measures on Albanians, whereas few directly avoidable errors are made in those detentions. Moreover, among all top 5 nationalities the share of deficiencies in the process and/or the measure in non-Dublin detentions is far higher for the AVIM and the KMar, on the one hand, than the DT&V, on the other. It varies by nationality from a factor of 1.5 to a factor of 6.7.[84]

In the next section we discuss the bottlenecks that respondents from the KMar, the AVIM and the DT&V encounter in the detention process and the measures they impose.

4.5 Bottlenecks in implementation

Figure 16: Bottlenecks encountered by officers during implementation

Bottleneck	AVIM	KMar	DT&V
Collaboration with AVIM and DV&O not optimal when individuals are apprehended			**X**
Substantive collaboration with IND and DT&V not optimal	**X**	**X**	
Severe time pressure	**X**	**X**	
Heavy administrative burden	**X**	**X**	
Poor provision and exchange of information	**X**	**X**	**X**
Legally complex material	**X**	**X**	
Developing, retaining and sharing knowledge and expertise still not given enough attention	**X**	**X**	**X**
Logistical challenges and facility issues when interviewing foreign nationals and issuing the measure			**X**

In this section we discuss the bottlenecks encountered by the operational officers of the AVIM, the KMar and the DT&V. This is based on the results of the survey, in addition to information from the interviews we conducted. As the bottlenecks relating to the thoroughness of the process and the measures identified by the respondents overlap considerably and it is difficult to clearly and completely distinguish between them, we have examined them together in this section.[85]

Collaboration among the organisations involved in migrant detention not optimal

The KMar and AVIM respondents are not faced with bottlenecks in the process of apprehending foreign nationals. The opposite applies to the DT&V respondents. The DT&V is dependent on various cooperating partners for placing foreign nationals in detention at COA locations (see also figure 12 in Section 4.1). The apprehension must be coordinated with the COA, the Transport and Support Department (DV&O) of the Custodial Institutions Agency (DJI) must apprehend the person in question, the AVIM must issue the required entry warrant and the DJI must make the location available for the interview. In the opinion of the DT&V respondents, coordination with the DV&O on scheduling the apprehension should be improved. This applies to an even greater extent to communication with the AVIM on the required entry warrant. The DT&V respondents find the DV&O generally more flexible than the AVIM. Due to the limited capacity of the DV&O and the AVIM, it is challenging to quickly schedule a detention at a COA location, which causes valuable time to be lost. This sometimes even leads to the postponement of the detention and consequently offers the foreign national the opportunity to abscond. Due to the involvement of several cooperating partners,

changes are regularly made in the detention schedule. In those cases, a new entry warrant has to be issued because the date, the authorised officer, or both change. This can cause procedural errors, which are called into question during the appeal proceedings before the court. The DT&V respondents additionally pointed out that it sometimes takes a long time for them to place a child in detention, born in the Netherlands to a foreign national who is obliged to leave, because the AVIM still has to issue a return decision for the individual in question. The 'implementing officials' of the DT&V can and are authorised to issue return decisions, but the cooperating organisations have agreed that return decisions will be issued by the AVIM. Lastly, the limited contact between the IND's counsel and the supervisor or implementing official of the DT&V in preparing for the court hearing is regarded as a shortcoming during consultation meetings held by the organisations involved.

Whereas the DT&V respondents encounter bottlenecks primarily in the process prior to detention, the KMar and the AVIM encounter the most bottlenecks when imposing the measure. However, the bottlenecks they have identified also affect the preceding phases. In fact, these bottlenecks do not necessarily relate to how the process has been structured, but they do individually affect the preconditions for properly implementing the entire process.

The AVIM and the KMar pointed out that the IND and the DT&V are not always easy to reach outside office hours, causing valuable time to be lost. It is also considered problematic that these organisations do not always see eye to eye during consultation meetings prior to imposing the measure.

'*When enquiring with the IND and the DT&V, they often have a different opinion on whether or not detention should be imposed. This strongly depends on the individual judgement of the officer concerned. But because they have different opinions, there have been cases in which two days after the detention a decision is made ex officio to lift the detention. Not because the measure was insufficiently reasoned, but for a different reason because, for instance, there are deemed to be no prospects of removal. This is frustrating not only for the officer who has placed the foreign national in detention, but particularly for the officers patrolling the streets, because you need to explain to them why the foreign national will end up on the street again, especially if the individual causes a nuisance.' (AVIM respondent)*

Lastly, criticism has been voiced about the lack of feedback from the IND on the results of the appeal proceedings before the court:

'If you have placed a foreign national in detention, you never receive feedback from the IND on whether you have done a good job, or whether there might be any improvement points for next time. *(AVIM respondent)*

Severe time pressure

The vast majority of the KMar and AVIM respondents find time pressure the biggest bottleneck in the detention process. This concerns the current statutory period of six hours for holding a foreign national for questioning who has been apprehended

and drawing up the measure. It appears to be difficult to meet that deadline for several reasons (see below), particularly if the foreign national has had no previous dealings with the brigade or unit. But it is found to be even more difficult if multiple foreign nationals are discovered together. In such cases additional staff and facilities from other regions often have to be deployed, which brings administrative and logistical challenges. The current possibility of extending the holding period (for questioning) by 48 hours at the most, usually does not solve the problem, including in the latter cases, because it quickly becomes clear that the foreign national apprehended has no legal stay and therefore there is no question of a *suspicion of illegal stay*, which must be further investigated.[86] Extension of the holding period from six to nine hours forms part of the Repatriation and Migrant Detention Act that is being debated in the House of Representatives.[87] The act also provides for reducing the current period for extending the holding period from 48 to 24 hours. The AVIM respondents stated that the current extension period of 48 hours is already insufficient to be able to conduct a further investigation into the identity and nationality of foreign nationals who are being held during the weekend. Often the AVIM requests a diplomatic representation to carry out a nationality check. This is not possible during the weekend because it is closed. The intended reduction of the extension period is expected to exacerbate this bottleneck.

The DT&V respondents do not find time pressure a bottleneck in the detention process. This is not surprising, given the difference between the nature of the work of the KMar and the AVIM, on the one hand, and the DT&V, on the other.

