



NATIONAL  
AGENCY  
FOR THE  
PREVENTION  
OF  
TORTURE

# ANNUAL REPORT 2020

**Period under review**

1 January 2020 – 31 December 2020

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# FOREWORD

The National Agency is the body responsible in Germany for preventing torture and ensuring humane detention conditions and treatment in all facilities where people are deprived of their liberty. The Agency hereby presents an annual report of its activities to the Federal Government, the German *Bundestag*, the *Länder* governments, the *Länder* parliaments and the public. The report covers the period from 1 January to 31 December 2020.

The central strategy of the National Agency is to carry out regular visits to facilities where people are deprived of their liberty. During these visits, the National Agency inspects the conditions at each location. Due to the COVID-19 pandemic, it was only possible on rare occasions in 2020 to carry out visits without endangering the individuals at the places of detention or members of the National Agency. Thus, the members of the National Agency decided to suspend their visits during the first two waves of the pandemic between the end of February and July, as well as from November 2020 onwards. Instead, they carried out alternative activities and drafted recommendations for dealing with the COVID-19 pandemic, which are described in detail in the relevant chapter of this report.

In 2020, the conditions in places of detention in Germany were strongly influenced by the precautionary measures taken due to the pandemic. Persons deprived of their liberty can only protect themselves against infection to a very limited extent. At the same time, the precautionary measures taken at the various locations often entail additional restrictions of liberty and have a particularly serious impact. In order to obtain information regarding the impact of the pandemic on the human rights of persons held in places of detention, the National Agency also sent written enquiries and made telephone calls in addition to on-site visits. The Agency also examined the documentation of all deportation procedures carried out between March and June as well as in November and December 2020.

For the first time, the National Agency set standards in 2020 regarding the conditions of placement in detention facilities of the Federal Armed Forces. The standards are derived in par-

ticular from recurring recommendations made by the Agency in its visit reports, and are continually developed and adapted.

Finally, the 13 visits carried out in 2020 and the recommendations made during these visits are reported on. In order to emphasise the effectiveness of the National Agency's work, this annual report will highlight cases where the competent supervisory authority agreed to implement the National Agency's recommendations. Two statements provided by supervisory authorities were inadequate in the view of the National Agency, which is why an additional response from the Agency was required.

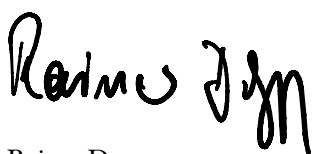
All visit reports and statements from the supervisory authorities are available – in German – in the “Besuche” section of the National Agency's website. New reports are also published via the Twitter account @NationaleStelle.

The National Agency regularly issues statements on planned legislative amendments that fall within its area of competence. In 2020, it did so in twelve cases. In the future, these statements will be published on the National Agency's website. This annual report also provides an overview of the statements issued in 2020 as well as the recommendations issued therein.

The death in 2019 of the previous Director of the Federal Agency, former senior civil servant Klaus Lange-Lehngut (*Leitender Regierungsdirektor*, ret'd), left a void in the team of mandate holders. For more than a decade, Mr Lange-Lehngut rendered outstanding services in establishing the Agency and in carrying out its activities.

Former senior civil servant and prison director Ralph-Günther Adam (*Leitender Sozialdirektor*, ret'd), who had already been Deputy Director of the Federal Agency since 2013, initially took over as Director on a provisional basis. In 2020, he was appointed as the new Director of the Federal Agency.

At the end of 2020, the National Agency moved to new premises in Luisenstrasse 7 in Wiesbaden, a location which provides excellent meeting and working conditions.



Rainer Dopp  
State Secretary (ret'd)  
Chairman of the Joint Commission



Ralph-Günther Adam  
Senior civil servant and prison director (ret'd)  
Director of the Federal Agency



## LIST OF ABBREVIATIONS

APT	Association for the Prevention of Torture
BVerfG	Federal Constitutional Court ( <i>Bundesverfassungsgericht</i> )
CAT	Committee against Torture
COVID-19	Corona Virus Disease 2019
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Court of Human Rights
EU	European Union
FamFG	Act on Procedure in Family Matters and in Non-Contentious Matters ( <i>Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit</i> )
GG	Basic Law ( <i>Grundgesetz</i> )
ICRC	International Committee of the Red Cross
LKA	<i>Land</i> Criminal Police Office ( <i>Landeskriminalamt</i> )
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
RKI	Robert Koch Institute (German federal government agency and research institute responsible for disease control and prevention)
SGB	Social Code ( <i>Sozialgesetzbuch</i> )
SPT	Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
StVollzG	Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention involving Deprivation of Liberty ( <i>Strafvollzugsgesetz</i> )
UN	United Nations
VG	Verwaltungsgericht
WHO	World Health Organization

# I SUMMARY

The National Agency had to shift the focus of its activities in 2020 due to the COVID-19 pandemic, an issue which is addressed in the present report. The Agency tested a range of new approaches and working methods, some of which may be retained after the pandemic. In addition, this annual report features another change compared with previous years: The National Agency has published the most important aspects of its statements on draft legislation.

In the individual chapters, the following points are particularly noteworthy:

In the chapter **General information about the National Agency**, reference is made to the persistent criticism of the resources available to the National Agency. In this context, it should be pointed out that one of the posts at the Federal Agency, which is supposed to consist of two members, has been vacant for over a year.

In December 2020, the European Committee for the Prevention of Torture (CPT) visited Germany. While it has already been announced which sites were visited<sup>1</sup>, the report and Germany's observations still need to be published. Before the visits, the National Agency informed the CPT of several shortcomings.

During the Schengen evaluation of Germany<sup>2</sup>, the lack of an effective mechanism for the monitoring of returns, as called for in the EU Return Directive, was criticised. The National Agency monitors deportations in accordance with its mandate from Article 4 of the OPCAT. However, due to its currently available resources, it cannot additionally take on the task of monitoring returns in line with the Return Directive.

Due to the **Covid-19 pandemic**, the National Agency carried out its visits amid special safety precautions. During the two waves of the pandemic and related lockdown measures, the members of the Agency temporarily suspended their visits. In order to obtain information regarding the impact of the pandemic at places where people are deprived of their liberty, the National Agency sent written enquiries to all competent *Land* and Federal Ministries as well as to indi-

vidual institutions within their remit. The main result of their work during the pandemic is recommendations on how to deal with the coronavirus at places where people are deprived of their liberty. At many such locations, measures were taken to stop the virus from spreading. However, many of these safety measures involve serious restrictions on the fundamental rights of those concerned, sometimes with far-reaching consequences. Isolating detainees must be avoided or limited to as short a period as possible. Isolated individuals require intensive and proactive care. Any restrictions must be compensated by new activities and opportunities for contact. However, not all *Länder* upheld these principles. The report contains specific recommendations regarding some types of facilities and draws attention to a few questionable practices.

The chapter **Standards** sets out the National Agency's proven standards which are indispensable in ensuring that deprivations of liberty are executed in line with human rights principles. For the first time, standards will be formulated with regard to detention in facilities of the Federal Armed Forces.

The chapter **Visits** outlines the National Agency's recommendations for specific facilities in 2020. The supervisory authorities of those facilities are obligated pursuant to Article 22 of the OPCAT to enter into a dialogue with the National Agency on possible implementation measures. However, the need to implement these measures was not recognised in all cases. Even though the implementation of the National Agency's recommendations had been promised in many cases, two statements provided by supervisory authorities were inadequate in the view of the National Agency, which is why an additional response from the Agency was required following the visits to Schwalmstadt Prison in Hesse and Karlsruhe Prison in Baden-Württemberg.

After its visit to Karlsruhe Prison, the National Agency once again criticised the double occupancy of prison cells which, having a floor space of 8 square metres, are equipped with a bunk bed and toilet separated only by a partition. This means that prisoners at Karlsruhe Prison are forced to use the toilet in the presence of other individuals. Sounds and smells can spread around the room. These detention conditions are worrying and in violation of human dignity, as the National Agency had previously pointed out in 2017. Although

<sup>1</sup> Cf. <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-visits-germa-1> (retrieved on 18 March 2021).

<sup>2</sup> Schengen evaluation mechanism (Regulation (EU) No. 1053/2013 of 7 October 2013). The mechanism serves to verify the effective application of the Schengen acquis. See II 6.2.

this situation ought to be rectified immediately, such conditions are still implemented by a facility that falls under the responsibility of the Ministry of Justice of Baden Württemberg.

After its visit to Schwalmstadt Prison, the National Agency criticised, among other things, the fact that it was not possible to have private telephone conversations. Moreover, it is not clear to detainees in preventive detention whether someone is listening in on their telephone conversations. The monitoring of telephone conversations must be announced in advance in each and every case.

The National Agency has repeatedly noted cases during its past visits to forensic psychiatric clinics where individuals have been segregated for several months at a time in a separate room, for example at a forensic clinic in Thuringia. Insufficient social contact and constant isolation usually have a negative impact on patients' mental health.

As far as custody awaiting deportation is concerned, the National Agency is of the opinion that only specific (*Land*) legislation can sufficiently regulate its execution. This was also reiterated during the visit to the facility for custody awaiting deportation in Eichstätt, Bavaria. However, the Bavarian State Ministry of Justice is still opposed to implementing such legislation in the form of a Bavarian act on the execution of custody awaiting deportation. Moreover, in the view of the National Agency, the security measures taken in many facilities for custody awaiting deportation in Germany are not proportionate and do not indicate that the requirement to differentiate between preventive detention and a prison sentence has been implemented.

A considerable number of people were deported from Germany during the COVID-19 pandemic. As deportees have an increased risk of infection, the National Agency focussed on the implementation of measures to prevent the spread of the COVID-19 pandemic and related measures to protect the individuals concerned. In the Agency's view, deportation procedures should be suspended as long as a serious risk for deportees and the spread of the virus cannot be prevented.

During its visit to Essen Customs Investigation Office (Düsseldorf branch), the National Agency came across the particular problem of detaining body packers who have to use a "swallowers' toi-

let". In the National Agency's view, this impinges on their human dignity.

It had already become clear during the Agency's visits that the *Land* legislators do not always comply with the requirements imposed by the Federal Constitutional Court. In this context, the National Agency welcomes the changes made to the Juvenile Prison Act and the Act on the Execution of Remand Detention in Schleswig-Holstein, which will align the provisions governing orders for strip-searches with the constitutionally required standard. During its visits, the National Agency criticised the fact that the legal situation in Thuringia (legislation on secure psychiatric detention [*Maßregelvollzugsgesetz*]) and in Lower Saxony (legislation concerning the execution of prison sentences [*Strafvollzugsgesetz*]) have – as far as the application of physical restraints is concerned – still not been adapted to meet the requirements established by the Federal Constitutional Court in its judgment on the issue of physical restraints of 2018. This means that there is currently no legal basis for the application of physical restraints that complies with the constitutional requirements. Neither the constitutionally prescribed requirement of a judicial decision, nor the application or definition of physical restraints have been regulated by law.

In its **statements on draft legislation**, the National agency frequently judged the rules governing the application and definition of physical restraints to be insufficient. The National Agency also has concerns about the provision of a draft legislative act from the Hesse Ministry of Justice which authorises the use of direct force to put masks on prisoners. This constitutes a serious interference for which a specific legal basis is required. However, the conditions for ordering and applying physical restraints were not included in the draft legislation.

In this last chapter, the National Agency will, for the first time, formulate legislative principles for its area of responsibility and will report on the twelve statements it issued on draft legislation in 2020.





**II  
GENERAL  
INFORMATION  
ABOUT THE WORK  
OF THE NATIONAL  
AGENCY**

The National Agency for the Prevention of Torture is Germany's designated National Preventive Mechanism. By establishing the Agency, the Federal Republic of Germany fulfilled its obligations under international law following from the OPCAT. The National Agency is responsible for places where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its explicit consent or acquiescence. The following provides an overview of the National Agency's special status, as well as background information regarding its structure.

## 1 – INSTITUTIONAL FRAMEWORK

The objective of preventing torture and abuse is laid down in the OPCAT, which adds a preventive approach to the UN Convention against Torture of 1984. At the start of 2021, it had 104 signatory states and had been ratified by 91 states.<sup>3</sup>

Article 3 of the OPCAT requires that the States Parties set up a national preventive mechanism (NPM). These independent national mechanisms engage in preventive measures and assess whether places of detention ensure humane treatment and detention conditions. To date, 74 States Parties are in compliance with this requirement.<sup>4</sup>

Germany's National Preventive Mechanism comprises the Federal Agency for the Prevention of Torture, which is responsible for facilities run at federal level, and the Joint Commission of the *Länder* for the Prevention of Torture, which is responsible for facilities at federal-state level. The Federal Agency and the Joint Commission work together as a National Agency for the Prevention of Torture, and closely coordinate their activities.

Under Article 18 of the OPCAT, the States Parties are obliged to guarantee the functional independence of the preventive mechanisms and to make the necessary financial resources available.

The members of the Federal Agency are appointed by the Federal Ministry of Justice and Consumer Protection, while the members of the Joint Commission are appointed by the Conference of Ministers of Justice of the *Länder*. The appointed members are not subject to supervisory

control or legal oversight, and are independent in the exercise of their functions. They act in an honorary capacity. Strict conditions apply for the removal of members before the end of their term in office, as set out in sections 21 and 24 of the German Judiciary Act (*Deutsches Richtergesetz*). The full-time secretariat is based in Wiesbaden and is affiliated with the organisational structure of the Centre for Criminology (*Kriminologische Zentralstelle e.V.*).

## 2 – TASKS

The principle task of the National Agency is to visit those facilities in which people are deprived of their liberty ("places of detention"), to draw attention to problems there, and to make recommendations and suggestions to the authorities for improving the situation of detainees and for preventing torture and other ill-treatment. Under Article 4(i) of the OPCAT, a place of detention is any place under a State Party's jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its explicit consent or acquiescence.

At the federal level, this definition encompasses all detention facilities operated by the Federal Armed Forces, Federal Police and customs authorities. In addition, the Federal Agency is also responsible for monitoring forced deportations. In 2020, a total of 8970 persons were deported from Germany by air.

The vast majority of facilities fall within the remit of the Joint Commission. These include prisons, *Land* police stations with custody cells, all courts with holding cells, facilities for custody awaiting deportation (*Abschiebungshaft*), psychiatric clinics, child and youth welfare facilities with closed units, and homes for people with disabilities. Furthermore, all residential care and nursing homes where measures depriving people of their liberty are or can be enforced are also classified as places of detention under the above definition.

Further to these activities, the National Agency is also tasked with issuing statements regarding both existing and draft legislation.

<sup>3</sup> URL: <https://indicators.ohchr.org/> (retrieved on 18 March 2021).

<sup>4</sup> URL: <https://www.appt.ch/en/knowledge-hub/opcat> (retrieved on 18 March 2021).

