
INVESTIGATION OF REPATRIATION FLIGHTS

Summary, conclusions and recommendations

Report

Investigation of repatriation flights

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RETURN FLIGHTS AT A GLANCE

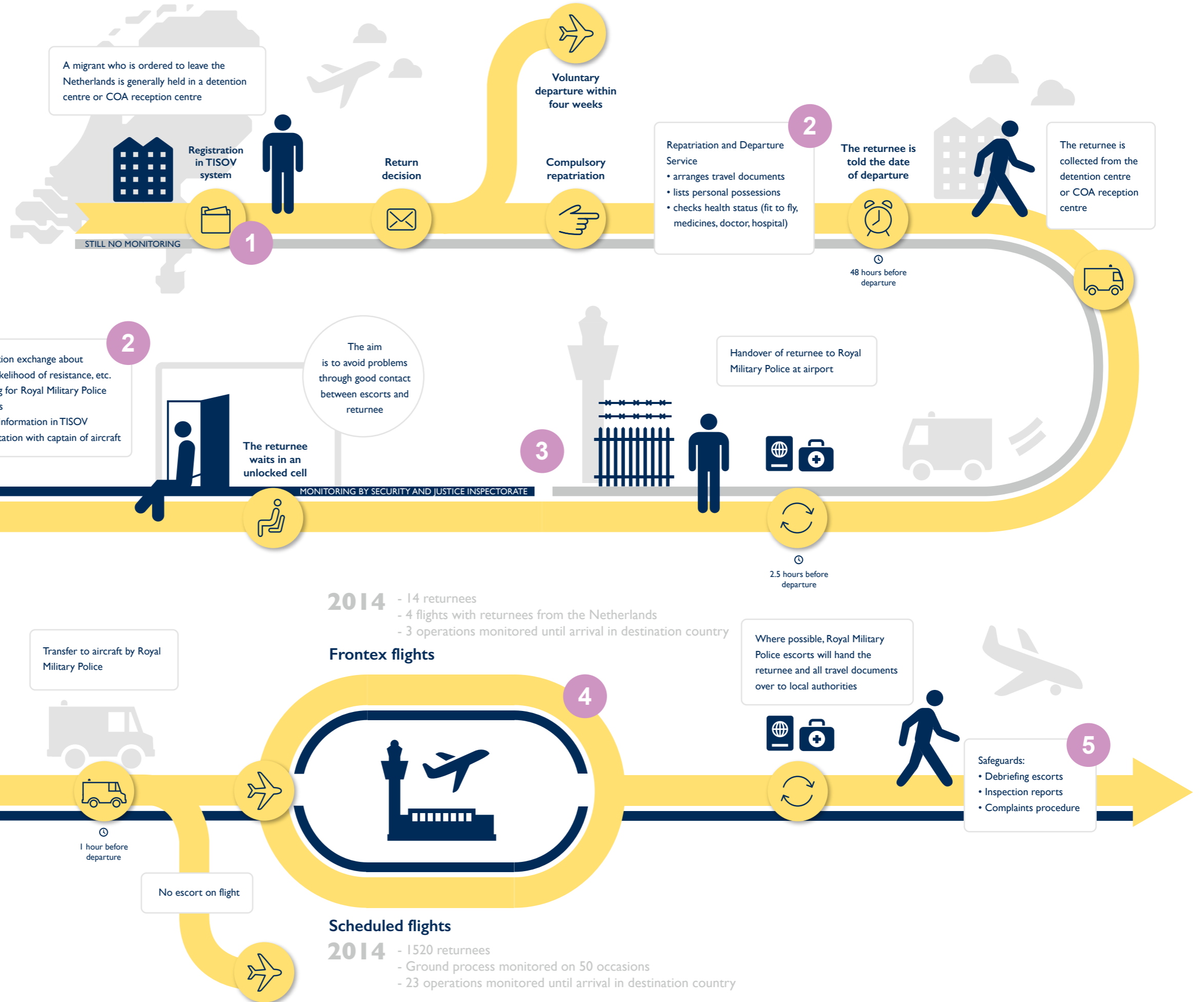
The National Ombudsman has investigated the procedures under which foreign nationals who are not eligible to remain in the Netherlands are repatriated: the 'Return Flights'. A migrant who is denied permission to reside in the Netherlands can be returned to his or her country of origin. The Ombudsman has examined how the relevant procedures work in practice and how they are monitored to ensure that the individual's rights are respected at all times. The complete report can be downloaded from: www.nationaleombudsman.nl.