The severe time pressure experienced by the KMar and the AVIM should also be viewed in conjunction with the other bottlenecks they encounter.

Heavy administrative burden

Many of the KMar and AVIM respondents emphasised that in each phase of the process various administrative tasks need to be carried out in different information systems (see also figure 12 in Section 4.1). They have to familiarise themselves with the case within six hours (individual decisions/orders, court judgments, preliminary phase in criminal proceedings, earlier detention upon conversion), assess the information arising from the primary investigation (fingerprint analysis, the information provided by the foreign national), telephone consultations with the Legal Affairs department of the IND (in connection with any pending proceedings) and the DT&V (to assess prospects of removal), drawing up the notification for the duty officer, travelling to the detention location, conducting the interview, writing a report of the interview and drawing up the statement of reasons for the measure, preparing the case file (model M119), scanning all documents for the transfer file for the DT&V and travelling back to the station or to the brigade if the detention location has no facilities available for preparing the documents. A substantial share of the KMar respondents moreover find their own information system user unfriendly. For many of the tasks and steps described above, the KMar and the AVIM are dependent on other parties such as the IND and the DT&V, as well as the foreign national's lawyer, who they need to wait on for up to two hours, if foreign nationals state that they do not want to be interviewed without their

lawyer. All steps must be diligently recorded, the foreign national must be interviewed separately prior to imposing a return decision and imposing an entry ban, where necessary, and imposing the detention measure, and each decision must be separately reasoned. In the past the relevant grounds for detention could be ticked on a form, but nowadays they have to be entered manually and substantiated. Although there are 'pre-prepared' text blocks, they have to be entered manually and adapted to reflect the individual facts and circumstances of the case.

Poor provision and exchange of information

Carrying out all the administrative tasks promptly poses an additional challenge because the information that is known about the foreign national is fragmented across multiple systems, some of which are not considered to be user friendly. The respondents pointed out that the provision of information for organisations working on asylum and migration has improved in recent years as a result of archiving digital files in the Central Digital Depot (CDD+) of the Judicial Information Service (JustID) and providing a viewing function in the CDD+, as well as introducing the TISOV[88] and its successor SIGMA.[89] SIGMA contains information on the 'personal profile' of the foreign national: conduct, build, psychological condition and any other risks for a successful removal. Its purpose was to enable officers working in the asylum and migration field to have online access, real time as far as possible, to the information necessary for their work, even and especially if it was not completely available within their own organisation.[90] In the opinion of a substantial share of the KMar, AVIM and DT&V respondents, the provision and exchange of information within the asylum and migration field still contains deficiencies despite these improvements. To date, the AVIM can only submit information for SIGMA, but still cannot consult it. On top of that, it takes a lot of time to collect and analyse the information available in the CDD+, partly because the information has not been stored in an orderly manner and the cooperating organisations do not record their information in a uniform manner. The possibility of entering data in the organisation's own information system as one sees fit can lead to conflicting or unclear information in CDD+ and SIGMA. Questions on the data in these systems still regularly arise, which means that the authority that has provided the information needs to be contacted for further clarification. Furthermore, quite often not all the information on the 'removability' of the foreign national in the CDD+ is up to date, or not all relevant documents have been stored, so that they still have to be requested separately.

The information recorded on the foreign national in the asylum and migration system is therefore not always entirely reliable because it is not always complete and current, nor can be it be interpreted unambiguously. This is a major concern for the AVIM and the KMar respondents, all the more so because they believe that the information provided by the IND and the DT&V contains deficiencies. A large share of the AVIM respondents do not see a clear line in the advice of these organisations. KMar respondents emphasised that they have no access to the systems of the cooperating organisations. When requesting them to provide information, it is often not received on time. A majority of the DT&V respondents

similarly experience problems with the availability of complete, current and prompt information for imposing detention measures. They have also stated that being dependent on the cooperating organisations (in this case the AVIM and the KMar) is the underlying cause. The information is quite often submitted too late, according to them. In some cases the information from one cooperating organisation differs from that of the other.

Legally complex material

Both the KMar and the AVIM respondents have highlighted the complexity of the laws and regulations and the resulting high demands placed on the reasons for the detention measure. The requirements for the statement of reasons have become more demanding since the implementation of the Return Directive. Due to developments in case law, unlike the situation prior to the entry into force of the Return Directive, it is no longer possible to rectify a deficiency in the statement of reasons after deciding on and issuing the measure. Consequently, this requires diligent preparation, which can clash with the severe time pressure and administrative burden experienced by the respondents.

Developing, retaining and sharing knowledge and expertise still not given enough attention

In the opinion of many respondents, particularly in view of the complexity of laws and regulations and the rapid developments in case law, developing, retaining and sharing knowledge and expertise are still not given enough attention.[91] The survey has brought to light that there is a considerable need among all organisations for more knowledge sharing, which crucially should be more structured and frequent, both prior to placement in detention, as well as afterwards. This mainly concerns consultations on individual cases and receiving feedback on the course and the outcome of detention to better anticipate the judicial review. The Dutch Police Academy and the IND's Legal Affairs department have found during educational situations and the peer feedback sessions organised that the KMar, the AVIM and the DT&V are grappling with the complexity of the legal guidelines arising from the face-paced developments in case law and that their knowledge is not always completely up to date.[92]

Besides proper training and sharing knowledge, it is essential to acquire experience. The opportunities for doing so depend partly on policy priorities, the available capacity and human resource development policy. KMar and AVIM chief public prosecutors have a broad range of duties, which includes placing foreign nationals in detention. By contrast, this is more or less a full-time activity for the implementing DT&V officials. Consequently, it is more difficult for the former group to build expertise and experience than the latter. This applies all the more to officers of forces and brigades in regions where fewer foreign nationals are discovered in any case and, consequently, where fewer foreign nationals are placed in detention, or less frequently. The officers who work for the AVIM are generally more experienced than those of the KMar because KMar staff turnover is higher. A principle of Kmar staff policy is that staff should change jobs every three years,

even though it takes time to become fully conversant with the detention process. The moment that chief public prosecutors and designated officials have acquired such experience, they are expected to assume another position, which means that the experience they have gained is lost.