### 3 – POWERS

Pursuant to the rules set out in the OPCAT, the Federal Government and the *Länder* grant the National Agency the following rights:

- + Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in Article 4 of the OPCAT, as well as the number of places and their location;
- + Access to all information referring to the treatment of those persons as well as their conditions of detention;
- + Access to all places of detention and their installations and facilities;
- + The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- + The liberty to choose the places they want to visit and the persons they want to interview;
- + To maintain contact with the UN Subcommittee on Prevention of Torture, to send it information and to meet with it.

In accordance with Article 21(1) OPCAT, persons who communicate information to the National Agency are not to be sanctioned or otherwise prejudiced in any way. The members and employees of the Agency are obligated to maintain confidentiality with regard to information disclosed to them in the course of their duties. This obligation is to be maintained even beyond the term of their office.

### 4 – PERSONNEL AND FINANCIAL RESOURCES

The mandate of the National Agency for the Prevention of Torture is carried out by ten members acting in an honorary capacity. They are supported by a Secretariat staffed with six full-time employees. The National Agency's budget was most recently increased by EUR 100,000 to a total of EUR 640,000 for the 2020 budget year.

The Agency's structure and the resources available to it are regularly criticised.<sup>5</sup> According to an expert opinion provided by the Reference and Research Services of the German Bundestag (*Wissenschaftliche Dienste des deutschen Bundestages*), the National Agency for the Prevention of Torture is "poorly equipped" (*schwach aufgestellt*) compared to the NPMs of Germany's neighbouring countries. For example, the French NPM has an annual budget of EUR 5.2 million for 59 employees, and the Austrian and Swiss NPMs also have considerably more resources available relative to their respective populations.<sup>6</sup>

In 2020, the mandates of the Chair of the Joint Commission, Rainer Dopp (State Secretary, ret'd), and the Commission members Dr Helmut Roos (*Ministerialdirigent*, ret'd) and Michael Thewalt (*Leitender Regierungsdirektor*, ret'd) were extended. In addition, Ralph-Günther Adam (*Leitender Sozialdirektor*, ret'd) was appointed as the Federal Agency's new Director. Mr Adam had been Deputy Director of the Federal Agency since 2013 and had provisionally taken over as Director after the previous Director, Klaus Lange-Lehngut

<sup>5</sup> CPT/Inf (2017) 13, p. 14; Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/OP/DEU/1, 16 December 2013, p. 6; Follmar-Otto, "Die Nationale Stelle zur Verhütung von Folter fortentwickeln!" *Zur völkerrechtskonformen Ausgestaltung und Ausstattung*", policy paper no. 20, 2013, URL: [https://www.ssoar.info/ssoar/bitstream/handle/document/34935/ssoar-2013-follmar-otto-Die\\_Nationale\\_Stelle\\_zur\\_Verhütung.pdf?sequence=1](https://www.ssoar.info/ssoar/bitstream/handle/document/34935/ssoar-2013-follmar-otto-Die_Nationale_Stelle_zur_Verhütung.pdf?sequence=1), (available in German only, last retrieved on 18/03/2021); Motion put forward in the *Bundestag* by Bündnis 90/Die Grünen ("Für den Menschenrechtsschutz in Deutschland – Die Nationale Stelle zur Verhütung von Folter reformieren und stärken") of 30/05/2017 (*Bundestag Printed Paper 18/12544*).

<sup>6</sup> Reference and Research Services of the German Bundestag (*Wissenschaftliche Dienste des deutschen Bundestages*) (2020): "Ausstattung und Kompetenzen der „Nationalen Stelle zur Verhütung von Folter“ in Deutschland im Vergleich zu ähnlichen Einrichtungen in ausgewählten europäischen Staaten, die im Zuge des Fakultativprotokolls zur Anti-Folter-Konvention der Vereinten Nationen (OPCAT) geschaffen wurden." Quote: p. 31; re the Austrian and French NPMs: pp. 30-31.

(*Leitender Regierungsdirektor*, ret'd), died in 2019. Since late 2019, the now vacant post at the Federal Agency has not been filled by the competent Federal Ministries.

## 5 – ENQUIRIES BY INDIVIDUALS

In the period under review, the National Agency received individual enquiries regarding 43 separate cases.

The National Agency does not operate as an ombuds institution. Nevertheless, details regarding specific incidents are of practical relevance for the work of the National Agency. They provide background information for visits, and may draw attention to specific problem areas. In addition, concrete information and tips can have an influence on which facilities the National Agency visits, and on the priorities it sets as a result.

Usually, the National Agency provides enquiring individuals with relevant contacts or information on complaints bodies. Where an enquiry contains information regarding serious deficiencies, the National Agency will, with the written consent of those concerned, contact the competent authority. If an enquiry provides an indication of a person posing a danger to themselves or to others, the National Agency will immediately contact the head of the facility concerned.

## 6 – WORLDWIDE TORTURE PREVENTION

### 6.1 – Exchange of experiences on monitoring during the COVID-19 pandemic

In light of the influence of the COVID-19 pandemic on the working methods of the national preventive mechanisms (NPMs) and its massive impact on the situation of persons deprived of their liberty, the National Agency has intensified its exchange with other NPMs, the European Committee for the Prevention of Torture (CPT), the Subcommittee on the Prevention of Torture (SPT) and the Association for the Prevention of Torture (APT).

In this connection, representatives of the National Agency participated, among other activities, in a webinar entitled “Monitoring Places of Detention and ‘Do No Harm Principle’: From Theory to Practice”, where up-to-date insights and standards of the World Health Organisation

(WHO), the International Committee of the Red Cross (ICRC) and the CPT in dealing with the COVID-19 pandemic during visits to places of detention were shared and discussed. For instance, in applying the “Do No Harm Principle”, a balance must be struck between protection from the virus and protection from human rights violations. Checks by an independent mechanism are crucial in this regard. NPMs in particular play a key role during the pandemic, since the work of the CPT and the SPT was – and still is – considerably more difficult due to the virus and the closure of borders. The questions of how the NPMs’ methods could be effectively adapted to the current situation and how visits can be carried out were also discussed in an online meeting organised by the SPT Regional Team for Europe in which the National Agency participated.

### 6.2 – Schengen evaluation regarding returns (EU)

As part of the Schengen evaluation of Germany<sup>7</sup>, the National Agency met the European expert delegation on 18 February 2020 in Essen. Among other things, this delegation verified whether the EU Return Directive had been implemented effectively.<sup>8</sup> Pursuant to Article 8 para. 6 of the Return Directive, Member States must provide for an effective forced-return monitoring system. This monitoring should cover all activities from preparation for departure until reception in the state of return or – in the event of a failed deportation attempt – until return to the place of departure. Such monitoring by independent organisations is not guaranteed in Germany.

The National Agency has made it clear that it is not the designated mechanism for the monitoring of forced returns. Even though the Agency regularly monitors forced deportations in accordance with its mandate from Article 4 of the OPCAT, it cannot additionally take on the task of monitoring returns in line with the Return Directive given its currently available resources.

In conversation with the expert delegation, the National Agency addressed the following recur-

<sup>7</sup> Schengen evaluation mechanism (Regulation (EU) No. 1053/2013 of 7 October 2013). The mechanism serves to verify the effective application of the Schengen acquis.

<sup>8</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (EU Return Directive).

ring problems: collections at night, even of families with children; strip searches that are not substantiated in a particular case; and the treatment of vulnerable persons.

It also reported on the observation of a deportation procedure organised by Bavaria from Nuremberg to Kosovo on 20 November 2019. The flight was accompanied by private security personnel employed by the airline Air Bulgaria. The National Agency's delegation was refused access to the aircraft, thus preventing it from effectively carrying out its mandate.

### 6.3 – Periodic visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)<sup>9</sup>

Another important event in the year under review was the periodic visit to Germany which the CPT carried out from 1 to 14 December 2020. In this connection, the Committee had a preparatory meeting with the National Agency during which the Agency provided an up-to-date overview of the NPM's structure and budget. The fact that the post of Deputy Director of the Federal Agency had been vacant for over a year was highlighted during this meeting as well.

In particular, the National Agency also set out the current human rights challenges associated with state deprivation of liberty that had become apparent during its visits. During these talks, the National Agency also addressed cases where its recommendations had not been implemented – for example in Baden-Württemberg, where cells without a separate toilet were occupied by more than one person even during the COVID-19 pandemic.<sup>10</sup> The problem of segregation lasting weeks or even months was also highlighted. The main issue addressed in this respect was the insufficient care provided to the persons concerned. Furthermore, the status of implementation of the Federal Constitutional Court's judgment of 24 July 2018<sup>11</sup>

was discussed. For example, not all *Länder* have yet enshrined in law the principles of a guaranteed judicial decision and of one-on-one supervision for every instance of physical restraint. The particular problem of physical restraints (*Fixierungen*) applied by the police was also addressed: The National Agency shares the CPT's opinion that physical restraints should not be used at all during police custody. The National Agency also reported on insufficient protection against infection during deportations, including of vulnerable persons, and on the increase in collections at night, including of children.

### 6.4 – Clarification and consolidation of standards in the EU<sup>12</sup>

The National Agency participated in the project "Improving Judicial Cooperation Across the EU Through Harmonised Detention Standards - The Role of National Preventive Mechanisms" which was concluded in December 2020 (organised by the Ludwig Boltzmann Institute of Human Rights). By participating in these events (which were all virtual conferences in 2020), the National Agency had the chance to discuss the application of standards with the 23 other NPMs in the EU and to identify good practices.

The standards set out in the handbook series focus on immaterial detention conditions:

- + Detention within detention (isolation, segregation)
- + Violence prevention in prisons
- + Requests, complaints and the right to information in prisons
- + Treatment of certain groups of prisoners in a situation of vulnerability

The consolidated standards are intended to strengthen the NPMs' work in carrying out control visits and making recommendations. They are expected to be published in 2021.

<sup>9</sup> <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-visits-germa-1> (retrieved on 18 March 2021).

<sup>10</sup> Cf. V 5 Visits to prisons.

<sup>11</sup> Federal Constitutional Court, judgment of 24 July 2018, 2 BvR 309/15. First, the Federal Constitutional Court emphasised that the use of physical restraints is only to be ordered as a last resort, on the basis of clear and precisely defined criteria, and for the shortest possible period of time. It went on to accentuate the constitutional requirements for the use of physical restraints, in particular that persons under physical restraint must be observed continuously and personally by

therapeutic or care staff who are in direct proximity to the detainee (one-on-one supervision). For any physical restraint applied for more than just a short period of time, a court decision is required.

<sup>12</sup> <https://bim.lbg.ac.at/de/projekt/laufende-projekte-projekte-menschenwuerde/dem-weg-zu-harmonisierten-haftstandards-eu-rolle-nationalen-praeventionsmechanismen-npm> (retrieved on 18 March 2021); English version: <https://bim.lbg.ac.at/en/project/current-projects-projects-human-dignity-and-public-security/improving-judicial-cooperation-across-eu-through-harmonised-detention-standards-role-national-preventive-mechanisms>.



# III COVID-19 PANDEMIC



## 1 – INTRODUCTION

Like all areas of public and private life, the work of NPMs around the world was affected by the COVID-19 pandemic. Against this background, the members of the National Agency did not carry out any visits to places of detention during the pandemic's first wave starting in March 2020 and its second wave starting in November 2020. In line with the “Do No Harm Principle”, the National Agency considered this necessary in order to protect the persons concerned – i.e. those living in the facilities in particular – as well as for reasons of self-protection.

The twelve visits the National Agency has managed to complete since the beginning of the COVID-19 pandemic were carried out in accordance with the safety and hygiene requirements applicable in the individual facilities. In order to discuss hygiene aspects and how to handle them, the National Agency started to provide two weeks' notice of its visits to the facilities and the competent supervisory authorities. On site, the National Agency specifically asked about the approaches taken in order to deal with the COVID-19 pandemic. Information on this is provided at the beginning of the visit reports published on the National Agency's website. As described below, the National Agency also used other means to obtain information about its area of responsibility and formulated recommendations on how to deal with the coronavirus.

At the beginning of the pandemic, the UN Subcommittee on Prevention of Torture (SPT) and the European Committee for the Prevention of Torture (CPT) published recommendations for the treatment of persons deprived of their liberty in the context of the COVID-19 pandemic. It is essential that full account is taken of the rights of persons deprived of their liberty during the COVID-19 pandemic.<sup>13</sup> In addition, the States are obligated to protect these individuals through various measures and to ensure that they

receive healthcare and support. In a series of on-line events attended by the National Agency, the effects of the pandemic and how the NPMs have been dealing with them were discussed on an international platform.

Living in detention facilities always means having to share a limited amount of space. Therefore, the risk of infection in such places is particularly high. Infections that are brought into the facilities are able to spread there very easily. Moreover, persons who are deprived of their liberty often belong to a high-risk group. For this reason, the facilities considerably reduced outside contacts in order to protect the life and health of the individuals placed there; life within the facilities – in particular activities – was also restricted.

When deciding which measures are appropriate in order to protect the life and health of individuals, the value of other affected legal interests must always be taken into account as well.<sup>14</sup> Individuals deprived of their liberty have considerably less individual choice on how to protect themselves against infections than persons outside of prison. They are dependent upon the detention conditions set by the State – both in terms of how they structure their daily lives and how they protect themselves against infection. At the same time, they suffer to a heightened degree from the consequences of the protective measures (e.g. contact restrictions, limited activities and treatment offers) and may, at least in part, continue to do so after the pandemic has ended. In order to minimise these negative consequences, restrictive measures to protect against the coronavirus should be compensated as far as possible by additional offers.

In May 2020, the National Agency sent enquiries to the competent ministries concerning the following areas: custody awaiting deportation and custody to secure departure, residential care, Federal and *Land* police and customs, reception centres for asylum seekers, child and youth welfare facilities and psychiatric clinics. The responses therefore reflect the situation and the precautionary measures taken during and after the first wave of the pandemic. Since the replies from many of the ministries responsible for residential care were unsatisfactory, the National Agency subsequently contacted individual facil-

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<sup>13</sup> Subcommittee on Prevention of Torture: Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic (adopted on 25th March 2020). URL: <https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>  
CPT/Inf(2020)13: Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic. URL: <https://rm.coe.int/16809cfa4b> (retrieved on 18 March 2021).

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<sup>14</sup> Federal Constitutional Court, order of 12 May 2020, file no.: 1 BvR 1027/20, margin nos. 6, 7

ities and residential care providers in Germany.

In order to avoid duplicating the enquiries of the UN Subcommittee on Prevention of Torture (SPT) and the European Committee for the Prevention of Torture (CPT), the National Agency initially refrained from sending its own enquiry on the topic of prisons. The timing of the National Agency's prison-related enquiry in 2020 provided the opportunity to specifically ask about the implementation of certain precautionary measures and to follow up on observations made during its visits. This enquiry covered the phase of the second "hard" lockdown in December 2020. All questions are available – in German – in the "Aktuelles" section of the National Agency's website.

A considerable number of people were deported from Germany during the COVID-19 pandemic. The National Agency inspected the documentation of all deportations carried out between March and June as well as in November and December 2020.

The following sections will set out specific challenges and examples from the responses to the enquiries as well as the National Agency's experiences during its visits to various types of facilities. They will also highlight the principles that the National Agency considers it necessary to uphold in places where individuals are deprived of their liberty.