Points for attention:

- 1 Improve information transfer
- 2 More attention for medical risks
- 3 Extend monitoring and supervision
- 4 Introduce safeguards against disproportional force on Frontex flights
- 5 Provide information about complaints procedure

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Summary, conclusions and recommendations

1. Introduction

Foreign nationals who are denied permission to settle in the Netherlands are required to leave within a few weeks of receiving instructions to return to their country of origin. Not all are willing or able to do so. Those who do not leave the Netherlands voluntarily must be repatriated by the government. This may entail the use of coercive measures, i.e. physical force and/or restraint.

Foreign nationals who are forced to return to their country of origin have diverse backgrounds. Some have unsuccessfully applied for asylum or some other form of lawful resident status in the Netherlands. Others have never done so and are classified as 'undocumented aliens' whose presence in the Netherlands is unlawful. Others have been convicted of a criminal offence, whereupon permission to remain in the Netherlands has been revoked in the interests of public order. In 2014, over 1,500 foreign nationals were repatriated from the Netherlands. It falls to the Dutch government to ensure that the 'return process' is conducted in full compliance with international law and with respect for the rights of the individual. The people being required to leave our country are under the direct responsibility of the Dutch government until such times as they are handed over to the authorities in their country of origin.

In October 2014, the European Ombudsman, Emily O'Reilly, announced that her department was to investigate repatriation procedures which involve 'Frontex flights' (as defined below). Ms O' Reilly invited the National Ombudsman of each European Member State to conduct a similar investigation at the national level¹. The National Ombudsman of the Netherlands has therefore examined whether the repatriation process in the Netherlands is such as to ensure the conscientious and humane treatment of 'returnees'.

2. Returnees: categories and numbers

If returnees are repatriated by airplane, there are several options. Some are booked onto a scheduled commercial flight and are seated among other passengers. Alternatively, an aircraft is chartered by the Dutch government for the sole purpose of returning foreign nationals to their country of origin. This type of operation is known as a 'government flight'. The third option is a return operation conducted in association with other countries. Joint flights are organized under the supervision of and financed by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, more conveniently known as 'Frontex' (a contraction of the French words *Frontières extérieures*) and are therefore known as 'Frontex flights'. All Member States that subscribe to the Frontex agreement (the 26 signatories to the Schengen acquis plus the United Kingdom and Ireland) are entitled to take part in these 'Joint Return Operations' (JROs).

In 2014, the Netherlands repatriated 1,520 foreign nationals on regular scheduled flights. Fourteen persons were returned to their country of origin on a Frontex flight and three on a national government flight².

¹ Twenty Ombudsmen have responded positively to his request.

² Information provided by the Ministry of Security and Justice, letter dated 9 March 2015.

The repatriation procedures are monitored and supervised by the Security and Justice Inspectorate. However, not all return operations are subject to end-to-end monitoring: the Inspectorate targets its activities based on four risk criteria³. In 2014, the Inspectorate monitored a total of 73 return operations. In fifty cases, it limited its attention to the ground process at the airport of departure. In the other 23 cases, inspectors were also present throughout the flight itself and, where possible, oversaw the handover of the returnees to the authorities in the destination country. Two inspections of the ground process were unannounced. The number of unannounced inspections has since been increased to around nine in the first half of 2015⁴.

3. What aspects has the National Ombudsman examined?

After a short introduction in Chapter 2, Chapter 3 of this report presents a brief account of the legal framework that governs the repatriation of foreign nationals. Further to national and international legislation, as well as the requirement for 'responsible government action', it is essential to ensure that returnees' human rights are respected at all times. The National Ombudsman has therefore examined the extent to which the organization and practice of repatriation procedures preclude any violation of those rights.