Logistical challenges and facility issues when interviewing foreign nationals and issuing the measure

The KMar and the AVIM respondents did not identify any specific bottlenecks relating the process of transferring and holding foreign nationals. One-third of the DT&V respondents, on the other hand, stated that they encountered 'logistical bottlenecks' when interviewing foreign nationals in this phase and issuing the final measure. There are only three locations in the Netherlands where DT&V officers can interview foreign nationals and impose the measure: the detention centre (DC) in Rotterdam, the secure family facility (GGV) in Zeist and the penal institution (PI) in Ter Apel. This means that the DT&V officers often have to travel a long way from the asylum seekers' centre (AZC) to the place of questioning. This is where they often still have to amend the prepared detention measure and issue it 'immediately'. However, the DT&V does not have any of its own facilities (computer, printer, etc.) on site, nor does it have access to the facilities of the cooperating organisations that are available there. This means that they are dependent on the availability of colleagues from these organisations for printing and scanning documents, which regularly causes delays in issuing the measure. Lastly, the DT&V is dependent on the opening hours of detention centres for actually bringing the measure into effect.

Bottlenecks are not new

The bottlenecks encountered by the officers from organisations working on asylum and migration in implementing the detention process and imposing the measures are not new. The poor coordination within the system, the lack of time, the provision and exchange of information that is regarded as insufficiently reliable, the increase in the number of administrative tasks, the growing complexity of the work and the need for more knowledge development had also been identified during our research on detention in 2012, and have therefore been encountered for a long time.[93]

4.6 Picture arising from the case file review: decisions usually carefully considered, room for improvement

During the case file review, we also looked at the thoroughness of the measures that failed to lead to demonstrable return. It sometimes happens that a foreign national has been placed in detention on an incorrect legal basis, for example, because the authority imposing the detention is not aware that an individual has submitted a new residence application shortly before that, or a provisional ruling has been granted, but those formed exceptions in our research.

The factual grounds for the detention, based on which it is assumed that there is a risk, significant or otherwise, of the foreign national absconding, were explained in almost all files. This applies to both the light and the substantial grounds. We came across one file, in which not all grounds had been reasoned, but in that case there still were sufficient other grounds that had been adequately reasoned. The factual grounds were generally reasoned on the basis of standard text blocks and a brief (or sometimes a very brief, particularly in the case of the KMar or the AVIM) description of the applicability of the situation described therein to the specific case.

As a rule, standard text blocks are also used to explain the reasons why imposing an equally effective less coercive measure will not suffice. In many cases, reference is additionally made to the procedural history. Foreign nationals have often already submitted one or more applications for residence permits that have been rejected and an obligation to leave the country has already been imposed and they have completed one or more return procedures. Similarly, in earlier procedures often a less coercive supervision measure has already been imposed (usually a requirement to report to a reception centre (asielzoekerscentrum, AZC) or a requirement to report to a specific return-oriented freedom-restricting or family location), which has failed to lead to demonstrable return. In many cases, foreign nationals have stated during the return interview with the DT&V that they do not want to cooperate in their return or this is reflected in their actions or failure to act. In those cases, along with the reference to the contents of the return interviews, the results of earlier residence procedures and failure to comply with the obligation to leave the country earlier are pointed out.

In the vast majority of the files examined, particularly cases involving single young adults, the foreign national personally advanced no facts or circumstances that should have resulted in using a less coercive measure. Where they did, they often stated that they had medical or psychological problems. However, documents evidencing these problems were not always provided but if they were, the detention centre was usually able to provide adequate treatment. The facilities available in the detention centre are generally of the same level as the regular healthcare facilities. But there were also cases in which the foreign national put

forward circumstances that were relevant to assessing the question whether a less coercive measure would suffice and it had not been considered:

Omar is a single young man. He submitted an asylum application. Because he caused nuisance in the asylum seekers' centre he was placed in a special supervision and monitoring location, which he soon left for an unknown destination. The AVIM later apprehended him at a station after he had been caught for fare-dodging. Omar was unable to identify himself. The AVIM handcuffed when taking him to the police station for questioning, and placed him in detention after that. During the interview, he stated that he was not doing well, that he was using medication and that he was being treated by a psychologist at the AZC. Later, during a return interview with the DT&V, Omar stated that he had consulted the medical service in the detention centre. His detention was lifted ex officio on account of the inadequate preliminary detention process. First of all, the AVIM failed to state reasons for handcuffing Omar in the official report. In addition, the medical circumstances put forward by Omar had not been taken into consideration in the reasons stating why a less coercive measure would not suffice and it was incorrectly stated that Omar had not put forward any circumstances.

The use of a less coercive measure is more often invoked in cases involving the detention of family members. However, these cases also usually involve a procedural history, often a stay in a family location with a reporting requirement, which shows that the use of such a measure has not had the intended effect. We did not come across any cases in which the foreign national argued for the use of another supervision measure such as imposing a deposit (bail or bond), allowing a surety or the surrender of a travel or identity document. This is not surprising because many foreign nationals who are obliged to leave do not have sufficient independent means of subsistence, nor a surety and claim that they do not have any travel or identity documents.

We came across a relatively large number of files of foreign nationals who had been placed in detention multiple times over the years, which had failed to lead to demonstrable return. Those detentions were lifted for various reasons, which are not always but sometimes related to the thoroughness of the measure.

Tarik is a middle-aged man. He had stayed in the Netherlands for almost 40 years. The IND revoked his regular residence permit for an indefinite period and declared him an undesirable migrant because he had committed many serious crimes and had spent almost half of his total stay in the Netherlands serving time in prison for his crimes. Tarik was placed in detention. He said that he no longer had any identity documents and that he did not want to return to his country of origin. The DT&V submitted a laissez-passer application for him to the authorities of his country of origin and presented him to them in person. After the presentation, the DT&V contacted the authorities several times to follow up on the application, but this failed to lead to the laissez-passer being issued and the detention was lifted. Tarik was later placed in migrant detention for the second time following criminal detention. That detention was lifted shortly before the expiry of the six-month period based on the weighing of interests. Shortly afterwards, Tarik was placed in detention for the third time, once again following criminal detention. That detention was lifted by order of the court because the DT&V had acted insufficiently expeditiously. Shortly after that, Tarik was placed in detention for the fourth time, this time after being released from prison. That detention was also lifted shortly before the expiry of the six-month period because Tarik's interests in being released were deemed to outweigh the interests of the Dutch state in keeping him in detention. A short

while later, Tarik was placed in detention for the fifth time. That detention was also lifted on the grounds of the weighing of interests. Tarik was later held in criminal detention for a few months. Immediately after serving his prison sentence, he was placed in detention for the sixth time. That detention was lifted within a few days because a procedural error had been made. Following that, Tarik was placed in detention for the seventh time, once again following criminal detention. That detention was also lifted within a number of days, this time because the measure had not been properly reasoned. During his interview, Tarik put forward medical circumstances that he alleged would make the detention disproportionately onerous for him. Those circumstances had not been included in the reasons for the measure.