Based on its insights, the National Agency formulated recommendations on how to deal with the pandemic. An advance version of these recommendations was published on the National Agency's website and the competent ministries were notified of this. The recommendations form the basis for future visits during the COVID-19 pandemic.

Specific challenges and examples from the responses to the enquiries, as well as the National Agency's experiences during its visits to various types of facilities, will be set out and the principles that the National Agency considers it necessary to uphold at places of deprivation of liberty for human rights reasons will be highlighted. The descriptions are not based on on-site observations, as is the case with the National Agency's visit reports, but on the information provided by the ministries, which can only be verified to a limited extent. Therefore, the findings refer to desirable and undesirable practices and are not linked

to any specific facilities.

While the general recommendations apply to all facilities that fall within the National Agency's mandate, specific recommendations for some types of facilities are provided under the relevant headings. Information is also provided on on-site conditions.

## 2 – GENERAL FINDINGS AND RECOMMENDATIONS

### 2.1 – Medical, psychological and social-work support during the pandemic

Adequate medical, psychological and social-work support of persons deprived of their liberty must be ensured at all times. The need for care and support has often increased during the COVID-19 pandemic, meaning that the conditions have had to be adapted accordingly. However, not all facilities ensured enhanced medical, psychological and social-work support.

In light of the new situation, increased medical, psychological and social-work support is necessary in many facilities. If necessary, treatment and care options should be adapted to the needs of the facility.

### 2.2 – Safeguarding the rights of persons deprived of their liberty

In the facilities where people are deprived of their liberty, many activities, treatment options, the freedom to move and communication possibilities have been limited. Visits or excursions outside the facility were subject to restrictions – when they were possible at all. However, minimum human rights guarantees and the rights of persons deprived of their liberty must be safeguarded in all cases.<sup>15</sup>

Every effort must be made to continue to guarantee the minimum required standards of human rights, such as the guarantee of one hour of outdoor exercise per day, and to uphold the rights of the individuals deprived of their liberty. In doing so, the principle of minimum intervention must be adhered to. Restrictions may only be imposed if they are absolutely necessary.

<sup>15</sup> Only in exceptional cases – for example where there is a risk of a detained person wilfully infecting others – may it be conceivable for outdoor exercise and access to outdoor facilities to be prohibited for reasons that are inherent in the respective individual's person.

### 2.3 – Compensation for restrictive measures

Where many interferences with fundamental rights are necessary to protect the health of persons deprived of their liberty, the severity of such interferences must be mitigated through compensatory measures.

Almost all facilities implemented such compensatory measures. However, the measures differed greatly depending on the facility. In order to compensate for bans or restrictions on visits, many facilities have increasingly relied on video telephony. In some facilities, telephone hours have been extended, telephone costs have been covered, telephones have been allowed inside cells or simple mobile telephones have been handed out. Recreational activities have been adapted, limited or cancelled in line with measures aimed at preventing infections.

Care should be taken to sufficiently compensate for restrictions, for example by adapting and expanding communication possibilities and recreational activities. It would also be desirable for extended communication possibilities such as video telephony, which has been introduced by many facilities, to be retained after the pandemic.

### 2.4 – Separate accommodation for new arrivals

In facilities where it can be expected that persons will spend longer periods of time, particularly in prisons, new arrivals were frequently isolated for an initial period upon their arrival in order to prevent the virus from spreading within the facilities.<sup>16</sup> However, unlike isolation or segregation under the Protection against Infection Act, which can be ordered in cases of infection or risk of infection, the above-mentioned practice has no formal legal basis. In particular, no individual decisions were taken based on the possible contacts of the persons concerned.

In its evaluation of the replies to its enquiries and during its visits, the National Agency observed that the duration of this initial isolation differed in the various facilities. In some facilities it lasted 14 days – or even up to 16 days in individual cases – while at other facilities the persons

<sup>16</sup> However, this does not apply to facilities where persons are detained spontaneously and/or for shorter periods, such as detention facilities operated by the police, customs authorities or the Federal Armed Forces and youth detention facilities.

concerned were allowed to leave isolation after two negative tests taken five days apart. The intensity of this interference, which has no legal basis, can be significantly reduced by applying it for a shorter period of time. Because the duration of isolation varies so greatly in the different *Länder*, all options should be utilised to minimise it. As of March 2021, different testing methods were increasingly available.

The National Agency also observed great variation in terms of the care provided to isolated persons: In some facilities, the individuals in isolation were actively visited and cared for by medical, psychological and social-work staff, while in other facilities the persons concerned did not receive any special care, despite being locked up 23 hours per day for two weeks. The possibilities to partake in activities also varied. In addition, in one of the facilities visited, new arrivals were quarantined together in shared rooms. This results in a high risk of infection among the persons sharing a room. Furthermore, being isolated together whilst having reduced activities available and little occasion to leave the cell can be very strenuous for the persons concerned.

Care should be taken to ensure that isolation is maintained only as long as is strictly necessary to prevent the possible spread of the virus and only where this cannot be achieved by other measures such as testing.

Detainees should be actively visited and cared for during their isolation.

The placement of new arrivals together in multi-occupancy cells for isolation should be avoided.<sup>17</sup>

## 2.5 – Informing the persons concerned

The persons concerned or their representatives were generally informed of the restrictive measures to prevent infections. Among other things, this was done through posters and pictograms, which, in the best case scenario, opened up a dialogue with the persons concerned and resulted in their consent to the measures taken.

The persons concerned should be informed, in a language they understand, of any restrictive measures, the applicable rules of conduct and

the reasons for them, and their representatives should be involved in the planning of the protective measures.

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<sup>17</sup> Furthermore, the legal requirements for shared accommodation must be complied with.

### 3 – RESIDENTIAL CARE

As they are particularly vulnerable, residents of residential care and nursing homes require particularly effective protection from infection during the COVID-19 pandemic. On account of their age and the possibility of pre-existing medical conditions, they are at a higher risk of severe disease. Due to the proximity between residents, their joint activities and the close contact they have with nursing staff, the risk of infection and the risk of the virus spreading are also increased. Residents of residential care and nursing homes are therefore given top priority in the Federal Ministry of Health's vaccination strategy.

In response to its enquiries with the competent ministries as to the situation in residential care and nursing homes, the National Agency only received very general statements that did not paint a detailed picture of the specific challenges in this area. Further steps were therefore necessary in order to obtain a clearer impression: The National Agency additionally contacted several residential care and nursing homes it had visited in the past, as well as several residential care providers.

This summary therefore also addresses specific challenges and examples from the point of view of residential care and nursing homes.

A particularly critical view must be taken when weighing up the restrictive measures in residential care and nursing homes; the facilities' management and the professional supervisory authorities have a particular duty to compensate for restrictions and burdens. While the highest possible health standards must be maintained, the restrictive measures must not undermine the autonomy and dignity of the persons concerned.<sup>18</sup>

Due to the COVID-19 pandemic, the facilities had to take various measures to protect their residents, their residents' relatives and their staff. According to the facilities, adapting those measures quickly and dynamically to the latest *Land* ordinances and the epidemiological situation was one of the greatest challenges they had to face. In addition to the procurement of protective equip-

ment and the increased administrative burden, residents, their relatives and employees had to be informed regularly, in a timely and comprehensible manner, about the current situation and the associated rules in order to avoid uncertainty and fear.

According to the facilities, it was also difficult to make up for the lack of contact with relatives and the reduced amount of activities available, such as group activities. In some cases, restructuring was necessary to replace external service providers with in-house staff and to avoid gaps in care as far as possible. The National Agency questions how this additional work could have been tackled with the already scarce staffing resources of residential care and nursing homes.

In order to allow visits to take place as soon as possible, visitors' rooms were specifically set up and visitation rules were developed in accordance with the respective *Land* ordinance. In addition, many of the contacted facilities reported that residents had been provided with the possibility to use video telephony. In the view of the National Agency, additional staff must also be provided to ensure that residents are able to use this modern communication tool.

Some facilities reported a tense, irritable mood among residents and their relatives. In a few cases, the facilities reported of altercations with relatives who had failed to comply with the applicable visitation rules and had thus endangered the health of residents and staff. Despite many discussions and consultations, these conflicts were only resolved once the visitation rules had been relaxed. According to the information provided, facilities that primarily care for persons with dementia had the most difficulty in establishing clear rules.

Care must be taken to ensure that the autonomy and dignity of the person concerned are not undermined or violated. Any restrictions must always be adapted to the currently applicable regulatory framework. Visitation rules should allow for as many contacts as possible. Moreover, restrictions should be compensated by activities where possible. In order to ensure this, the current staffing situation should be adapted to the specific challenges of the pandemic.

<sup>18</sup> AGE Platform Europe, COVID-19 and human rights concerns for older persons, [https://www.age-platform.eu/sites/default/files/COVID-19\\_%26\\_human\\_rights\\_concerns\\_for\\_older\\_persons-April20.pdf](https://www.age-platform.eu/sites/default/files/COVID-19_%26_human_rights_concerns_for_older_persons-April20.pdf) (German version [https://www.age-platform.eu/sites/default/files/COVID-19\\_%26\\_human\\_rights\\_concerns\\_for\\_older\\_persons-April20-DE\\_translation.pdf](https://www.age-platform.eu/sites/default/files/COVID-19_%26_human_rights_concerns_for_older_persons-April20-DE_translation.pdf) retrieved on 18 March 2021).

## 4 – RECEPTION CENTRES

Due to high infection rates, several reception centres for asylum seekers were put under quarantine starting in March 2020 and during lockdown. In this context, the National Agency made enquiries with the responsible ministries.

Despite intensive follow-up enquiries, Thuringia did not provide any information to the National Agency. The responses provided by the other ministries differed in quality. For the most part, the documentation was not sufficient to answer the individual questions at issue. For this reason, the following summary does not reflect the situation in all *Länder*, but rather addresses specific challenges and some positive examples. Since the responsible ministries of 14 *Länder* have called into question the National Agency's competence for reception centres under quarantine, the scope of the National Agency's mandate will first be discussed.

### 4.1 – Mandate of the National Agency

In the view of the National Agency, reception centres that are placed under quarantine and whose residents are not allowed to leave the premises<sup>19</sup> are places where people are deprived of their liberty within the meaning of Article 4 of the OPCAT and therefore fall within the scope of the National Agency's mandate.

It should first be noted that such reception centres are places under the jurisdiction and control of the State.<sup>20</sup> This means that the residents of reception centres are under state care or state supervision. Residence in a reception centre entails a duty of care on behalf of the competent authorities<sup>21</sup> as well as statutory restrictions aimed, inter alia, at monitoring the persons concerned<sup>22</sup>.

Moreover, at least in the case of reception centres that are put under quarantine, these are places where people are – or can be – deprived of their

liberty,<sup>23</sup> as persons subject to a quarantine order were not allowed to leave the premises provided for that purpose. At some facilities, collective quarantine was ordered. In these cases, all residents were prevented from leaving the facility or a separation was carried out within the facility. Where collective quarantine was ordered, all residents were affected – i.e. those who were infected and those who were not, irrespective of their potential exposure to COVID-19. Among other methods, these measures were enforced through structural/physical separation (e.g. with fences) and/or the deployment of security personnel and sometimes the police.<sup>24</sup> In one *Land*, the fluctuation was managed, inter alia, by means of transponder access controls.

According to the information provided by the ministries, medical care for those under quarantine was generally provided by the medical service of the facilities. Those who suffered severe illness were transferred to hospitals.

### 4.2 – Health protection measures

Due to their trauma as refugees and their need for reorientation upon arriving in Germany, residents of reception centres may have a particularly high risk of infection with COVID-19 and may be generally more vulnerable to infectious diseases.<sup>25</sup> The Robert Koch Institute urgently advises against placing under quarantine entire facilities in which physical distancing is only possible to a limited extent, since this would significantly increase the risk of infection for persons who are not infected.<sup>26</sup>

<sup>19</sup> Article 4 para. 1 of the OPCAT.

<sup>20</sup> The Robert Koch Institute (RKI) also recommends that such procedures be avoided: “We strongly advise against imposing quarantine orders for entire reception centres or for all residents of collective accommodation, as well as the erection of (additional) physical barriers (fences).”, [https://www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/AE-GU/Aufnahmeeinrichtungen.html](https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/AE-GU/Aufnahmeeinrichtungen.html) (German only, retrieved on 18 March 2021).

<sup>21</sup> Cf. Leipzig Administrative Court, order of 22 April 2020, file no.: 3 L 204/20.A. Similarly, Leipzig Administrative Court (order of 22 April 2020, 3 L 204/20.A); Dresden Administrative Court (order of 24 April 2020, 11 L 269/20.A), Dresden Administrative Court (order of 29 April 2020, 13 L 270/20.A); Chemnitz Administrative Court (order of 30 April 2020, 4 L 224/20.A); Münster Administrative Court (order of 07 May 2020, 6a L 365/20); Münster Administrative Court (order of 12 May 2020, 5 339/20).

<sup>22</sup> See, inter alia, section 44 (2a) of the Asylum Act (*Asylgesetz*, AsylG).

<sup>23</sup> Obligation to reside in a reception centre, prohibition to work, etc.

<sup>19</sup> For the purposes of the Protocol, “deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority” (Article 4 para. 2 of the OPCAT).

<sup>20</sup> Article 4 para. 1 of the OPCAT.

<sup>21</sup> See, inter alia, section 44 (2a) of the Asylum Act (*Asylgesetz*, AsylG).

<sup>22</sup> Obligation to reside in a reception centre, prohibition to work, etc.

In order to raise awareness among residents, multilingual posters and pictograms were put up informing them about the measures to prevent infection. In several places, conversations with social workers on this issue were also made possible by telephone or via messenger service. Mecklenburg-Western Pomerania additionally reported that a special mobile phone app had been created with information in the residents' native languages. According to some ministries, the sufficient dissemination of information to the affected persons in several *Länder* was instrumental in avoiding the use of special measures and in preventing police interventions or further incidents. In other *Länder*, the restrictive measures in place led to incidents that required police intervention.

The special framework conditions in reception centres can limit the possibilities of consistent adherence to and enforcement of the usual hygiene measures.<sup>27</sup> According to information from the respective ministries, some facilities lowered the occupancy rate for this reason; for example, the hygiene measures in force in Hesse at the time of the enquiry provided for a reduction in occupancy to below 50% of the previous capacity. In Berlin, a large proportion of the residents were released from the obligation to reside in a reception centre and were placed, for example, in collective accommodation with more space and accommodation options according to their specific needs. Several *Länder* also ensured that vulnerable persons were accommodated separately. According to information from Brandenburg, they were at first accommodated in special shelters and then allocated to the various municipalities as quickly as possible. The competent ministry also reported that, where necessary, single room accommodation was made available and the affected persons were allowed to eat in their rooms.

#### 4.3 – Compensation for restrictive measures

Since close personal contact encourages the spread of the virus,<sup>28</sup> restrictive measures such

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tions 44 and 53 of the Asylum Act).