A key requirement is compliance with Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". There are occasions on which returnees do not freely cooperate with their repatriation but offer some resistance. Their escorts, officers of the Royal Netherlands Marechaussee (*Koninklijke Marechaussee*), will then use coercive measures to board the returnee onto the aircraft and ensure that he or she is unable to disrupt the flight. Any unnecessary or disproportional use of coercive measures may be considered a violation of the returnee's human rights. The European Court of Human Rights (ECHR) has interpreted Article 3 as a 'positive obligation', i.e. it is not enough to refrain from deliberate action likely to undermine a returnee's health and well-being. Rather, governments must take affirmative action to safeguard his or her health and well-being⁵. Given this positive obligation, the National Ombudsman has examined the measures taken to ensure that the use of coercive measures is proportional, and that returnees have access to necessary medical care at all times during the repatriation.

To allow thorough assessment of whether human rights are indeed being respected, it is essential that an effective system of independent monitoring is in place. There must also be a complaints procedure whereby returnees can make any grievances known and can be certain that those grievances will be duly investigated. The National Ombudsman has therefore examined whether an accessible complaints procedure does indeed exist, and whether the overall monitoring and supervision of the repatriation process in the Netherlands is well organized and 'fit for purpose'.

4. Safeguarding the proportional use of coercive measures

The repatriation process is subject to strict protocols, many of which have been implemented in response to past incidents. Nevertheless, every situation is different, and difficult decisions have to be made, often 'on the spot'. Officers of the Royal Netherlands Marechaussee are trained to

develop a good personal relationship with the returnees they are required to escort. Contact with respect for the individual is an essential component of the repatriation process in the Netherlands. It can sometimes prevent the returnee's behaviour escalating to a degree which would require the use of restraint or force. Moreover, the permissible types of restraint are clearly defined. They are limited to handcuffs, soft body cuffs, velcro bands, tie-wraps and transparent (netting) face masks. All other forms of restraint are prohibited and may never be used on Dutch soil or on any flight which is conducted under the responsibility of the Dutch government.

Further to Article 3 of the European Convention, it follows that the use of force during a return operation will be regarded as a violation of human rights *unless* such force is necessary and proportional to the conduct of the returnee at that time. The ECHR has ruled that any force directed towards a person whose liberty has been restricted, where that force is not absolutely necessary in view of that person's behaviour, is a violation of human dignity and therefore, in principle, an infringement of Article 3⁶. In the case concerned, the ECHR conceded that the use of force can indeed be necessary in certain circumstances. However, the force must never be excessive, i.e. it must always be proportional⁷. During a return operation, any use of force which is not necessary and not proportional to the resistance offered by the returnee can therefore be regarded as a violation of Article 3.

The National Ombudsman finds that, overall, the Royal Netherlands Marechaussee are successful in establishing a good relationship with the returnees whom they are required to escort. Officers make every effort to ensure that a returnee's behaviour does not reach a level at which the use of coercive measures becomes necessary. The protocols and training ensure that all officers are aware that de-escalation of a situation that threatens to get out of hand is important. Any use of coercive measures is subject to an internal reporting procedure, and the resultant written report may prompt a debriefing interview with the officers concerned. Because no two situations are alike and spontaneous decisions must sometimes be taken by the individual, it is important that an effective monitoring system is in place. There must be independent supervision and an effective complaints procedure (see also paras. 1.6 and 1.7).

5. Risks to medical care

Alongside the proscriptive element, the ECHR has attached a prescriptive interpretation to Article 3, whereby there is an obligation to safeguard health and wellbeing of the returnee⁸. The Netherlands applies the principle that all detainees, including returnees, should have access to care of the same quality as that available to all other members of society. If the government is aware, or could have reasonably ascertained, that a returnee is suffering from a serious medical condition or faces an immediate risk to life or limb, it must take appropriate action. This duty of care extends to potential self-harm and suicide.

Where a person to be repatriated is known to be suffering from a medical condition, the *Dienst Terugkeer en Vertrek* (Repatriation and Departure Service; DT&V) will request the *Bureau Medische Advisering* (Medical Advisors Office; BMA) to produce a formal 'opinion' stating whether the person's health status requires any 'special travel conditions' to be observed. If so, the DT&V must make all necessary arrangements prior to the return operation. The DT&V may

³ These criteria are: medical points of attention, vulnerable individuals or groups of individuals, expected behaviour (such as resistance), and social perception and/or unrest.