In nearly all the detention case files of families with minor children an extra thorough assessment of interests was made. In those cases, the measure for the children referred to the reasons for the measure for the parent, in which the children's circumstances were discussed. Standard text blocks were also used for this purpose but were not always further explained. These text blocks emphasised that the family is always treated as a social unit, that it would be in the children's best interests to stay with their parent(s), that the detention would be implemented in an adjusted regime (the GGV in Zeist) and that it would be as short as possible. A flight had usually already been booked, in view of the requirement stipulating that children may only be kept in detention for a maximum period of two weeks. If, when preparing a case for the court hearing, the IND finds that an extra thorough assessment of interests for the children has not taken place, as a rule the IND will not proceed with the case and the detention will be lifted ex officio because of a deficiency in the statement of reasons, which makes the measure unlawful. However, in some cases this does not happen:

Zalika is a single mother with minor children. Her youngest child was born in the Netherlands. Zalika was granted an asylum permit, but it was revoked. After the revocation became final, Zalika was 'legally removable'. However, she refused to cooperate in a presentation to the authorities of her country of origin. In the end, they confirmed her nationality based on copies of identity documents. The DT&V placed Zalika and her children in detention because she refused to leave voluntarily, failed to cooperate in forced return, and in the opinion of the service, there was a risk that she would abscond. The detention was lifted by order of the court. The best interests of the minor children had not been explicitly taken into consideration. In addition, the fact that Zalika had always complied with the reporting requirement and that, although she had not fully cooperated during the period in which she was told that she was required to return without her children, she cooperated more from the moment she was told that she would leave with her children had been insufficiently taken into consideration in the measure. Shortly afterwards, the DT&V again placed the family in detention. The authorities of the country of origin had meanwhile issued laissez-passers for Zalika and her children. The DT&V booked a flight and notified her of it. Zalika then submitted a repeated asylum application. The DT&V lifted the detention ex officio and decided, partly in view of the judgment of the court on the previous detention, that Zalika would be allowed to await the decision on her application in the reception centre. Zalika maintained her appeal against this detention in light of the award of compensation. The court ruled on that appeal that this detention was not justified either and that the DT&V should have settled on a less coercive supervision measure. By placing the minor children in detention twice within a short period of time based on the sole argument that it was in their best interests to stay with their mother, the DT&V had once again

insufficiently taken their interests into consideration. In addition, the DT&V had disregarded the fact that although Zalika had stated that she would not leave of her own accord, she had also stated that she would not resist removal. Zalika withdrew her repeated asylum application shortly after that. She invoked the Regulation for children staying on a long-term basis (Regeling Langdurig Verblijvende Kinderen). That application was rejected without further consideration and the family was placed in detention for the third time. The DT&V did not use a less coercive measure because during her stay in the family location, Zalika had failed to undertake any efforts to leave voluntarily. An IND staff member wrote the following in the analysis of the notice of appeal on the third detention procedure: The claimant and her children are not allowed to stay here. She had sufficient time to leave. She demonstrated that she was obstructing her return. And in such cases it is not the intention that we as a government authority have no legal remedy to carry out the legislator's intention. Those who are not permitted to stay here should leave. If she does not, then we will have to try. And of course it's unfortunate that the claimant's children are reaping the bitter fruits. And of course we do not place children in detention in principle. But as a government authority, you cannot be held to ransom. The children are being used as a sledgehammer as it were by their mother. The court declared the appeal against the third detention unfounded and Zalika and her children were eventually removed.

We have only seen two detention cases involving UAMs. The case files were not selected on that basis either and the data analysis shows that UAMs are rarely placed in detention. Both cases involved a child that was almost 18 years of age. An extra thorough weighing of interests was made in both cases. In one case the detention was lifted because the UAM submitted a repeated asylum application (based on which an asylum permit was ultimately granted), in the other case the detention was lifted by order of the court on account of insufficient reasoning.

In all the case files we examined, the grounds were ticked, on which basis it was assumed that there would be prospects of removal within a reasonable period. A discussion usually arises on the prospects of removal the longer the detention continues and a response from the country of origin on the laissez-passer application is not forthcoming. An explicit statement from the country of origin that it will not issue a laissez-passer even though there are no doubts about the nationality stated is rarely provided. Foreign nationals often refuse to cooperate in their removal. Although as a result of their refusal the detention may no longer be justified (because there are no longer any prospects of removal within a reasonable period), this does not mean that the detention for the purpose of removal could not be imposed for that reason. After all, foreign nationals should be expected to cooperate actively and fully in their return.[94]

The case file review not only provides a picture of the thoroughness of the detention measures. It also provides insight into the thoroughness of the assessment of the consequences of continuing the detention. If the IND reaches the conclusion after some time that there are no longer any prospects of removal within a reasonable period, this may be recorded in the DT&V's system as a detention lifted on account of the absence of prospects of removal, but this is usually recorded as a detention lifted on the grounds of the weighing of interests because the underlying reasons consist of multiple elements. The detention of

foreign nationals who do hold identity documents can also be lifted on account of the absence of prospects of removal within the permitted detention period. This is also recorded by the DT&V as 'weighing of interests':

Dana is a divorced woman with minor children. She has been staying in the Netherlands, with an interruption, for many years. She held a no-fault residence permit, but it was not extended when she left the Netherlands voluntarily. After she returned to the Netherlands, it emerged upon presentation of original identity documents certified as genuine that the family had applied for asylum in another EU Member State. Those documents show that the family had provided false identity data for their residence applications in the Netherlands. After returning to the Netherlands, the family continued to use the false identity data. Dana underwent multiple asylum procedures and also invoked the Regulation for children staying on a long-term basis several times. She and her children lived at a COA family location. When the family had exhausted all legal remedies, Dana refused to cooperate in her return. In the DT&V's opinion, there was a risk that she would abscond. After all, the family had left for an unknown destination in the past. The DT&V contacted the authorities of the country of origin. The authorities informed the DT&V that based on the passports, which had meanwhile expired, a take back and readmission agreement would be issued to the family. The family was then placed in detention. However, the DT&V was unable to remove the family within two weeks because the above agreement was not forthcoming from the authorities of the country of origin. The DT&V lifted the detention and the family was placed back in the family location.