<sup>27</sup> Cf. for example Leipzig Administrative Court, order of 22 April 2020, file no.: 3 L 204/20.A: "Due to the circumstances in the centre, it is not (always) possible to maintain the required minimum distance"

<sup>28</sup> Cf. the recommendations of the Robert Koch Institute for health authorities on the prevention and management of COVID-19 infections in reception centres and collective accommodation for persons seeking protection (within the

as the suspension of visits were ordered in order to safeguard public health. In addition to the acute health risk of contracting COVID-19, the affected persons also suffer a severe psychological burden. In the view of the National Agency, it is therefore essential to compensate for any restrictive measures. The following statement by a ministry should therefore be viewed critically: "Compensation for restrictive measures is not provided for, as restrictions due to the COVID-19 crisis affect all people inside and outside of the facility to the same extent."

Other ministries provided more detailed information about the range and types of activities during quarantine. In Bremen, for example, contact with the outside world was guaranteed through the use of Wi-Fi and mobile phones. In addition, continuous social support was ensured. The same was reported by Hesse, Lower Saxony and Baden-Württemberg (contactless counselling – e.g. by phone). Several *Länder* also pointed to the various possibilities for affected persons to occupy themselves: tablets, books, sometimes televisions (Lower Saxony), board games, arts and crafts, materials for learning German (Hamburg). In Hamburg, it was reported, the container housing had common rooms with TV sets, a sofa, games, a pool table and table football. In addition, playrooms for children had been set up, and there were various possibilities for outdoor activities such as access to playgrounds, basketball, table tennis or football.

Due to the often cramped living situation, residents of reception centres have an increased risk of contracting the coronavirus. Therefore, the occupancy rate of these facilities should be reduced to such an extent that the risk of spreading infections is avoided. Furthermore, persons at risk must be given special protection.

Persons at risk of infection should be immediately separated from other residents.

Collective quarantine, during which all residents are prevented from leaving the facility, should be avoided at all costs.

Contact with the outside world must be possible at all times.

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meaning of sections 44 and 53 of the Asylum Act): "The risk of transmission of virus-related diseases of the respiratory tract is particularly high in reception centres and collective accommodation, where many people live together in a small space and share a living room, kitchen, dining and sanitary rooms."

## 5 – PSYCHIATRIC CLINICS

This summary addresses specific challenges and examples from the answers provided by the responsible ministries.

### 5.1 – Quarantine measures

According to the ministries, the pandemic response plans, hygiene policies and quarantine concepts in psychiatric hospitals were dynamically adapted to the situation and protective measures were taken in accordance with the recommendations of the Robert Koch Institute.

In the hospitals, individual wards were converted into quarantine wards, and in some cases separate admission wards were created. Patients who tested positive for the coronavirus were isolated in these quarantine units, discharged into quarantine at home or, if necessary, transferred to an intensive care unit where they received a psychiatric consultation. The rooms that were used for isolation in the psychiatric hospitals were mostly patient rooms with the usual equipment, notably with a private bathroom. It was also reported that, occasionally, so-called crisis rooms or seclusion rooms with special furnishings that eliminate outside stimulus and aim to prevent patients from harming themselves or others were kept ready and used for quarantine.

### 5.2 – Health protection measures

In order to keep occupancy on the wards as low as possible, planned and non-urgent admissions were suspended and patients who did not require urgent treatment were discharged. This largely made it possible to adhere to the distancing rules on the wards and in the patients' rooms. According to the information provided by the ministries, a telephone conversation was held before admissions where possible so as to identify the individual risk. Patients were always tested for the coronavirus upon admission.

The subsequent procedure was described in various ways. In some facilities, the affected persons were accommodated separately and released from isolation after the incubation period or following a second negative test taken five days later. In other facilities, affected persons were allowed to move freely on the wards if they tested negative and complied with the distancing

and hygiene rules. Where possible, patients were accommodated in single rooms. However, it appears problematic that accommodation in rooms with two or more beds could apparently not be avoided in some cases due to hospitals' obligation to provide care. In these cases, there is a risk of mutual infection. It was reported, however, that three or four-bed rooms were occupied by a maximum of two patients, which was possible in most cases due to the reduced occupancy rates. However, in the view of the National Agency, it is doubtful whether compliance with the distancing rules can be ensured this way. According to the information provided by one ministry, this was not always possible when occupancy rates were higher. In the ministry's view, this was acceptable since the patients concerned had already been accommodated together for several years.

Staff were only tested when necessary, i.e. if they had symptoms or had previously been in contact with an infected person. In some hospitals, however, staff were given a temperature check and screened for symptoms before their shift. To avoid infections, handovers between shifts and rounds took place in large rooms or outdoors and with as few participants as possible. Other meetings and training courses were carried out by telephone or video conference or were cancelled. Furthermore, it was ensured that there was no mixing of staff across wards, for example by dividing them into fixed teams for each shift. It was also recommended that staff should not swap shifts or stand in for other staff. When working across multiple wards, staff had to take even greater care to wear the necessary protective gear.

In order to avoid contact with people outside the wards as far as possible, patients' visiting rights were severely restricted during the "lock-down" period. The permitted visits took place mainly in rooms equipped with protective partitions or outdoors.

### 5.3 – Compensation for restrictive measures

In order to compensate for the restrictive measures affecting patients' interpersonal contacts, the possibilities for telephone, internet and video communication were expanded and virtual visits established. In addition, visiting times were usually staggered and outdoor times were extended.



It was reported that, in some facilities, it was possible to counteract the increased tension associated with the restrictions by offering more opportunities for sports and exercise therapy. Group therapy also largely took place – but only within individual wards, with a reduced number of participants and primarily outdoors. In the summer of 2020, after the first wave of the pandemic, the clinics gradually began to lift their restrictions. According to the ministries, this step was necessary in order to maintain the atmosphere of understanding and acceptance in the facilities.

#### **5.4 – Reactions of affected persons**

Overall, it was reported that patients' reactions were similar to those in society at large and that they were mostly understanding. However, this required a dialogue about the measures with the patients concerned, who were informed and instructed accordingly. Patients who still found it difficult to adhere to the measures were given more support.

In most cases, it was reported that there was no increase in coercive measures. In some cases, a slight decrease in tension and aggression was even observed due to the reduced occupancy. Only in a few cases was a slight increase in isolations reported, as most of the patients who were admitted were seriously ill and some posed an acute danger to themselves or others. In some hospitals for child and youth psychiatry, a sporadic increase in placements was observed. These were attributed to COVID-19-related restrictions in homes, school closures and the associated loss of daily routine and structure for children and adolescents.

Quarantine on the grounds of infection prevention should not be carried out in rooms with special low-stimulation furnishings. These should be reserved for acute emergencies where placement in such a room is absolutely necessary in order to prevent patients from harming themselves or others. If these rooms have to be used for quarantine, they should be equipped for everyday use.

During in-patient stays at a hospital, it should be possible to adhere to the distancing and hygiene rules.

Sports and therapy options should be expanded in order to compensate for restrictive measures.

## 6 – CHILD AND YOUTH WELFARE

This summary addresses specific challenges and examples from the answers provided by the responsible ministries.<sup>29</sup>

Given that the best interests of the child must be a primary consideration in all actions concerning children pursuant to Article 3 para. 1 of the Convention on the Rights of the Child, a particularly critical view must be taken when weighing up restrictive measures in child and youth welfare facilities during the COVID-19 pandemic; the facilities' management and the supervisory authorities have a particular duty to compensate for restrictions and burdens and to take the best interests of the child into account.

### 6.1 – Health protection measures

In child and youth welfare facilities with closed units, pandemic response plans and hygiene concepts had reportedly been developed or adapted to the current situation. In addition, quarantine rooms were set up in order to separate the children and juveniles if necessary.

According to the information provided by the ministries, the children, juveniles and staff at most facilities were only tested if they exhibited symptoms of a COVID-19 infection.

In order to protect children and juveniles from infection with the coronavirus, contact with persons outside of the individual residential groups was avoided or at least reduced. In order to prevent infections across different groups, personal contact between children and juveniles of these different groups was not allowed. Furthermore, weekend trips home for children and juveniles were largely suspended and visits were restricted. While visits from attachment figures such as parents were permitted, these mostly had to take place outdoors and in compliance with the distancing rules. It was forbidden to enter a residential group for anyone who did not live or work there.

It was also reported that school visits, training courses and other events were suspended. Even though in-house schooling is provided to the children and juveniles in most facilities, there

were still some restrictions due to the pandemic which put a strain on the children and juveniles and the staff.

### 6.2 – Compensation for restrictive measures

The ministries reported that the restrictive measures were compensated for by expanding the possibilities for digital communication. Contact with the Youth Welfare Office was possible via telephone or video conferences. Leisure activities were mainly offered in such a way that they could take place outdoors.

According to Article 3 para. 1 of the UN Convention on the Rights of the Child, the best interests of the child must be a primary consideration when designing and compensating for restrictive measures. In this context, alternative activities are to be offered to a greater extent and the necessary materials should be purchased where necessary.

<sup>29</sup> A supplementary survey of previously visited child and youth welfare facilities was initiated in early 2021.

## 7 – CUSTODY AWAITING DEPORTATION AND CUSTODY TO SECURE DEPARTURE

The majority of the contacted ministries provided meaningful information about the situation in the respective facilities for custody awaiting deportation. However, the responses provided by the ministries differed in quality. In Saxony, there was nobody in custody awaiting deportation at the time of the enquiry, which is why the Land refrained from sending relevant information on the operation and execution of custody awaiting deportation under COVID-19.

This summary addresses specific challenges and examples from the answers provided by the responsible ministries.

### 7.1 – Occupancy

In the majority of the *Länder*, no deportation procedures were organised during the first lockdown. This meant that the number of detainees awaiting deportation was reduced, since no new detainees were admitted and some of those already in custody were released. This is due to the applicable legal situation: Where a return to certain countries cannot be carried out as planned, a decision has to be made on whether to continue the placement in custody, taking into account all of the circumstances of the specific case. One of the relevant factors here is the question of when flights are expected to be available. Pursuant to section 62 (3), third sentence, of the Residence Act (*Aufenthaltsgesetz*, *AufenthG*), custody to secure deportation is not permitted if it is clear that it will not be possible to carry out deportation within the next three months for reasons beyond the foreigner's control. In these cases, detainees must be released from custody awaiting deportation. For this reason, most facilities for custody awaiting deportation were closed or sparsely occupied.

According to information from several ministries, the aforementioned provisions do not apply to criminal offenders, potential terrorists and persons who pose a significant threat to the life and limb of others or to significant legally protected internal security interests. According to section 62 (3), fourth sentence, of the Residence

Act persons posing “a significant threat to the life and limb of others or to significant legally protected internal security interests” may be kept in custody to secure deportation even if they cannot be deported within the next three months. However, some ministries stated that, in practice, they did not adhere to the wording of that exemption and also included previous offenders.

According to the ministries, the facilities for custody awaiting deportation generally provided for single occupancy only. Baden-Württemberg and Lower Saxony reported that double rooms were allowed if requested, following an assessment of the associated health risks.

### 7.2 – Quarantine measures

According to the information provided, there were plans to isolate detainees awaiting deportation within the facility if they exhibit symptoms and for them to receive medical attention there. In case of severe illness, they would be transferred to a hospital. Fortunately, the ministries reported that, at the time of the survey, no detainees awaiting deportation or staff working at facilities for custody awaiting deportation had been infected with COVID-19.

### 7.3 – Health protection measures

According to the ministries, the facilities for custody awaiting deportation introduced and maintained extensive safety and hygiene measures. In some cases, multilingual information materials and pictograms were used to inform people about the current situation and the necessary hygiene and safety measures. Persons entering facilities for custody awaiting deportation were asked about symptoms, contact with infected persons and stays in risk areas.

In Baden-Württemberg, Hamburg, Lower Saxony and North Rhine-Westphalia, detainees awaiting deportation were tested for the coronavirus before, during or immediately after entering the facility for custody awaiting deportation. In North Rhine-Westphalia, they were also tested before being transferred to another unit. According to the ministries, the remaining *Länder* did not provide for systematic testing of detainees awaiting deportation. Bremen, however, reported that it would strive to test detainees upon admission.

According to the responsible ministry in Lower

Saxony, staff always wear a mask, while in other *Länder* masks are only worn where the minimum distance cannot be maintained.

Visits were largely suspended, but meetings – for example with lawyers – were permitted.

#### 7.4 – Compensation for restrictive measures

The National Agency was informed that, in order to compensate for the suspended visits, many facilities extended the possibilities to use a telephone. In some cases, this was done at the facility's own expense. Sometimes, detainees were permitted to use telephones inside cells or to make video calls. It should be pointed out that, according to the competent ministry, detainees awaiting deportation in Hamburg were allowed to use their own smartphones at all times. The facility provided wireless Internet free of charge for this purpose.

In addition, the ministries stated that the usual possibilities for detainees to occupy themselves were available, such as television, sports, games and books. Due to the low occupancy, it was possible to expand this range of activities in some facilities.

#### 7.5 – Reactions of affected persons

According to the ministries, the majority of those affected showed understanding for the restrictive measures. There was no recorded increase in the number of security measures.

According to the information provided, deportation procedures are to be suspended while it is not possible to avoid a serious risk to deportees and to prevent the spreading of the virus.

In line with the current legal situation, custody awaiting deportation must be suspended where no deportation procedures can be carried out. Exemptions set forth in section 62 (3), fourth sentence, of the Residence Act are to be limited to those cases where the person awaiting deportation poses “a significant threat to the life and limb of others or to significant legally protected internal security interests”, with this threat having been confirmed at the time the court ordered detention awaiting deportation in the individual case.

## 8 – FEDERAL AND LAND POLICE, CUSTOMS AUTHORITIES

The following summary addresses particular challenges and examples taken from the ministries' responses on Federal and *Land* police stations and customs offices. However, due to the various types of answers provided, this overview does not purport to be exhaustive.

### 8.1 – Health protection measures

In almost all responses from the ministries, reference was made to the instructions of the Robert Koch Institute for non-medical personnel, which contain guidelines for personal protection when coming into contact with the public. Particularly given the inevitability of external contacts, police and customs forces were heavily equipped with protective equipment such as face coverings and FFP2 masks, disinfectants, eye protection and even protective suits. Many *Länder* reported that police officers could get tested for COVID-19 on an ad-hoc basis or in case of a suspected infection and that they could use the police forces' own testing resources.

In order to reduce contacts among staff, employees were divided into fixed shift groups. In addition, the measures applicable in the working world at the time of the survey were also implemented in the stations and agencies in order to reduce staff presence and to largely limit public traffic, for example by asking the public to make greater use of “online” stations where possible, or by holding meetings outdoors.

### 8.2 – Enforcement of custody

Custody was also enforced during the COVID-19 pandemic at police stations and customs offices. The examination of an individual's fitness for detention also included a check for a possible COVID-19 infection or an assessment of the risk of such an infection occurring; individuals were asked about symptoms and whether they had spent time in high-risk areas. In addition, a medical assessment was carried out if necessary.