⁴ Figures provided by the Ministry of Security and Justice, 16 June 2015

⁵ Hagens M (2011), *Toezicht op menswaardige behandeling van gedetineerden in Europa*, Wolf Productions 2011, para.7.2

⁶ ECHR 20 July 2004, No. 47940/99 (Balogh vs Hungary), para. 59; ECHR 22 December 2009, no. 27900/04 (Palushi vs Austria), para. 62

⁷ ECHR 20 July 2004, No. 47940/99 (Balogh vs Hungary), para. 59e

⁸ Hagens M (2011), *Toezicht op menswaardige behandeling van gedetineerden in Europa*, Wolf Productions 2011, para.7.2

also request a 'fit-to-fly' certificate. Such a certificate is only issued for persons declared fit enough to board a plane, and is only requested when circumstances so demand. There is no formal definition of such circumstances.

The National Ombudsman notes three points that undermine the availability of effective medical care.

First, the circumstances in which any assessment of fitness to fly is made are by no means clear. When do the appropriate authorities decide whether there are any medical contraindications to air travel⁹? The Ombudsman has been unable to ascertain when a 'fit-to-fly' certificate will be requested or whether and how any risks are assessed. It is unclear whether the returnee is examined by a qualified medical practitioner in all circumstances where this would be appropriate. The National Ombudsman is of the opinion that the government has a responsibility to satisfy itself that a returnee's state of health raises no restrictions to travel. In order to do so, there must be a clearly defined process with designated tasks and responsibilities.

Second, there is the possibility of medical issues arising during return operations where there is no medical expertise on hand. The officers of the Royal Netherlands Marechaussee themselves do not have such expertise. For example, a returnee may report to the airport carrying one or more medications, claiming that he or she must take them before or during the flight. Police escorts do not have the knowledge required to assess the veracity of this claim, or whether there is any risk to the returnee's health or well-being. The escorts are also unable to provide medical assistance if necessary. Royal Netherlands Marechaussee personnel have themselves identified this as a problem.

Third, the escorts state that, in the interests of their own safety and that of other airplane passengers, they require information about any risk of infection. In practice, they are not always given this information.

6. Accessibility of the complaints procedure

Officers of the Royal Netherlands Marechaussee do not routinely inform returnees of their right to submit a complaint. If the returnee states during the flight that he/she is not satisfied, or alleges some infringement of his/her rights, the senior officer will explain the complaints procedure verbally and in brief. No written information is available during the flight; the returnee is referred to a website of the Royal Netherlands Marechaussee. The names or identifying service numbers of the escorts are provided on request.

The National Ombudsman is of the opinion that too little information about the right to complain is made available either prior to or during the return operation. The situation in which returnees find themselves can make it extremely difficult for them to exercise this right. Good and complete information is essential; merely advising the returnee to read a website is not enough.

A thorough complaints procedure is important for at least two reasons. First, it is the only way in which a person can inform the government of any perceived shortcomings in the way he has been treated. Second, it offers the government itself ongoing information about its working

⁹ The CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) has recommended that all persons subject to involuntary repatriation should be offered a medical examination prior to departure. The Dutch government states that a 'fit-to-fly' certificate is not requested in every case. All returnees are assumed to be fit to fly unless there are medical reasons that suggest otherwise.

practices and any problems inherent in the current arrangements. A complaints procedure is therefore a necessary safeguard which ensures that the government meets all responsibilities with regard to respect for human rights.

The National Ombudsman notes that the number of complaints made by returnees is low, and is likely to remain so even if more complete information about the procedure is made available. The people concerned have, after all, left the Netherlands and in most cases will have no further contact with individuals or organizations in our country. The question is therefore how the government can be apprised of any ongoing problems if such problems only come to light further to sporadic complaints. It is essential to draw upon the experiences of those who have been subject to the repatriation procedure. Systematic follow-up by the government, whereby the opinions of returnees or their representatives are actively sought, is an option that should be explored.