In all the case files we examined, the DT&V had carried out an extra thorough weighing assessment of interests, as required under the Return Directive. In the most cases by far, the assessment resulted in the detention being lifted because more weight was given to the interests of the foreign national being released than the interests of the Dutch State in continuing the detention. This is also in line with the provisions of the Return Directive. We also found a number of cases in which the detention had been lifted shortly before the expiry of the six-month period, even though the court had declared the pending appeal against the continuation of the detention unfounded. In those cases, the IND had adopted the principle of 'better safe than sorry'. Earlier fruitless removal attempts may play a role in this regard:

Arif is a single young man. He was placed in migrant detention following criminal detention because he was illegally staying in the Netherlands. Arif is an undocumented foreign national and used multiple aliases. He had been arrested in another EU Member State under different personal data and held a valid passport at that time. The DT&V provided that passport number to the authorities of his country of origin and presented him to them in person, but that failed to result in a replacement document being issued. The detention was lifted by order of the court because Arif's interests in being released, even though he had failed to cooperate in his return, outweighed the interests of the Dutch state in keeping him in detention. He was later rearrested on suspicion of committing a criminal offence. He was placed in detention for the second time, which was temporarily lifted in connection with criminal detention. The court ruled that Arif's detention, after he had served his prison sentence, was unlawful and that it had to be lifted. He said that he was sick of using drugs and that he wanted to return to his country of origin. Those circumstances had insufficiently been taken into consideration in continuing the detention. By that time, Arif had once again been held in detention for several months in total. He was later

rearrested for committing a criminal offence and was held in pre-trial detention pending the court's decision on his criminal case. The DT&V already began discussing his return with him during those proceedings. Arif indicated that he now wanted to return voluntarily to another EU Member State. He therefore felt that the DT&V should settle for imposing a less coercive supervision measure. However, he refused to contact the IOM, nor did he make any further efforts to organise his return himself. He was presented to the authorities of his country of origin once again. He told the DT&V that the consul had stated that laissez-passer applications for criminals in the Netherlands end up at the bottom of the pile. They would prefer to keep them in the Netherlands rather than sending them back to the country of origin because the consul would otherwise run into problems, according to Arif. The supervisor pointed out that the embassy would issue a laissez-passer if he was prepared to return voluntarily, but that he still had doubts about returning during his presentation. In response, Arif said that he would submit an application for a laissez-passer to the embassy himself after being released and that he wanted no assistance from the IOM or the DT&V: 'It takes months, it's quicker for me to arrange. The supervisor explained that when his criminal detention had ended, he would again be placed in detention immediately afterwards because he would not yet be able to leave the Netherlands. Arif said that that would be fine and that he would arrange everything himself after his release. The court concurred with the DT&V that it was not likely that he would now leave of his own accord because he had already been given the opportunity to do so several times and he had no travel document and no money. The court declared all applications for judicial review submitted by Arif against the continuation of his detention unfounded. Six months later, the DT&V lifted his detention ex officio on the grounds of the weighing of interests. A few days later, the court declared the pending application for judicial review unfounded. In that judgment the court ruled that it was at the risk and expense of Arif that he failed to cooperate in establishing his identity and nationality and that the DT&V had acted sufficiently expeditiously and had exercised due care.

4.7 Analysis and conclusions

Chronic bottlenecks in the detention process

KMar, AVIM and DT&V officers who place foreign nationals in detention have, for a long time, encountered various bottlenecks that pose a challenge in implementing the detention process thoroughly: the poor collaboration and coordination between the organisations working on asylum and migration (DT&V), the severe time pressure and administrative burden (AVIM and KMar), the poor provision of information (DT&V, KMar, AVIM), the fast-paced developments in case law and the increasingly complex laws and regulations and the increasingly stringent requirements applicable to the statement of reasons (AVIM and KMar), and the logistical challenges when interviewing foreign nationals and imposing the measure (DT&V).

KMar and AVIM officers experience severe time pressure as the biggest bottleneck. The implementing DT&V officials usually have more time to prepare their cases. They believe that there is primarily room for improvement in the collaboration and coordination between the cooperating organisations. The differences in emphasis between the AVIM and KMar respondents, on the one hand, and the DT&V respondents, on the other, can be explained by the differences in the nature of the supervision exercised by the services and the locations where they apprehend foreign nationals.

The bottlenecks encountered in the process also play a role in drawing up detention measures. The KMar and AVIM respondents have also mainly highlighted the severe time pressure experienced in this regard and they often explicitly link them to other bottlenecks, such as the requirement to state reasons in detail. In implementing thorough measures, all three organisations often specifically mentioned the provision and exchange of information, which they consider insufficiently reliable. Moreover, it appears to be a challenge to keep knowledge and expertise up to date.

We consider some matters that constitute bottlenecks for the organisations as a fact, such as the requirement to give reasons for the measures and the complexity of the underlying laws and regulations, which are both partly the consequence of developments in case law on EU law. Other types of matters such as recording data in the system, the user-unfriendly information systems, the accessibility and prompt availability of information, the exchange of information between the cooperating partners and coordination of the information can be more directly influenced. This similarly applies to the opportunities for developing knowledge and expertise and keeping it up to date. Tackling the bottlenecks relating to information systems, the recording and provision and sharing of information could also reduce the administrative burden. The biggest bottleneck encountered by the AVIM and KMar officers, the severe time pressure, will at least be partly eliminated upon the entry into force of the Repatriation and Migrant Detention Act (*Wet Terugkeer en vreemdelingenbewaring*), pursuant to which the period for holding and questioning individuals will be extended from six to nine hours.[95] However, the analysis of the survey results shows that this will not be sufficient for them to always be able to carry out their work in a diligent fashion. The fact that the process has become increasingly complex and more time-consuming over the years also affects the quality and the reasoning of the measures.