Where it was essential to do so, the authorities also reserved the right to detain persons who had contracted COVID-19. However, persons who had contracted COVID-19 and exhibited symptoms such as severe coughing, a high fever

or shortness of breath were not considered fit for detention. One *Land* pointed out that persons infected with COVID-19 who were not fit to be detained could still be taken into custody if this was absolutely necessary for the protection of the general public. This was only possible on a temporary basis until they could be transferred to a hospital or to another institution or responsible person. In these cases, the persons in question had to be supervised at all times.

Staff and the persons taken into custody wore a mask. Where this was not tolerated, staff members wore an FFP2 mask in accordance with the rules of the Robert Koch Institute on self-protection and protection of others.

Bremen and Saarland set up special central detention facilities that were reserved exclusively for persons infected with COVID-19. Hesse designated individual rooms in police stations or customs offices for this purpose. In North Rhine-Westphalia, persons infected with COVID-19 were accommodated in rooms where CCTV monitoring was possible. In Bavaria, where preventive custody can be ordered for an unlimited period of time, long-term custody was enforced in prisons within the framework of administrative assistance. In these cases, persons taken into custody were subject to the rules applicable in prisons, such as isolation for two weeks from the time of admission.

The procedures for transporting persons infected with COVID-19 varied; in some *Länder*, transport was only carried out in ambulances, while others used special police vehicles for this purpose.

In many of the responses from the ministries, it was stated that detention rooms were disinfected and ventilated after each occupancy and that there was no multiple-occupancy of cells. Some *Länder* were unable to rule out the possibility of large multi-occupancy cells being occupied by a small number of people at the same time.

Individuals who are unfit for detention must not be taken into custody – even temporarily. The use of multi-occupancy cells must be avoided where a risk of infection cannot be ruled out.

## 9 – DETENTION FACILITIES OF THE FEDERAL ARMED FORCES

### 9.1 – Health protection measures

The Federal Armed Forces Medical Service developed a special hygiene concept for the enforcement of custody or detention (*Arrest*) at the facilities operated by the Armed Forces. While this did not include tests for soldiers without symptoms, the examination of a person's fitness to be detained did include a test for the coronavirus. A survey of the individuals in detention was conducted in this context, which made it possible to determine the need to impose requirements to protect against infection. When conducting searches of the individuals in detention, the detention aides wore appropriate protective clothing. In order to reduce the risk of infection, visits were only permitted in exceptional cases.

### 9.2 – Quarantine measures

If an individual was exhibiting symptoms of disease, enforcement of custody was immediately suspended and measures in line with the Infection Protection Act (*Infektionsschutzgesetz*, IfSG) were taken. The competent medical officer was in charge of the proportionality test, particularly as regards the suitable form of accommodation.

Where this was necessary to ease the burden on hospitals, the in-patient care of soldiers who were mildly ill with COVID-19 was provided on the premises of the Federal Armed Forces. The necessary medical care was organised by the Medical Service.

Whether a person is fit for detention should be determined by way of a medical examination, irrespective of the COVID-19 pandemic.

## 10 – PRISONS

The enquiry sent out in December related both to the organisation of quarantine and isolation measures in prisons and to restrictions and compensatory measures in connection with the pandemic.

The enquiry hence covered the phase of the second “hard” lockdown in December 2020. The questionnaires were sent out in mid-December. The majority of the replies arrived by the second half of January.

### 10.1 – Conditions and duration of preventive isolation

All *Länder* held prisoners in preventive isolation at the beginning of their detention. This was to ensure that no other prisoners would be infected in the event that the newly admitted prisoner was unknowingly infected with COVID-19. This type of isolation was an additional safety measure in prisons that was also implemented – on the basis of various criteria – after a prisoner had spent time outside of the prison facility. There was no formal legal basis for this. This is to be distinguished from quarantine or isolation under the Infection Protection Act, which is ordered by the health authorities when a contact person has been proven or is suspected to be infected with the coronavirus – as is also the case outside of prisons.

#### Duration

Even though all of the *Länder* implemented preventive isolation in their prisons, the actual conditions varied: In some places, isolation lasted five days, after which time the detainees could be transferred to the regular prison unit if they tested negative for COVID-19. In other places, however, isolation lasted a full 14 days, followed by a test. As it took 48 hours for the result of the test to arrive, these isolations lasted up to 16 days, as was the case in Bavaria. Other *Länder* refrained from testing prisoners at the beginning of isolation or, where isolation lasted 14 days, did not test prisoners at all. This was due to the assumption that, even if they were actually infected, prisoners would no longer be infectious after 14 days if they had not shown any symptoms for a specific period of time.

Insofar as the medical circumstances allow it, the duration of so-called preventive isolation

should be kept as short as possible. Care should be taken to ensure that isolation is maintained only as long as the risk of the virus spreading cannot be eliminated by other measures such as testing.

#### Conditions

As regards the conditions of isolation, two distinct models can be identified. Approximately half of the *Länder* implemented a strict form of isolation, holding prisoners in single-occupancy cells with individual outdoor leisure hours.<sup>30</sup> The remaining *Länder* grouped prisoners into cohorts of different sizes. Within these cohorts, there were opportunities for contact during isolation, for example during outdoor exercise, shared leisure time or cell visits. In Hamburg, it was possible for very small groups to jointly participate in correctional measures while observing distancing rules. The central remand detention facility there was designated to carry out this type of isolation. In other *Länder*, specific prison units were used for this purpose.

On the one hand, individual isolation can reduce contacts and therefore the chance of infection among newly admitted prisoners to almost zero. On the other hand, cohort accommodation lowers the health protection of prisoners within the cohort while simultaneously reducing the severity of restrictions, thus allowing for joint activities, leisure time, outdoor exercise, cell visits and participation in group programmes. In both cases, where the persons being isolated are separated from the general prison population, the health protection of prisoners who have been detained for a longer time is guaranteed, provided that no infections are brought in by staff members. The balance between health protection and the maintenance of activities, social contacts and, where applicable, rehabilitation differed in the various *Länder*.

As regards individual isolation, it should be noted that, in the view of the National Agency, the isolation of prisoners constitutes a considerable interference with fundamental rights that is particularly burdensome for the person concerned. The Federal Constitutional Court has expressed the view that if there is “insufficient supervision [...] during the enforcement of isolation, there

<sup>30</sup> Alternatively, outdoor leisure hours were subject to distancing rules and the requirement to wear masks.

is a risk of considerable damage to the health of the person concerned”.<sup>31</sup> In specific cases, the intensity experienced by the person in isolation can even be equivalent to that of “five-point or seven-point restraints”.<sup>32</sup> In the view of the National Agency and according to the past decisions of the Federal Constitutional Court, isolation has so far primarily been regarded as a special security measure, but not as a measure to protect the health of the prisoners themselves. However, in order to assess how intense isolation can be for the person concerned, similar assumptions must apply in this context. Due to the considerable effects of (individual) isolation, this measure should be accompanied by special precautionary measures and support services. The need for such support increases with the duration of the measures and the degree of isolation involved.

Some of the *Länder* that implemented this type of individual isolation stated that they provided the affected prisoners with greater support and more ways in which to occupy themselves. For example, isolated prisoners in Brandenburg received an “education and leisure bag” with reading material, writing and drawing utensils, games for one person, puzzles or exercise sheets for learning German. In Saarland, instructions for physical exercises in the cell were handed out.

In addition to activities, it is important for prisoners in individual isolation to receive intensive support from specialist staff. However, not all *Länder* reported that prisoners had daily contact with staff. The practice reported by some *Länder* should therefore be highlighted: Brandenburg, for example, reported having raised awareness among staff in relation to suicide prevention during isolation. Prisoners who were perceived to be depressed were given emergency mobile phones so that they could talk to the telephone helpline. The competent ministry in Baden-Württemberg stated that a telehealth service was created. Some *Länder* reported that staff members regularly visited prisoners’ cells on their own initiative while wearing extensive protective equipment. During the admission process, any special risk that isolation might pose to the individual concerned can be identified. Similar measures would also be appropriate in other *Länder* and, in the view of the National Agency, should be introduced as

a permanent measure, especially since it must be assumed that the practice of individual isolation will be maintained in some *Länder* until the end of the pandemic. However, many of the replies received from the *Länder* on this matter were rather brief, suggesting that no support was otherwise provided. Where prisoners have to ask for appropriate support or apply for it in writing, there is a particular risk that certain needs will not be recognised.

To mitigate the negative impact of (individual) isolation on mental and physical health, detainees should be provided with sufficient opportunities for human contact and to engage in meaningful activities. They must also be seen regularly by a psychiatrist or psychologist. This should take place in a suitable and confidential environment.

The need for intensive support is particularly great in cases of individual isolation.

## 10.2 – Reasons for isolation

In addition to isolation upon admission, prisoners were also isolated for other reasons. In almost all *Länder*, this was the case following external overnight hospital stays, as well as following situations in which the distancing and hygiene rules applicable to prisoners were not or could not be observed during stays outside the prison or during visits. In Saxony-Anhalt<sup>33</sup> and Hesse, isolation was also enforced following court dates, which likely placed a significant burden on (remand) prisoners facing longer proceedings. The duration was 14 days in Saxony-Anhalt and five days in Hesse. In Hesse, prisoners were also isolated for five days after medical appointments outside the prison. In order to avoid repeat isolations, both *Länder* should urgently consider introducing the practice that is primarily in place in the other *Länder*.

In most of the *Länder*, prisoners were not isolated after spending time outside the prison facility (including court appointments), as long as the hygiene rules had been observed. Schleswig-Holstein stated that, if necessary, prisoners were equipped with protective clothing and FFP2 masks in order to avoid isolation after court appointments.

<sup>31</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 80).

<sup>32</sup> Ibid.

<sup>33</sup> In those *Länder*, isolation is subsequently enforced whenever a prisoner leaves prison for an important reason pursuant to section 46 (1) of the Prison Code of Saxony-Anhalt (*Justizvollzugsgesetzbuch Sachsen-Anhalt*, JVVollzGB LSA).

Furthermore, during the period in question, many *Länder* only allowed stays outside the prison if the prisoners were accompanied by prison staff.

Repeated isolation after stays outside of prison should be avoided as far as medically possible through the use of protective measures.

### 10.3 – Isolation in case of infection or suspected infection, outdoor exercise

If a person is infected or classified as a contact person, the competent health offices will order medically justified isolation or segregation in accordance with the Infection Protection Act. In some *Länder*, responsibility for the conditions of detention was also transferred to the competent health offices; in Hamburg, for example, outdoor exercise was in some cases suspended until the health office had decided on the further course of action. In Hesse, individual outdoor leisure hours were also not granted by order of the health offices.

However, the granting of one hour of outdoor exercise per day is a minimum human rights guarantee that must be upheld in all circumstances.<sup>34</sup> Where prisoners are infected, access to outdoor facilities must be arranged in such a way that there is no risk of infection to other persons. Such access to outdoor facilities must be possible for cooperating prisoners if appropriate measures are taken. In this context, the assessment of prisoners' potential behaviour must remain the responsibility of the prison and must not be carried out by the competent health office.

Every effort must be made to continue to guarantee minimum standards required by human rights, such as the guarantee of one hour of outdoor exercise per day.

### 10.4 – Video telephony and digitalisation

As in all other areas of society, the pandemic has accelerated digitalisation in prisons, too. Even though the introduction of video telephony was already planned in many *Länder*, its implementation was accelerated in some cases due to the COVID-19 pandemic. Almost all *Länder* in-

roduced this service or expanded their already existing range of services. However, only very few *Länder* rolled out video telephony across the board. Three *Länder* reported that they were still assessing whether the possibility of video visits could be retained (Brandenburg, Bavaria, North Rhine-Westphalia, Bremen and Hamburg did not provide any information in this regard), despite the fact that only positive experiences of this measure were reported. As regards the legislative implementation of these measures, the National Agency would appreciate it if the possibility of video visits did not have any consequences for regular visits.<sup>35</sup> This would, however, also require appropriate staffing resources. Rhineland-Palatinate reported that electronic mailboxes for mail from the authorities can be accessed via the available TVs.

The possibility of using phones inside cells was also expanded in many *Länder*. Berlin, Brandenburg and Hamburg even handed out simple mobile phones to prisoners during the pandemic. While in Hamburg the possibility of using simple mobile phones was withdrawn after the first wave of the pandemic, prisoners in Brandenburg were permitted to use these phones to call the telephone helpline. In Berlin, simple mobile phones were handed out to prisoners who did not have access to telephones inside their cells. In North Rhine-Westphalia, prisoners in open institutions were allowed to use mobile phones.

The National Agency welcomes the implementation of services and systems that enable phone usage in cells, limited use of the Internet, a digital notice board, access to information and the sending of e-mails in prisons. In light of the ongoing digital transformation in society, these possibilities contribute considerably to the process of rehabilitation and alignment with the outside world.

Irrespective of the COVID-19 pandemic, the possibilities for digital communication should be expanded without limiting conventional ways of communication. The periods of time available for real-life visits after the pandemic should not be limited due to the option of video visits.

<sup>34</sup> Only in exceptional cases – for example where there is a risk of a detained person wilfully infecting others – is it conceivable for outdoor exercise and access to outdoor facilities to be prohibited for reasons that are inherent in the respective individual's person.

<sup>35</sup> In Hesse, however, such measures are planned for all types of custody except youth detention, cf. Hesse State Parliament, printed matter 20/2967, Article 11 no. 11 aa, Article 2 no. 12 aa, Article 3 no. 8 aa, Article 4 no. 8 aa.



## 11 – DEPORTATION

While accompanying deportations, the National Agency repeatedly became aware of the variety of actors involved.<sup>36</sup> It also became clear that, in addition to the transfer of deportees, the *Länder* are now also increasingly in charge of the ground handling phase and the escorting of deportees during the flight. The National Agency was informed only by Bavaria that charter operations were also organised at the *Land* level, and it observed one deportation procedure at Nuremberg Airport in 2019. In order to obtain a nationwide overview of the practice of return operations, the National Agency sent an enquiry to the competent *Land* ministries in December 2020. Only through this survey did the National Agency learn that, in recent years, several *Länder* have started organising their own return operations. At least 2,067 people were affected by these in 2020.<sup>37</sup> In the view of the National Agency, the fact that, with the exception of Bavaria, none of the *Länder* informed the National Agency of the organisation of such operations constitutes a clear obstacle to the exercise of its mandate.

The following findings relate exclusively to deportation procedures carried out by or with the involvement of the Federal Police. However, the recommendations should be implemented for all deportees.

According to a statistical study by the Federal Police, a total of 10,800 people were deported from Germany in 2020, 8,970 of them by air. The operations included 1,911 minors. The Federal Police does not separately record any data on elderly, pregnant and sick persons.

Due to the COVID-19 pandemic, the National Agency expanded its working methods beyond on-site observations. In addition to queries submitted to the Federal Ministry of the Interior, Building and Community, the National Agency also requested the relevant documentation of 46 return operations from the Federal Police Headquarters. It reviewed the documentations

of 11 operations conducted between 11 March and 23 June and 35 operations carried out between 1 November and 31 December 2020, i.e. during the “lockdown” periods.