Frontex flights have no separate complaints procedure established by the Frontex organization itself. No information is provided to returnees either as to where they can submit a complaint about their treatment during the flight. According to the Frontex Code of Conduct¹⁰, it is for each individual country to, "give sufficient and clear information to the returnees about the JRO, including the possibility to lodge a complaint concerning alleged ill-treatment during the operation".

Further to her investigation of Frontex procedures in 2012¹¹, the European Ombudsman recommends:

(i) Taking any possible action to enable the FRO [Fundamental Rights Officer] to consider dealing with complaints about infringements of fundamental rights in all Frontex activities submitted by persons individually affected by the infringements and also in the public interest, and (ii) providing adequate administrative support for that purpose.

In response, Frontex states:

The competences of the FRO, as defined in the Frontex Regulation, do not include resolving external and individual complaints as the FRO has no executive powers as such. For this purpose, other institutions are competent (e.g. mainly national and EU Courts), at present.

The National Ombudsman agrees with the European Ombudsman's conclusion that it should be possible to submit a complaint about alleged infringements *during* the return operation itself. This calls for returnees to be made aware of the complaints procedure, which must be fully accessible. All complaints must be properly processed and evaluated thereafter. In the National Ombudsman's view, these requirements apply regardless of the governmental organization concerned. A complaint submitted to Frontex must receive the same thorough and balanced consideration as one submitted to a national government.

7. Monitoring

An effective system of monitoring the forced repatriation of foreign nationals, conducted by an independent party, is an essential safeguard of human rights. The National Ombudsman finds that monitoring is too limited at present.

¹⁰ As of October 2013, a Code of Conduct for Joint Return Operations has been established by Frontex.

¹¹ Own-initiative inquiry OI/5/2012/BEH-MHZ

No supervision of preparations for departure

On 1 January 2014, the Security and Justice Inspectorate assumed all tasks and responsibilities of the former *Commissie Integraal Toezicht Terugkeer* (Integrated Supervision of Returns Commission; CITT). The scope of the Inspectorate's supervisory tasks includes all stages of the asylum and immigration process (the so-called 'Aliens Chain'). By now, a supervision framework for return operations, from the moment returnees arrive at the airport, has been produced by the Inspectorate itself. At present the Inspectorate does not oversee the preceding 'preparations for departure' phase. It intends to do so and is working on the necessary framework. At the time of writing, however, the Inspectorate's supervision begins at the moment that the returnee arrives at the airport. In the National Ombudsman's opinion, supervision should be extended to include the preparations for departure as soon as possible, for there are already risks in this phase. This is when returnees are told what is to happen and are informed about their rights. It is also when their medical situation is assessed. Moreover, a returnee who is to offer any resistance may start to do so at the time of his or her collection from the detention centre. The use of coercive measures may therefore be indicated.

Multidisciplinary supervision is lacking

The National Ombudsman is a firm proponent of a multidisciplinary approach to the return process, particularly in terms of monitoring. To date, there has been no multidisciplinary cooperation between the organizations responsible for the implementation of the National Preventive Mechanism (NPM). Currently, not all risks are subject to inspection or monitoring. With respect to the returnee's medical situation, for example, the Security and Justice Inspectorate limits itself to ascertaining whether medical support – where indicated – is available during the ground process. It is not involved in determining whether medical support is indeed necessary. The Inspectorate also checks that the 'fit-to-fly' certificate is at hand, if one has been requested. However, the Security and Justice Inspectorate does not establish whether the decision not to medically examine a returnee for fitness to fly was justifiable. In short, the Inspectorate performs its tasks according to the letter of the law but fails to address the intent of that law. The Health Care Inspectorate has the necessary mandate and expertise to investigate these matters.

More frequent investigation of incidents

The National Ombudsman is also of the opinion that the Security and Justice Inspectorate cannot fulfil its duty of 'effective and independent monitoring' unless it exercises its authority to investigate alleged incidents. Given that the returnees themselves are often unable or unwilling to lodge a formal complaint, it is important to adopt a proactive approach in order to identify any ongoing problems, even in the absence of an actual complaint. In the Ombudsman's view, any hint of doubt concerning the probity and due process of a return operation, in full compliance with all legislative and other requirements, should always prompt a full investigation.