14% of detentions lifted due to negligent conduct

In terms of the thoroughness of detention measures, the results of the data analysis and the picture we have obtained from the case file review differ from the results of the survey we distributed. Virtually all the DT&V, AVIM and KMar respondents encounter, to a greater or lesser extent, the same types of bottlenecks and have stated that these adversely affect the thoroughness of the measures (and the process). The lasting impression is that of officers who under severe time pressure have to make and state reasons for a far-reaching decision on the deprivation of liberty based on fragmented and poor information after carrying out many administrative tasks within the framework of complex laws and regulations, of which they do not always have sufficient up-to-date knowledge and expertise. Many of them feel that they are actually insufficiently or in any case not optimally equipped to do so. Nevertheless, they usually impose detention measures that stand up in court. Eighty-six per cent of the detentions that were terminated during the 2015–2019 period were lifted for reasons not associated with the thoroughness of the measure and/or the process. However, 14% of the detentions lifted were avoidable: procedural errors (5%), deficiencies in the

statement of reasons (4%), unlawful detentions (3%), not working on return sufficiently expeditiously (2%), using a less coercive measure (1%) and not decided promptly (<1%). In 2019, this percentage was 12%. Therefore there is still room for improvement, which is also evident from a number of the cases described.

The most detentions are lifted because the foreign nationally was successfully removed or still decided to leave voluntarily (although under supervision). The most frequent reason for lifting detentions that failed to lead to demonstrable return is the weighing up of the interests of the foreign national against the interests of the Dutch state. Nine out of ten times this does not take place by order of the court but ex officio. The IND pays particular attention to this. The picture that has emerged from the case file review is that also after the detention, a careful assessment is made of whether continuing the detention is not disproportionately onerous for the foreign national.

Differences in diligent conduct between the DT&V, on the one hand, and the KMar and the AVIM, on the other hand, can easily be explained

We have established that the DT&V is often more diligent in imposing measures than the KMar and the AVIM. Detentions imposed by the KMar or the AVIM are lifted five times more frequently due to an avoidable deficiency relating to the thoroughness of the process and/or measure than detentions imposed by the DT&V. This partly explains why the DT&V's measures are more effective. This is not a value judgement. The difference can easily be explained. The KMar and the AVIM experience the most time pressure, often have less time to prepare their cases substantively than the DT&V and, moreover, often less information is known about the foreign nationals they discover during supervision. Within the KMar and the AVIM there are units and officers who do not place foreign nationals in detention that often because they also have other duties, or simply because fewer illegally staying foreign nationals are discovered in their region. This may make it more difficult to acquire experience than for the implementing DT&V officials who work more or less full-time on detentions.

4.8 Recommendations

In the previous chapter we highlighted that a completely infallible return policy is practically unattainable. Detention will never be 100% effective either. The Netherlands is too dependent on the cooperation of foreign nationals and countries of origin. Moreover, the facts and circumstances on which the detention is based can change in the course of time. We have noted that the operational officers of the KMar, the AVIM and the DT&V have been encountering bottlenecks in the detention process for a long time that prevent them from being able to carry out the detention process optimally, and that they believe that those bottlenecks also have a negative impact on the thoroughness of the measures they impose. However, most of the detentions that were terminated without the foreign national demonstrably leaving the Netherlands were lifted for reasons unrelated to

negligent conduct. Based on the survey results, we consider the bottlenecks encountered by AVIM, KMar and DT&V officers in carrying out their work to be serious obstacles that prevent them from carrying out the detention process optimally and more efficiently. Furthermore, the case file review brought to light that the thoroughness of the measures can be improved. However, this will not automatically lead to a proportionate increase in demonstrable returns from detention, because even then, detentions may be lifted for reasons not directly linked to actions or acts of the organisations involved, such as the foreign national still or once again acquiring legal stay, or the tipping of the balance of interests due to the passage of time on account of the failure of the foreign national or the country of origin to cooperate sufficiently. First of all, as we concluded in Chapter 3, efforts should therefore be undertaken to encourage them to cooperate. In order to be able to carry out the detention process optimally and to further improve the measures, it is essential to tackle the bottlenecks we have identified in this chapter. It has emerged from the survey results and the interviews we conducted that officers of the organisations involved already have many concrete ideas on this. We took these into account when considering the recommendations. However, the potentially positive effects of implementing them on the effectiveness of detentions should not be overestimated in advance. Under that proviso, we have formulated the following recommendations.

Recommendation 4: Improve the facilities to ensure closer collaboration

- Accelerate the completion of an actual shared information system that can be accessed and consulted by all officers charged with placing foreign nationals in detention.
- Refocus attention on the importance of a uniform method of recording information and keeping the foreign nationals profile up to date in SIGMA and the CDD+ and make the method of recording data in these central facilities a fixed or at least a regularly recurring item on the agenda of the case consultations, which should be intensified (see recommendation 5).
- Critically re-examine together with the AVIM and KMar the manner in which the information in the CDD+ is organised.
- Undertake system-wide efforts to achieve a more uniform method of recording the reasons for lifting detentions.
- Arrange basic facilities at locations where foreign nationals are interviewed.

All officers of the DT&V, the Kmar and the AVIM should have real-time access to the necessary and current information so that they can properly perform their work. To preclude the information from being interpreted in different ways, all organisations that have/are granted access to SIGMA and the CDD+ should also record that information as uniformly as possible. This will prevent differences in interpretation and time from being lost unnecessarily. This also applies to the manner in which the information from the primary systems of the cooperating organisations is stored and organised in the central facilities.