It should be noted that the competent officials at the ministry and the police headquarters were also always available for further questions, thus allowing a productive exchange.

### 11.1 – Health protection measures

As deportees have an increased risk of infection, the National Agency focussed on the implementation of measures to prevent the spread of the COVID-19 pandemic and related measures to protect the individuals concerned. These measures comply with the state's duty to protect and promote life and to protect the persons concerned from any impairments to their physical integrity and health.<sup>38</sup>

While inspecting the documentation, the National Agency found that return operations to regions classified as high COVID-risk areas according to the Robert Koch Institute were once again taking place<sup>39</sup>, having initially been suspended at the beginning of the pandemic. Joint return operations<sup>40</sup> involving up to five other EU countries were also organised.

Upon inspection of the documentation, it became apparent that adequate protection against infection could not be fully ensured during the return operations. For example, the rules on distancing, hygiene and face coverings (“AHA” rules<sup>41</sup>) could not be fully adhered to.

During several procedures, the confined spaces in particular made it difficult to comply with the distancing and hygiene rules.<sup>42</sup> The time spent at the airport alone generally amounts to several

<sup>36</sup> On the various stages of deportation, see V1 Visits - Deportations.

<sup>37</sup> These figures are based on the responses to the National Agency's enquiry. Some of the operations carried out in December 2020 are not included in the information provided. In addition, Lower Saxony did not provide any comprehensible information on operations it organised autonomously. A total of 600 people were deported from Lower Saxony in 2020.

<sup>38</sup> Federal Constitutional Court, order of 12 May 2020, file no.: 1 BvR 1027/20, margin no. 6.

<sup>39</sup> From 1 November to 31 December 2020, deportations were carried out to the following destination countries: Albania, Armenia, Bangladesh, Gambia, Georgia, Ghana, Guinea, Iraq, Kosovo, Lebanon, Moldova, Nigeria, North Macedonia, Romania, Serbia, Tunisia, Turkey and Ukraine. All destination countries were classified as risk areas by the Robert Koch Institute at the time of the operation.

<sup>40</sup> Joint deportation procedures by several EU Member States.

<sup>41</sup> AHA = Abstand halten, Hygieneregeln beachten, Alltag mit Maske.

<sup>42</sup> This was also observed by a visiting delegation of the National Agency during a deportation at Düsseldorf Airport, see V1 Visits - Deportation.

hours, which increases the risk of possible infection in confined spaces. Distance to the direct escorts could not generally be guaranteed during the return procedure. The increased risk of infection associated with this became clear when staff members tested positive after the return operation, as recorded in two reports.

In addition, the use of masks by escorts and deportees was not always guaranteed. During the first phase of the pandemic, the National Agency noted with concern that masks were sometimes not worn during the documented deportation procedures. Now, the staff of the Federal Police always wear FFP2 masks. While deportees are provided with masks, it is not always possible to verify and ensure that they actually wore them.

As part of the medical examination at the airport, the persons concerned were also tested for symptoms of COVID-19 infection. For individuals with symptoms such as a fever or sore throat, the procedure was aborted following the examination at the airport. According to the Robert Koch Institute, however, the virus can also be transmitted by persons who do not exhibit any symptoms.<sup>43</sup>

A test is not always required in order to execute the deportation measure. COVID tests are administered in cases where the destination country requires a negative test result. There are two particularly problematic aspects that should be highlighted here. First of all, a negative test result is merely a snapshot.<sup>44</sup> Furthermore, the deportees were sometimes not tested until they were at the airport. In some cases, the deportation of a particular individual had to be aborted due to a positive test result. In addition, deportees who refused a test were subject to forced testing.<sup>45</sup> The use of direct force by police officers when carrying out a test represents an interference with the fundamental rights of the persons concerned. Testing should always be carried out in a proportionate manner.

<sup>43</sup> Cf. [https://www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/Steckbrief.html](https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Steckbrief.html); [https://www.rki.de/DE/Content/Infekt/EpidBull/Archiv/2020/Ausgaben/39\\_20.pdf?\\_\\_blob=publicationFile](https://www.rki.de/DE/Content/Infekt/EpidBull/Archiv/2020/Ausgaben/39_20.pdf?__blob=publicationFile) (retrieved on 18 March 2021).

<sup>44</sup> For example, one officer tested positive following a deportation procedure after their previous test was negative.

<sup>45</sup> This information was obtained from the available documentation.

## 11.2 – Monitoring of vulnerable persons during the COVID-19 pandemic

As part of an initial enquiry (March 2020) submitted to the Federal Ministry of the Interior, Building and Community, the National Agency found that no information could be provided as to whether appropriate safeguards were applied when deciding whether to carry out deportations and whether, for example, deportations were suspended for persons in high-risk groups.

It was not possible to accurately identify vulnerable persons on the basis of the documentation viewed by the National Agency. However, it was clear from the documents that sick persons were also deported. For example, one deportee suspected of having tuberculosis was required to wear a mask in order to avoid infecting third parties. The individual in question was deported to Afghanistan.

Persons with an increased risk of developing a severe form of COVID-19 were also affected by the measures. This included pregnant women, one of whom had a high-risk pregnancy, and persons with certain pre-existing conditions. For example, one person suffered from chronic obstructive pulmonary disease, arterial hypertension, obesity, chronic renal failure and diabetes.

The National Agency was also concerned to learn that a four-year-old child with Down syndrome (trisomy 21) had been deported. For individuals with Down syndrome, the risk of contracting a severe or lethal form of COVID-19 is significantly increased.<sup>46</sup>

Deportation procedures should be suspended while it is not possible to avoid a serious risk to deportees and to prevent the spreading of the virus. This applies in particular to persons who are in a vulnerable situation.

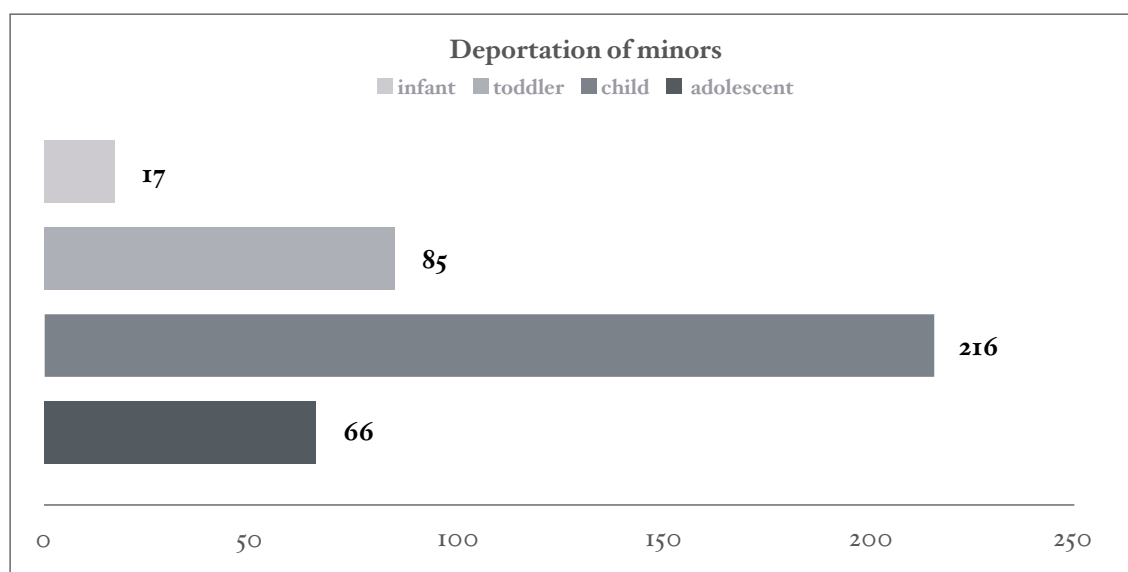
<sup>46</sup> Cf. Robert Koch Institute, Aktuelle Daten und Informationen zu Infektionskrankheiten und public health, Epidemiologisches Bulletin, 2/21, pp. 36-37.

### 11.3 – Further findings and recommendations within the framework of documentation-based monitoring

#### 11.3.1 – Time of collection

Since the beginning of the COVID-19 pandemic, deportees have regularly been picked up at night time. This also applies to procedures involving the deportation of minors.

With respect to the 46 charter measures, the National Agency recorded the deportation of 384 minors in total:



The use of age-related terms is based on the following age ranges:

Infant: up to the age of 12 months; toddler: from the age of 1 to the age of 3; child: from the age of 3 to the age of 14; adolescent: from the age of 14 to the age of 18.

Collections at night must always be avoided in order to ensure that the burden on deportees, especially families with children, is kept to a minimum. Mere organisational considerations, such as the departure times of the chartered aircraft, do not justify deviating from this guarantee.<sup>47</sup>

Collections at night should be avoided. Where children are deported, this must be guaranteed as a general principle.

<sup>47</sup> Cf. Düsseldorf Administrative Court, order of 16 November 2020, 7 I 32/20.

#### 11.3.2 – Observation of deportation procedures

When inspecting the documentation, the National Agency noted that the presence of Frontex personnel has been greatly reduced since the beginning of the pandemic. Several procedures were even carried out without a Frontex monitor. However, according to Article 28(3) sentence 3 of Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016, “at least one Member State representative, and one forced-return monitor [...] shall be present throughout the entire return operation [...]” In-

dependent deportation monitoring<sup>48</sup> is essential ("nemo monitor in res sua"<sup>49</sup>).

In Germany, this is guaranteed at Frankfurt am Main<sup>50</sup> and Hamburg<sup>51</sup> airports, as well as the airports in Berlin<sup>52</sup> and in North Rhine-Westphalia.<sup>53</sup> It is limited to the phase from the arrival at the airport to the boarding of the plane.

The National Agency monitors deportations in accordance with its mandate from Article 4 of the OPCAT. However, due to its currently available resources, it cannot additionally take on the task of monitoring returns in line with the Return Directive.

Deportation monitoring and regular exchanges with authorities and non-state actors are essential to ensure sustainable compliance with state and human rights regulations and to develop these further.

An effective deportation monitoring system must be provided for.<sup>54</sup> Independent monitoring should take place at all stages of the procedure.

### 11.3.3 – Documentation

When looking at the documents, the National Agency first of all noted the choice of words in some of the reports: for example, one report consistently referred to a deportee as a "troublemaker". This type of classification must not be used as justification for intrusive measures. In another report, it was noted that one deportee "was very

whiny during the flight". In the view of the National Agency, this is a value judgement that could give the impression of a biased attitude on the part of the officers involved. In the context of another procedure, the medical documentation differed from that of the officers. In the view of the National Agency, "unexplained fainting" (medical documentation) is not equivalent to "feigned fainting" (Federal Police).

It was also observed that the documentation of deportation procedures is heterogeneous and in some cases incomplete.

In its statement of February 21, 2020 regarding the observation of a deportation procedure at Berlin-Schönefeld Airport to Moscow on September 26, 2019, the Federal Ministry of the Interior, Building and Community gave assurances that, following a recommendation by the National Agency, the so-called escort sheet had been modified. According to the Ministry, this will ensure in future that interferences with fundamental rights – such as strip-searches and coercive measures – are documented separately and their proportionality can be verified.

However, when inspecting the "escort sheets" within the framework of several procedures, it became clear that different documents are used at the various airports, making it considerably more difficult to reconstruct the events. The use of standardised forms would make this process considerably easier. In addition, the justification provided for interference with fundamental rights was not always complete and comprehensible.

### Strip-searches

During some deportation procedures, including a deportation to Afghanistan, the strip-searches were merely noted in the report; the reasons for the measures were not documented. In the view of the National Agency, this practice is not acceptable.

Strip-searches involving a visual inspection of the detainee's genital area represent a severe interference with the detainee's general right of personality.<sup>55</sup> It should therefore be decided on a case-by-case basis whether there are in fact indications of a danger to public security and order

<sup>48</sup> The aim of deportation monitoring is to identify structural deficiencies, to contribute to the protection of fundamental and human rights and to make the process and execution of deportations more transparent.

<sup>49</sup> Return Handbook, p. 55; [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return-handbook\\_de.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return-handbook_de.pdf) (retrieved on 18 March 2021).

<sup>50</sup> The activity report can be viewed at <https://www.diakonie-frankfurt-offenbach.de/wp-content/uploads/2021/03/Taetigkeitsbericht-der-Abschiebungsbeobachtung-2019.pdf> einzusehen (retrieved on 18 March 2021).

<sup>51</sup> The activity report can be viewed at <https://www.diakonie-hamburg.de/export/sites/default/.content/downloads/Fachbereiche/ME/Jahresbericht-Abschiebungsbeobachtung-2019-2020.pdf> (retrieved on 18 March 2021).

<sup>52</sup> The activity report can be viewed at [www.caritas-brandenburg.de/beratung-hilfe/flucht-und-migration/abschiebungsbeobachtung/](http://www.caritas-brandenburg.de/beratung-hilfe/flucht-und-migration/abschiebungsbeobachtung/) (retrieved on 18 March 2021).

<sup>53</sup> The activity report can be viewed at [https://www.ekir.de/www/downloads/Jahresbericht\\_Abschiebungsbeobachtung\\_NRW\\_2019.pdf](https://www.ekir.de/www/downloads/Jahresbericht_Abschiebungsbeobachtung_NRW_2019.pdf) (retrieved on 18 March 2021).

<sup>54</sup> Article 8(6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008.

<sup>55</sup> Federal Constitutional Court, order of 29 October 2003, file no.: 2 BvR 1745/01; order of 4 February 2009, file no.: 2 BvR 455/08.

that would justify a strip-search. Any such measures must adhere to the principle of proportionality.<sup>56</sup>

In order for the necessity and proportionality of the search to be verified, it is essential that the justification for the measure is also documented. This must be based on information showing an acute risk that justifies the search in the individual case. For example, it is not sufficient to state that the person concerned was transferred from a prison.

Separate and detailed documentation of strip-searches and their reasons as well as regular evaluations may have a preventive effect in helping to reduce or avoid the use of such measures. In addition, such documentation provides for transparency regarding measures which are often perceived as arbitrary by the persons concerned.

### Shackles

While inspecting the documentation on the means of restraint, it became apparent that plastic cuffs on hands and feet and “body cuff” restraints were used. Head, bite and spit guards were also used in several cases. The coercive measures were kept in place for several hours – in some cases during the entire deportation procedure.

While some staff members comprehensively documented the coercive measures, others merely noted the fact that means of restraint were used. Overall, the application of cuffs was only justified in some cases, and continued shackling was only justified in rare cases.

Due to the severity of the interference with fundamental rights, the justifications for strip-searches and coercive measures must be documented completely and comprehensibly so that it can be verified whether such measures were necessary and proportionate in the individual case. The reasons must be based on current information indicating a risk of endangerment.

The data relating to strip-searches and shackling are to be collected with a view to reviewing the necessity of the Federal Police's procedures in areas relevant to fundamental rights.

<sup>56</sup> Cologne Administrative Court, judgment of 25 November 2015, file no.: 20 K 2624/14.