Monitoring of Frontex flights

In principle, the Security and Justice Inspectorate is responsible for monitoring any Frontex flight in which there is formal involvement on the part of the Netherlands, i.e. where officers of the Dutch Royal Netherlands Marechaussee are deployed as escorts. After all, the Inspectorate is responsible for monitoring the performance of Dutch organizations involved in repatriation flights. In 2014, one foreign national was deported from the Netherlands on a Frontex flight without a Royal Netherlands Marechaussee escort¹². On this occasion, the returnee was

¹² This was a 'Collecting Joint Return Operation', i.e. the returnees were brought to Paris where they were handed over to the escorts of the destination country.

accompanied to Paris where he was handed over to the escort team of the destination country. Because the Frontex flight itself was conducted under the responsibility of those authorities, there was no Dutch escort and hence no monitoring by the Security and Justice Inspectorate, which has no authority or jurisdiction over escorts from other countries. In this case, the Netherlands had no influence over the return operation beyond Paris.

In practice the supervisory agencies of the various Member States do not coordinate their activities. Each monitors only the procedures of the escorts attached to their 'own' returnees. Some Member States have no supervisory agency at all, and hence their escorts are not subject to any supervision. Because there is no common assessment framework, the supervisory agency of one Member State has no authority to monitor escorts or flights from another: they are not 'interchangeable'.

8. Transfer of information

The Royal Netherlands Marechaussee obtains the information required to carry out its duties from the TISOV registration system. Provided the necessary information is entered at all points of the chain, this is an effective and efficient system which offers real-time information. As yet, however, there is no guarantee that the information in the system is complete and correct. There have been several occasions on which information that is important or essential to the Royal Netherlands Marechaussee was not available. The effective transfer of information between all chain partners is extremely important. The National Ombudsman therefore finds that efforts must be made to ensure the structured use of the TISOV system by all concerned.

9. Recommendations

The National Ombudsman makes the following recommendations to the State Secretary of Security and Justice:

Proportional force

- Make agreements with other Member States regarding the permissible use of restraints.
- Do not entrust a returnee from the Netherlands to an escort team from another country unless and until disparities with regard to the use of coercive measures have been resolved.

Medical care

- Ensure that all returnees are in a fit state of health to travel. Establish the circumstances in which a medical examination is required and who is to be responsible for assessing this requirement on a case-by-case basis.
- Ensure that the Royal Netherlands Marechaussee can access medical expertise at all stages of the return operation.
- Establish what medical information is to be made available to the Royal Netherlands Marechaussee escorts in the interests of the officers' own personal safety, taking the restrictions of medical confidentiality and privacy legislation into account. A case in point may be informing escorts and other staff about any precautionary measures that should be taken. Determine who is to be responsible for ensuring that the information is sufficient.

Accessibility of the complaints procedure

- Ensure that returnees are able to submit a complaint to any relevant authority, whereupon it will be processed and assessed in a uniform and standard manner.

- Provide all returnees with accessible written information about the complaints procedure and their right to submit a complaint. This must apply equally to all types of return operation, including Frontex flights.
- Ensure that all personnel on board the aircraft can be identified.
- Actively seek feedback from returnees. Find a way of assessing procedures from the returnee's perspective.

Better transfer of information

- Ensure that all chain partners use the TISOV system in a structured manner, entering complete and accurate information.

The National Ombudsman makes the following recommendations to the Head of the Security and Justice Inspectorate:

Inadequate monitoring

- Extend monitoring and supervision to include the 'preparation for departure' phase.
- Organize multidisciplinary inspections, with particular attention for effective medical supervision.
- Always conduct a full investigation where there is any cause to question the probity of official action during a return operation.
- Promote the development of a common assessment framework at the highest level.
- In the case of Frontex flights, establish appropriate cooperation with the supervisory agencies of other Member States.
- Ensure that the treatment of all returnees on Frontex flights is subject to full and effective monitoring at all times.