Our research showed that the KMar, the AVIM and the DT&V may record the reasons for lifting a detention differently and that the information recorded in the relevant model (M113) is not always factually correct. In order to obtain a clearer and more complete insight into the reasons for lifting detention it is essential to record these reasons in the same way by the cooperating organisations as well. The method of recording information used by the DT&V should be used as the guiding principle.

It is hard to imagine that the basic facilities officers require to be able to carry out their work properly, such as computers and printers, are not always available at the limited number of locations where foreign nationals are currently interviewed and actually placed in detention. These facilities should be organised as swiftly as possible.

Recommendation 5: Achieve closer collaboration between the organisations involved and promote the further development of knowledge and expertise

- Examine the possibilities of accommodating the organisations involved at multiple locations in the country under one roof.
- In anticipation of closer collaboration, discuss the practical obstacles encountered by the organisations involved in preparing detentions.
- Promote and make a budget available for organising peer feedback sessions in which the organisations involved can discuss detention cases with each other.
- Encourage the DT&V and the IND to appoint officers to act as the fixed point of contact for KMar and AVIM officers who wish to discuss the substance of a case before they impose a detention measure.
- Ensure that the IND structurally and consistently provides feedback on the final result of the detention to a fixed contact point at the KMar and the AVIM, not only if the detention is lifted without the foreign national leaving, but especially in cases in which the detention had the intended effect too.
- Promote the exchange of staff between the KMar brigades and between the various AVIMs.

All the organisations directly involved have a considerable need to liaise more intensively with their cooperating partners. This is easier and more natural when people are located physically close to each other than remotely. Pooling knowledge and expertise, and short lines of communication between the officers of the various organisations involved are essential in being able to carry out the labour-intensive and operationally challenging detention process properly. Various scenarios for organising closer collaboration are conceivable. The most far-reaching scenario would be merging the KMar, the AVIM and the DT&V into one organisation that would be responsible for the supervision of foreign nationals and the return of foreign nationals who are obliged to leave the country. In our view, this would not be immediately obvious for two reasons. Firstly, because the tasks and activities of all three organisations encompass more than placing foreign nationals in detention and also differ substantially between the organisations. Secondly,

because the existing logistical challenges posed by the limited number of available locations where foreign nationals can be interviewed and placed in detention would not be eliminated. Another option is to set up a central coordination centre where KMar, AVIM, DT&V and IND officers can consult with each other on detention cases and the process, and can coordinate decision-making on detention. Although this would better facilitate more direct collaboration, the logistical challenges related to interviewing and placing foreign nationals in detention will continue to exist. For this reason, in any event in the short term, it would be more obvious to examine a third scenario and that is to accommodate the organisations involved under one roof at multiple locations in the country. A number of suitable and obvious locations should be found which are more or less spread across the country. In addition to the locations already available in Rotterdam (DC), Zeist (GGV) and Ter Apel (PI), it would be obvious to examine whether this could be implemented at the Shared Locations for Foreign Nationals (GVLs) in Gilze and Budel where the cooperating partners are already housed under one roof to carry out the asylum process and at a GVL to be set up in a more central location in the Netherlands.[96]

In anticipation of closer collaboration, it is important to further discuss the practical obstacles encountered by the organisations involved in preparing detentions. It should be examined whether these obstacles can be removed within the existing working agreements, or whether other or additional arrangements should be made. This primarily concerns matters affecting the scheduling of detentions by the DT&V, but which the DT&V itself is unable to influence: imposing a return decision if a foreign national is not included in its own caseload and drawing up and issuing the required entry warrant. This is now carried out by the AVIM. In this context, the possibility should be examined of the DT&V imposing a return decision that may not yet have been issued on foreign nationals included in its caseload. The same types of activities must be performed for imposing a return decision and a detention measure (interviewing, giving reasons, issuing). It may be more efficient for one and the same organisation and officer to carry this out. It could also be examined in this context whether it would be possible and worthwhile to have the Transport and Support Department (DV&O) of the Custodial Institutions Agency (DJI) draw up and issue the entry warrant, which is also responsible for apprehending foreign nationals at COA locations.

In addition, it is important to meet the considerable need to increase the exchange of knowledge and case consultations particularly among officers of the KMar and the AVIM, both prior to and after detentions. To prevent officers from potentially receiving the wrong impression of the effectiveness of and the thoroughness of their work, it is important to not only provide feedback on the results of non-effective detentions, but also those of successful detentions. Actively promoting the exchange of officers between the KMar brigades and between the various AVIMs will also enable officers of brigades and forces who less frequently place foreign nationals in detention to acquire the necessary experience in order to continue to implement thorough detention measures.