### 11.3.4 – Shackling system

When inspecting the documentation, the National Agency placed a particular focus on the use of means of restraint, in particular on the respective shackling systems. Plastic cuffs on the hands and/or feet were used, as well as body cuffs and steel handcuffs in the case of transfers.

The use of plastic and metal cuffs can result in haematomas or compressed nerves. In its statement of 21 February 2020, the Federal Ministry of the Interior, Building and Community had previously given assurances that the possibility of using textile restraint belts with a locking function (Frontex model) would be examined.

The National Agency is particularly concerned about the fact that, in a large number of cases, staff not only used a body cuff but also applied plastic cuffs to the feet or to the hands and feet. In the view of the National Agency, this is not a reasonable practice. In this context, it should be recalled that means of restraint should be used no more than is absolutely necessary. A body cuff is a holding and restraining system for the hands and legs, the application of which must already be considered a last resort, to be used only if less severe measures are not sufficient.

Finally, it is particularly noteworthy that, in the context of one deportation procedure, two individuals who had been restrained were forced to wear nappies against their will. Applying this type of measure, or preventing detainees from using the toilet during the flight, can only bring about a degrading situation.<sup>57</sup>

Coercive measures always represent a serious interference and may only be used as a last resort when other options have been exhausted. They should furthermore be limited to the shortest possible period of time. In order to protect the right to physical integrity, any shackling should be carried out using textile hand restraint belts<sup>58</sup>, which should be kept in stock at all times.

<sup>57</sup> Cf. CPT/Inf (2003) 35, margin no. 35; Swiss Centre of Expertise in Human Rights, “*Menschenrechtliche Schranken bei der zwangsweisen Rückführung ausländischer Staatsangehöriger: Gutachten zubanden der Nationalen Kommission zur Verbütung von Folter (NKVF) erstattet von Prof. Dr. Jörg Künzli und Andreas Kind*”, p. 23.

<sup>58</sup> An example of this can be seen in the model used by Frontex during deportation flights.

# IV STANDARDS

The National Agency is tasked with preventing torture and other cruel, inhuman or degrading treatment or punishment at places of detention. This means that it has a preventive remit. For the fulfilment of this task, it is necessary that the Agency's recommendations are implemented not only in the facilities it visits but in all the relevant facilities across Germany. The National Agency translates recurring recommendations into standards. These standards are developed on a continual basis and are intended to provide the supervisory authorities and facilities with benchmarks for humane detention conditions and humane treatment of persons who are deprived of their liberty in any of the facilities under their responsibility. This helps ensure humane detention conditions while also increasing the effectiveness of the National Agency's work despite the large number of facilities. The standards are also published on the website of the National Agency.

To ensure the respect of human dignity, the National Agency considers the following standards to be indispensable.

# 1 – DEPORTATION

## 1.1 – Time of collection

Collections at night should be avoided.

## 1.2 – Deportation from prison

Where persons who are required to leave the country are currently serving a prison sentence, every effort should be made to ensure they are deported before the end of their sentence. At the very least, it should be ensured that the conditions for deportation are in place before they have fully served their prison sentence.

## 1.3 – Deportation from educational, medical, and care facilities

As a rule, deportations should not be carried out from hospitals, schools or daycare facilities.

## 1.4 – Respect for the best interests of children

Families should not be separated as a result of deportation measures. Children should not be shackled. Parents should not be shackled in the presence of their children. If children are deported, there should always be one person who is tasked with ensuring the child's best interests are respected during the deportation procedure. Suitable facilities to keep children occupied should be available at the airport.

## 1.5 – Strip-searches

Strip-searches involving a visual inspection of the detainee's genital area represent a severe interference with the detainee's general right of personality.<sup>59</sup> It should therefore be decided on a case-by-case basis whether there are indications of a danger to public security and order that would justify a strip-search. Any such measures must adhere to the principle of proportionality.<sup>60</sup>

If a strip-search is carried out, the reasons for this should be documented in a clear and comprehensible manner. Furthermore, the search should be conducted as respectfully as possible, for example involving two stages where half the body remains dressed in each stage. Staff members of the opposite sex to the detainee must not be present during such searches.

<sup>59</sup> Federal Constitutional Court, order of 5 March 2015, file no.: 2 BvR 746/13, margin no. 33.

<sup>60</sup> Cologne Administrative Court, judgment of 25 November 2015, file no.: 20 K 2624/14, margin no. 115 et seqq.

## 1.6 – Further training for prison staff

Deportations should be carried out by members of staff who are sufficiently qualified and have received adequate further training.

## 1.7 – Luggage

Every person awaiting deportation must be given the opportunity to pack personal belongings. Steps must be taken to ensure that the person being deported is dressed appropriately for the procedure and for the country of destination, and that identity documents, necessary medication, provisions for children, and any necessary medical aids (e.g. glasses) are packed. One of the persons carrying out the deportation should make sure that luggage is also packed for children being deported. A supply of basic hygiene products and sufficient clothing should be kept at the airport and issued as necessary.

## 1.8 – Cash lump sum

All deportees must have sufficient financial means to pay for the journey from the airport to their final destination, as well as for meals needed during this journey.

## 1.9 – Information on the time of execution of the deportation order

For humanitarian reasons, wherever individual cases require – for example if there are children or sick people in the family – persons required to leave the country should be informed at least a week in advance that their deportation is imminent.

## 1.10 – Information on the deportation procedure

At the time of collection, persons being deported should be provided with information on the deportation procedure. This should be done immediately, comprehensively, in writing and in a language they understand. The information should include the following details:

- + The schedule of the deportation including flight times
- + Information on luggage
- + Information on rights during the deportation procedure



### **1.11 – Communication during the entire deportation procedure**

It must be possible for persons being deported and the accompanying prison staff to communicate during the entire deportation procedure. The written information on the person's rights and the schedule of the deportation cannot substitute for the service of an interpreter where communication difficulties arise. Interpreters may also assist via telephone or video conferencing.

### **1.12 – Contact with legal counsel**

During the deportation procedure, persons awaiting deportation must be allowed to contact legal counsel. Such contact must be made possible at the beginning of the deportation procedure so that any necessary legal measures can be taken in due time. In case the person concerned has so far had no contact with a lawyer, they must be given contact details for emergency legal services.

### **1.13 – Special consideration for children and sick persons**

During deportation procedures, special consideration should be given to the needs of children and sick persons, including any particular care they require.

### **1.14 – Phone calls with relatives**

All persons awaiting deportation should be given the opportunity to contact their relatives.

### **1.15 – Mobile phones**

Mobile phones should only be confiscated during a deportation procedure if this is deemed necessary in substantiated individual cases. If circumstances no longer require the confiscation of mobile phones, they must be returned to their owners. Before a mobile phone is confiscated, the person being deported must be given the opportunity to write down important phone numbers.

### **1.16 – Meals**

Sufficient amounts of food and drink must be available during the entire deportation procedure.

## 2 – CUSTODY AWAITING DEPORTATION AND CUSTODY TO SECURE DEPARTURE

### 2.1 – Initial medical examination

Every person required to leave the country must undergo an initial medical examination upon admission into custody awaiting deportation (*Abschiebungshaft*) or custody to secure departure (*Ausreisegewahrsam*). It must be ensured that any indications of trauma or mental illness are diagnosed. In case of communication difficulties, an interpreter should always be called upon to assist in initial medical examinations. For reasons of confidentiality, translations should not be performed by other detainees awaiting deportation. Moreover, if translations are performed by staff members or other detainees awaiting deportation, there is no guarantee that technical terms and subject matter will be correctly translated into the other language.

### 2.2 – External contact

It should be possible for persons required to leave the country to receive visitors without restrictions, especially relatives. In order to establish or maintain contact with their families and home country, and to facilitate their return, they should also be allowed to use mobile phones and have access to the internet.

### 2.3 – Work and recreational activities

It should be possible for persons required to leave the country to make meaningful use of their time. There should be sufficient opportunities to do so every day. This includes access to common rooms, prayer rooms and kitchens where detainees can prepare their own meals.

### 2.4 – Strip-searches

Strip-searches involving a visual inspection of the detainee's genital area represent a severe interference with the detainee's general right of personality. It should therefore be decided on a case-by-case basis whether there are indications of a danger to public security and order that would justify a strip-search. Any such measures must adhere to the principle of proportionality.

If a strip-search is carried out, the reasons for this should be documented in a clear and comprehensible manner. Furthermore, the search should be conducted as respectfully as possible, for example involving two stages where half the body remains dressed in each stage. Staff members of the opposite sex to the detainee must not be present during such searches.

### 2.5 – Visibility of toilets

Staff members should indicate their presence before entering a cell, especially if the toilet is not partitioned off. The person in the cell might be using the toilet and should be given the opportunity to indicate this.

CCTV cameras must be installed in such a way that the toilet area is either not visible on the monitor at all or, alternatively, is only shown in the form of pixelated images. If deemed necessary in individual cases, it may be possible to permit unrestricted monitoring of detainees held in specially secured cells due to an acute danger of self-harm or suicide. However, any such decision should be carefully considered, substantiated and clearly documented. If a toilet area is indeed covered by CCTV monitoring and is not pixelated, only persons of the same sex as the detainee should carry out the monitoring.

### 2.6 – Physical restraint

The National Agency defines physical restraint (*Fixierung*) as the act of depriving a person of their freedom to move by binding their arms, legs and in some cases the centre of the body, with the result that they are unable or only marginally able to change their sitting or lying position independently. The Agency requires the following conditions be met for the use of this measure:

The use of physical restraints is only to be ordered as a last resort, on the basis of clear and precisely defined criteria, and for the shortest possible period of time. To minimise the risk of physical harm, restraints should be applied using a strap-based system. Persons being physically restrained should, at the very least, be given paper underwear and a paper shirt to wear in order to protect their sense of modesty. They must be

checked on regularly by a doctor. Persons under physical restraint must also be observed continuously and personally by therapeutic or care staff who are in direct proximity to the detainee (one-on-one supervision). For any physical restraint applied for more than just a short period of time, a court decision is required.<sup>61</sup> The measure should be discussed with the detainee concerned afterwards.<sup>62</sup> The detainee should also be informed after the measure of the possibility to have a court review the permissibility of the restraint procedure.<sup>63</sup>

Written reasons should be given for every instance of physical restraint. This includes documenting which less severe measures have already been tried and an explanation of why they failed.

### 2.7 – CCTV monitoring

CCTV monitoring should only be used in individual cases where it is imperative to protect the person concerned. The reasons for the use of CCTV monitoring should be documented. In addition, the person concerned must be informed that monitoring is taking place. The mere fact that the camera is visible is not sufficient. It should be possible for the person concerned to discern whether the camera is running.

### 2.8 – Clothing

As a rule, persons required to leave the country should be allowed to wear their own clothes.

### 2.9 – Staff

The staff of facilities for the enforcement of custody awaiting deportation (*Abschiebungshaft*) or custody to secure departure (*Ausreisegewahrsam*) should be specifically chosen and trained to work in this field.

### 2.10 – Psychological and psychiatric care

The facility should make sure that a psychologist or psychiatrist is called in where this is necessary.

### 2.11 – Legal advice

Persons required to leave the country must be given the opportunity to seek legal advice.

### 2.12 – Legal basis

The detention conditions of persons in custody awaiting deportation (*Abschiebungshaft*) and custody to secure departure (*Ausreisegewahrsam*) must differ from those of sentenced prisoners.<sup>64</sup> Furthermore, any interference with fundamental rights beyond the mere placement in such a detention facility requires its own legal basis.<sup>65</sup> Consequently, a specific legal basis must be established for the enforcement of custody awaiting deportation and custody to secure departure.

### 2.13 – Respectful treatment

Detainees awaiting deportation should be treated respectfully. For example, staff members should indicate their presence in a suitable manner before entering a room, and should, as a rule, speak to detainees using polite forms of address.

### 2.14 – Placement of minors

Unaccompanied minors should not be placed in facilities for the enforcement of custody awaiting deportation or custody to secure departure, but in child and youth welfare facilities. If minors are placed in facilities for custody awaiting deportation or custody to secure departure together with their parents or legal guardians, it must be ensured that such custody takes account of the child's best interests.

### 2.15 – Weapons in custody

In facilities for custody awaiting deportation or custody to secure departure, officers should remove firearms before entering a custody suite.

Due to the significant health risks involved, the use of pepper spray in confined spaces is not a

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<sup>61</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 69.

<sup>62</sup> DGPPN [German Society for Psychiatry and Psychotherapy] (2018): “S<sub>3</sub>-Leitlinie: Verhinderung von Zwang-Prävention und Therapie aggressiven Verhaltens bei Erwachsenen”, [https://www.dgppn.de/\\_Resources/Persistent/154528053e2d1464d9788c0b2d298ee4a9dcca3/S3%20LL%20Verhinderung%20von%20Zwang%20LANG%20BLITERATUR%20FINAL%2010.9.2018.pdf](https://www.dgppn.de/_Resources/Persistent/154528053e2d1464d9788c0b2d298ee4a9dcca3/S3%20LL%20Verhinderung%20von%20Zwang%20LANG%20BLITERATUR%20FINAL%2010.9.2018.pdf) (retrieved on 18 March 2021).

<sup>63</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 85.

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<sup>64</sup> Article 16 para. 1 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

<sup>65</sup> Federal Constitutional Court, judgment of 31 May 2006, file no.: 2 BvR 1673/04, NJW 2006, 2093 (2093).

proportionate measure under any circumstances. It should therefore be avoided inside detention facilities.<sup>66</sup>

### **2.16 – Admission meeting**

An admission meeting must be held with every newly admitted person, during which they should be informed of the reason for their detention. They should also be informed of their rights.

During these meetings, special attention should be paid to any indications of mental illness. If necessary, a psychologist should be involved.

For these purposes, the detention facility's staff members responsible for conducting admission meetings must receive specialised training enabling them to recognise signs of trauma or mental illness. In case of communication difficulties, an interpreter must be called upon to assist in admission meetings.

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<sup>66</sup> ECHR, *Tali v. Estonia*, judgment of 13 February 2014, Application no. 66393/10, § 78; CPT/Inf (2008) 33, margin no. 86.

## 3 – FEDERAL AND LAND POLICE, CUSTOMS

### 3.1 – Furnishing and fittings, conditions in custody cells

The conditions in custody cells, including furnishings and fittings, must uphold the human dignity of detainees. Every custody cell should be equipped with a smoke detector, an emergency button, adjustable lighting, a non-flammable, washable mattress, a blanket and a pillow. Where a custody cell is only equipped with a low bed, it should have additional seating at standard height.

To ensure the protection of persons placed in custody in the event of a fire, all custody cells must be equipped with a smoke detector.

In addition, it must be possible for persons deprived of their liberty to call for attention through an emergency button. It must be guaranteed that the alarm system is working. This should be checked before each occupancy of a custody cell.

It should be possible to adjust the lighting in custody cells to ensure that persons taken into custody are able to sleep, while at the same time reducing the risk of injury and enabling detainees to find their way in the dark.

Every custody cell should receive natural light, including those intended for short-term custody. Furthermore, a suitable room temperature should be ensured in custody cells.