[74] We came across cases in which the court ordered the detention to be lifted due to a deficiency in the statement of reasons, whereas 'procedural error' had been stated as the reason for lifting the detention in the model M113. The DT&V uses its own list of reasons for lifting detention for its registration system, from which the supervisor chooses the most appropriate reason based on the circumstances and/or the judgment of the court. As a result, the information about the reason for lifting the detention in the DT&V's registration system may differ from the information that has been filled in by the AVIM or the KMar in the model M113.
[75] Except for the situation in which the IND has indicated, when processing an asylum application, that a decision cannot be made promptly due to new facts and or circumstances. 'Prompt' refers to the maximum period of four weeks in which asylum applicants may in principle be kept in detention. It is therefore unrelated to the statutory decision period applying to asylum procedures.
[76] See figure 20 and the text below it in Appendix 5.
[77] See figure 20 and the text below it in Appendix 5.
[78] See figure 20 and the text below it in Appendix 5.
[79] See figure 16 and the text below it in Appendix 5.
[80] See figure 17 and the text below it in Appendix 5.
[81] See figure 18 and the text below it in Appendix 5.
[82] See figure 21 and the text below it in Appendix 5.
[83] See figure 22 and the text below it in Appendix 5.
[84] See figures 15 and 20 and the text below it in Appendix 5.
[85] When identifying bottlenecks in the detention process, we looked at apprehension, transfer and holding, and placement in migrant detention. Under the Return Directive illegally staying foreign nationals may be placed in detention only if a return decision (together with a potential entry ban) has been issued against them. We have not specifically examined bottlenecks in issuing return decisions (and imposing travel bans). Nor have we specifically examined the process of removal because removals are monitored by the Inspectorate of Justice and Security.
[86] For an explanation, see Section 3.3 of Appendix 3.
[87] The government amended the Act after it had been approved by the House of Representatives. These amendments are still pending, but due to the caretaker status of the government it has been labelled as 'controversial'. See https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35501.
[88] The Temporary Information System on the Transfer of Foreign Nationals (TISOV) was temporarily put into operation in September 2014 and was used to transfer information between the cooperating partners on foreign nationals who were forced to leave the Netherlands. It actually was a digital version of the old M118 form containing information on the special characteristics of the foreign national that could be relevant to the return process. TISOV enabled each cooperating partner to add relevant information to the form to create a shared 'personal profile' of the foreign national. The TISOV was replaced by SIGMA in October 2016.
[89] SIGMA is a shared digital information hub containing information relevant to the return process from the systems of the various cooperating partners that was put into operation in October 2016. They can view the information and use it for their own work process. The cooperating partners that have access to SIGMA are the AVIM, KMar, DT&V, DJI and the Seaport Police (ZHP).
[90] *Parliamentary Papers II* (2015/16) 19 637, No. 2186.
[91] In the survey results, this point neither appears among the top 3 bottlenecks relating to the process, nor among the top 3 bottlenecks relating to the detention measures. Yet it featured prominently in the responses to the question on what is required to reduce the number of detentions lifted. This has led us to conclude that this constitutes another bottleneck.
[92] See Appendix 7 for a brief description of the existing efforts aimed at developing, retaining and sharing knowledge and expertise.
[93] ACVZ, Migrant detention or a less intrusive measure? (2013).
[94] See Appendix 4, Section 4.3.
[95] The government amended the Act after it had been approved by the House of Representatives. These amendments are still pending, but due to the caretaker status of the government it has been labelled as 'controversial'. See https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35501.
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Voluntary return and reintegration assistance | Publication | Repatriation and Departure Service

Reintegration assistance | Return assistance terugkeer | Repatriation and Departure Service

Support after forced return | Return assistance Repatriation and Departure Service

Glossary

- Demonstrable return or effective return: return under supervision (i.e. there is evidence that the person left the national territory).
- AVIM detention: a detention imposed by an officer of the AVIM.
- Basic return assistance: basic assistance with voluntary return under the 'Return and Emigration Assistance from the Netherlands' (REAN) programme carried out by the International Organisation for Migration (IOM).
- Weighing of interests: weighing the liberty interest of the foreign national against the Dutch State's interest in placing or keeping him or her in detention.
- Detention: a measure involving deprivation of liberty imposed on foreign nationals who are required to leave the Netherlands if there is risk of absconding to keep them available to prepare for and carry out return to the country of origin, a Dublin transfer to another EU Member State, or to be able to carry out the asylum procedure properly.
- Length of detention: the duration of the detention.
- Detention measure: the decision imposing the detention.
- Detention centre: an accommodation facility where foreign nationals stay who are subject to a detention measure.
- DT&V detention: a detention imposed by an officer of the DT&V.
- Dublin detention: a detention imposed for the purpose of transferring the foreign national to another EU Member State under the Dublin Regulation.
- Effectiveness of detention: the extent to which foreign nationals demonstrably leave the Netherlands after they have been placed in detention.
- Factual grounds: a combination of culpable conduct and factual circumstances (the substantial and light grounds), based on which it is assumed that there is a risk of the foreign national absconding.
- Forced return: removal.
- Secure family facility: a detention centre with an adapted regime for the detention of families with minor children, women and unaccompanied minors (UAMs).
- Reintegration assistance: support for migrants who meet the conditions for basic return assistance and who return to a country designated as a developing country by the OECD.
- Detention: implementation of the detention measure.
- Legal basis: the basis for the detention under the Dutch Aliens Act (*Vreemdelingenwet*).
- KMar detention: a detention imposed by an officer of the KMar.
- Quality of the detention measure: the thoroughness and completeness of the statement of reasons for the detention measure and the absence of procedural errors.
- Quality of the detention process: the extent to which the process has been properly understood and implemented by all the organisations involved.
- Less coercive measure: a supervision measure that is less onerous for the foreign national than detention.
- Deficiency in the statement of reasons: a deficiency in the statement of reasons for the detention measure.

- Non-Dublin detention: a detention imposed for the purpose of return to the country of origin.
- Unlawful detention: a detention imposed despite deficiencies in the process prior to detention (unlawful apprehension or unlawful transfer and holding).
- Holding for questioning: holding a foreign national at a place of questioning to conduct a further investigation into the individual's identity, nationality and residence status.
- Transfer: transferring a foreign national to a place of questioning to conduct a further investigation into the individual's identity, nationality and residence status.
- Detention process: the procedure from the apprehension of the foreign national through to the lifting of the detention measure.
- Apprehension: apprehending a foreign national to establish the individual's identity, nationality and residence status.
- Return policy: the policy pursued to minimise the illegal stay of foreign nationals.
- Removal: forced return.
- Measure of last resort: measure used as the last resort if all other methods fail.
- Avoidable reason for lifting detention: a reason for lifting detention associated with a deficiency in the detention process and/or a deficiency in the detention measure.
- Extra thorough assessment of interests: the weighing of interests in which the foreign national has a compelling interest in not being placed in detention or in being released, for example, because the case involves an unaccompanied minor, a family with minor children or because the initial maximum length of detention of six months is at risk of being exceeded.
- Procedural error: a procedural error in imposing the detention measure, including applying an incorrect legal basis for imposing the measure.
- Voluntary return: effective return which is not forced; usually assisted by IOM or NGO.
- Prospect of removal: the possibility of carrying out the forced return of the foreign national within a reasonable period.

List of respondents

Organisation	Position
Interviews	
Migrant Police, Identification and Human Trafficking Department (AVIM)	Operational expert Operational specialist A Operational specialist A
Repatriation and Departure Service (DT&V)	Coordinating specialist adviser Senior adviser
Royal Netherlands Marechaussee (KMar)	Policy adviser
Immigration and Naturalisation Service (IND)	Senior adviser
Ministry of Justice and Security. Migration Policy Department	Coordinating specialist adviserSuperintendent
Police	Operational Specialist B
Survey	
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