### 3.2 – Instruction about rights

Each and every person deprived of their liberty must be informed of their rights, immediately and without exception. To this end, forms containing all the relevant information should be available in various languages. They must at the very least include information about the fact that anyone who is taken into custody has the right to be examined by a doctor, to consult a lawyer, to notify a trusted third party and, where applicable, inform the consulate of their home country. It should be documented in the police custody record book that the person taken into custody has been instructed about their rights so that it is immediately clear to staff members following a shift change-over whenever the relevant information has not been communicated for any specific reason. If a person was not instructed about their rights when they were brought into custody, this must be done at a later point in time.

### 3.3 – Documentation

Custody documentation at police stations and customs offices should be clear and comprehensible. This serves to protect those being held in custody, as well as the responsible staff members.

The following details should be documented:

- + The detainee's personal details
- + When the deprivation of liberty began
- + The staff members responsible for taking the person concerned into custody and for supervising them during custody
- + The health condition of the person concerned
- + Whether the person was informed of their rights
- + Whether the person was informed of the reason for the deprivation of liberty
- + Whether a judicial order had been obtained
- + If a strip-search was conducted, the reasons for this
- + The name of the staff member conducting the strip-search
- + The times of checks, including the initials of the responsible staff member
- + The time and type of meals
- + The removal and subsequent return of personal objects
- + The time of release
- + If it was not possible to inform the persons concerned of their rights when they were brought into custody, it should be documented whether this was done at the latest by the time they were released.

Senior officers should check at regular intervals whether the documentation is complete. These checks should be recorded.

### 3.4 – Strip-searches

Strip-searches involving a visual inspection of the detainee's genital area represent a severe interference with the detainee's general right of personality.<sup>67</sup> It should therefore be decided on a case-by-case basis whether there are indications of a danger to public security and order that would justify a strip-search. Any such measures must adhere to the principle of proportionality.<sup>68</sup>

If a strip-search is carried out, the reasons for this should be documented in a clear and comprehensible manner. Furthermore, the search should be conducted as respectfully as possible, for example involving two stages where half the body remains dressed in each stage.

### 3.5 – Visibility of custody cells

It must not be possible for third persons to look inside a custody cell.

### 3.6 – Visibility of toilets

It must be ensured without exception that persons taken into custody cannot be observed when using the toilet. For example, a screen could be installed to block the view of the toilet area.

CCTV cameras must be installed in such a way that the toilet area is either not visible on the monitor at all or, alternatively, is only shown in the form of pixelated images. Unrestricted monitoring of the custody cell should only be permitted in carefully assessed, substantiated and clearly documented individual cases where there is an acute danger of self-harm or suicide. If a toilet area is indeed covered by CCTV monitoring and is not pixelated, only persons of the same sex as the detainee should carry out the monitoring.

### 3.7 – Shackles

In contrast to physical restraint, “shackling”, in the National Agency’s usage of the term, is the restriction of movement by tying together arms or legs, or by tying them to an object.

Tying persons to the wall or to other objects violates their human dignity and must be avoided without exception.

In order to protect the right to physical integri-

ty, any shackling in custody should be carried out using textile hand restraint belts<sup>69</sup>, which should be kept in stock at all times.

### 3.8 – Physical restraint

Physical restraints should not be used at all during police custody or customs custody.

### 3.9 – Size of custody cells

Custody cells must be designed in a way that ensures humane detention conditions.

A single-occupancy custody cell must have a floor space of at least 4.5 square metres. Multiple-occupancy custody cells must have a floor space of at least 3.5 square metres per person.

Facing walls must be separated by a distance of at least two metres, and the ceiling must be considerably higher than two metres.

### 3.10 – CCTV monitoring

CCTV monitoring should only be used in police stations and customs offices in individual cases where it is imperative for the protection of the person concerned. The reasons for the use of CCTV monitoring should be documented. In addition, the person concerned must be informed that monitoring is taking place. The mere fact that the camera is visible is not sufficient. It should be possible for the person concerned to discern whether the camera is running.

### 3.11 – Multiple-occupancy of custody cells

In order to ensure humane detention conditions, it is imperative that custody cells accommodating more than one person have a fully partitioned toilet with separate ventilation.

### 3.12 – Right to medical examination

Every person taken into custody has the right to consult a doctor.

### 3.13 – Respectful treatment

Persons being held in detention should be treated respectfully. For example, staff members should indicate their presence in a suitable manner before entering a custody cell, and should, as a rule, speak to detainees using polite forms of address.

<sup>67</sup> Federal Constitutional Court, order of 5 March 2015, file no.: 2 BvR 746/13, margin no. 33.

<sup>68</sup> Cologne Administrative Court, judgment of 25 November 2015, file no.: 20 K 2624/14, margin no. 115 et seqq.

<sup>69</sup> An example of this can be seen in the model used by FRONTEX during deportation flights.

### **3.14 – Independent complaints offices and investigation bodies**

An essential element of preventing abuse by staff members is the detection, prosecution and punishment of misconduct.

Every *Land* should therefore set up independent complaints offices and investigation bodies.<sup>70</sup>

### **3.15 – Confidentiality of conversations**

Persons in custody must be given the opportunity to have confidential conversations with their lawyers. Confidentiality should also be assured for conversations with doctors or relatives.

### **3.16 – Weapons in custody**

Officers should remove firearms before entering a custody suite.

Due to the significant health risks involved, the use of pepper spray in confined spaces is not a proportionate measure under any circumstances. It should therefore be avoided inside police stations.<sup>71</sup>

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<sup>70</sup> See, *inter alia*, ECHR, Kummer v. Czech Republic, judgment of 25 July 2013, Application no. 32133/11, § 83; Eremiášova and Pechová v. Czech Republic, judgment of 16 February 2012, Application no. 23944/04, § 135.

<sup>71</sup> ECHR, Tali v. Estonia, judgment of 13 February 2014, Application no. 66393/10, § 78; CPT/Inf (2008) 33, margin no. 86.

## **4 – CHILD AND YOUTH WELFARE FACILITIES**

### **4.1 – Possibilities for complaint**

Children and juveniles must be in a position to submit complaints to a suitable complaint body. In addition to contact persons within the facility, it is important that an external ombudsperson exists who has no ties with the facility.

It must be ensured that children and juveniles can contact such an ombudsperson easily and confidentially. The complaint channels and all necessary contact details should be provided in an information leaflet worded in a child-appropriate manner, or in the facility's house rules, and explained to them when they are first admitted to the facility.

### **4.2 – Outdoor exercise**

Every person deprived of their liberty should be offered at least one hour of outdoor exercise per day. Children and juveniles should be offered considerably more time outdoors for exercise.

### **4.3 – Information on rights**

When they are admitted to the facility, children and juveniles must be informed in writing about their rights. This information must be given in a manner that is appropriate to their age.

### **4.4 – CCTV monitoring**

Children and juveniles should not be subjected to uninterrupted and indiscriminate CCTV monitoring. Under no circumstances can CCTV monitoring replace the presence of members of staff. The reasons for the use of CCTV monitoring should be documented. In addition, the persons concerned must be informed of the monitoring. The mere fact that the camera is visible is not sufficient. It should be possible for the person concerned to discern whether the camera is running.



## 5 – PRISONS

### 5.1 – Clothing worn in specially secured cells

When detained in a specially secured cell containing no dangerous objects, prisoners should be given at least a pair of paper underwear and a paper shirt to wear.

### 5.2 – Strip-searches

According to the Federal Constitutional Court, strip-searches involving a visual inspection of detainees' genital area represent a severe interference with their general right of personality.<sup>72</sup> It is not permissible to carry out strip-searches routinely and without case-specific suspicions.<sup>73</sup> To satisfy this requirement, general strip-search orders must allow for exceptions if the principle of proportionality so demands. Staff must be made aware that in individual cases it may not be necessary for the prisoner to undress fully.

If it is indeed necessary that the person concerned undress fully, then the search should be conducted in a respectful procedure, for example involving two stages where half the body remains dressed in each stage.

### 5.3 – Showers

Persons who have been deprived of their liberty should be given the opportunity to shower alone if they wish to do so. At least one shower should be partitioned off in communal shower rooms.

### 5.4 – Visibility of toilets

Staff members should indicate their presence before entering a cell, especially if the toilet is not partitioned off. The person in the cell might be using the toilet and should be given the opportunity to indicate this.

CCTV cameras must be installed in such a way that the toilet area is either not visible on the monitor at all or, alternatively, is only shown in the form of pixelated images. If deemed necessary in individual cases, it may be possible to per-

<sup>72</sup> Federal Constitutional Court, order of 5 March 2015, file no.: 2 BvR 746/13, margin nos. 33-35.

<sup>73</sup> Federal Constitutional Court, order of 10 July 2013, file no.: 2 BvR 2815/11, margin no. 16, with reference to ECHR, *Van der Ven v. the Netherlands*, judgment of 4 February 2003, Application no. 50901/99, § 62.

mit unrestricted monitoring of detainees held in specially secured cells due to an acute danger of self-harm or suicide. However, any such decision should be carefully considered, substantiated and clearly documented. If a toilet area is indeed covered by CCTV monitoring and is not pixelated, only persons of the same sex as the detainee should carry out the monitoring.

### 5.5 – Solitary confinement

To mitigate the negative impact of solitary confinement on mental and physical health, detainees should be provided with sufficient opportunities for human contact (e.g. extended visiting times) and to engage in meaningful activities. Those placed in solitary confinement are also to be seen regularly by a psychiatrist or psychologist. This should take place in a suitable and confidential environment.

### 5.6 – Physical restraint

The use of physical restraints<sup>74</sup> is only to be ordered as a last resort, on the basis of clear and precisely defined criteria, and for the shortest possible period of time. To minimise the risk of physical harm, restraints should be applied using a strap-based system. Persons being physically restrained should, at the very least, be given paper underwear and a paper shirt to wear in order to protect their sense of modesty. The detainee must also be checked on regularly by a doctor. Persons under physical restraint must also be observed continuously and personally by therapeutic or care staff who are in direct proximity to the individual concerned (one-on-one supervision). For any physical restraint applied for more than just a short period of time, a court decision is required.<sup>75</sup> The measure should be discussed with the detainee concerned afterwards.<sup>76</sup> The detain-

<sup>74</sup> For definition, see part IV 2.6 - Physical restraint.

<sup>75</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 69.

<sup>76</sup> DGPPN [German Society for Psychiatry and Psychotherapy] (2018): “S3-Leitlinie: Verbindung von Zwang: Prävention und Therapie aggressiven Verhaltens bei Erwachsenen”, [https://www.dgppn.de/\\_Resources/Persistent/154528053e2d1464d9788cob2d298ee4a9d1cca3/S3%20LL%20Verhinderung%20von%20Zwang%20LANG%20BLITERATUR%20FINAL%2010.9.2018.pdf](https://www.dgppn.de/_Resources/Persistent/154528053e2d1464d9788cob2d298ee4a9d1cca3/S3%20LL%20Verhinderung%20von%20Zwang%20LANG%20BLITERATUR%20FINAL%2010.9.2018.pdf) (retrieved on 18 March 2021).

ee should also be informed after the measure of the possibility to have a court review the permissibility of the restraint procedure.<sup>77</sup>

Written reasons should be given for every instance of physical restraint. This includes documenting which less severe measures have already been tried and an explanation of why they failed.

#### **5.7 – Cell size**

In order for detention conditions to be humane, a single-occupancy cell must have a floor space of at least six square metres<sup>78</sup>, excluding the sanitary area. In cases where the sanitary area is not partitioned, approximately one further square metre should be added for that area, giving a total floor space of at least seven square metres. For multiple-occupancy, a further four square metres of floor space must be added to this figure for each additional person, excluding the sanitary area.

#### **5.8 – CCTV monitoring**

CCTV monitoring in prisons should only be conducted in individual cases where this is imperative to protect the person concerned. The reasons for the use of CCTV monitoring should be documented. In addition, the person concerned must be informed that monitoring is taking place. The mere fact that the camera is visible is not sufficient. It should be possible for the person concerned to discern whether the camera is running.

#### **5.9 – Multiple-occupancy of prison cells**

According to the case law of the German Federal Constitutional Court<sup>79</sup>, prison cells accommodating more than one person must have a completely separate toilet with separate ventilation. Multiple-occupancy without such a separation constitutes a violation of human dignity.

#### **5.10 – Use of segregation units**

In addition to the specially secured cells containing no dangerous objects, facilities may also have segregation units with similar furnishings

and fittings. In such cases, the same detention conditions must be applied as for the specially secured cells. Furthermore, comprehensive documenting must be carried out, in line with procedures for specially secured cells.

#### **5.11 – Respectful treatment**

Detainees should be treated respectfully. This includes staff indicating their presence in a suitable manner before entering the prison cell, and speaking to detainees using polite forms of address.

#### **5.12 – Peepholes**

With the exception of observation rooms, peepholes should be made opaque in order to protect the privacy of the detainees.

#### **5.13 – Interpretation during medical consultations**

Confidentiality must be assured for medical consultations, which are subject to medical secrecy. Furthermore, it must be ensured, where necessary, that technical terms and subject matter are adequately translated into the other language. In case of communication difficulties, an interpreter must be called upon to assist. Translation by fellow inmates or any of the facility's non-medical staff is not appropriate.

#### **5.14 – Handling confidential medical information**

In order to ensure medical information is handled confidentially, details concerning infectious diseases, for example, should only be recorded in medical files and not in prisoner files. This ensures that only medical personnel are made aware of such information, and not general prison staff.

#### **5.15 – Conditions in prison cells**

In prisons, inmates should have access to natural, unfiltered light in their cells. Their view outside may not be obstructed by opaque plexiglass panes, for instance.

<sup>77</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 85.

<sup>78</sup> The absolute minimum requirement is six square metres. In the National Agency's view, cells that are smaller than this violate Article 1 of the German Basic Law. Any additional legal requirements must, of course, also be observed, and are welcomed.

<sup>79</sup> Federal Constitutional Court, judgment of 22 February 2011, file no.: 1 BvR 409/09, margin no. 30.

## 6 – PSYCHIATRIC CLINICS

### 6.1 – Outdoor exercise

Every person deprived of their liberty should be offered at least one hour of outdoor exercise per day. Children and juveniles should be offered considerably more time outdoors for exercise.

### 6.2 – Documentation of coercive measures

All coercive measures should be documented comprehensively, comprehensibly and completely. The measure must be documented in writing. This includes documenting which less severe measures have already been tried and an explanation of why they failed.

### 6.3 – Physical restraint

The use of physical restraints<sup>80</sup> is only to be ordered as a last resort, on the basis of clear and precisely defined criteria, and for the shortest possible period of time. Persons under physical restraint must be observed continuously and personally by therapeutic or care staff who are in direct proximity to the individual concerned (one-on-one supervision). For any physical restraint applied for more than just a short period of time, a court decision is required.<sup>81</sup> The measure should be discussed with the detainee concerned afterwards.<sup>82</sup> The detainee should also be informed after the measure of the possibility to have a court review the permissibility of the restraint procedure.<sup>83</sup>

### 6.4 – Information on rights

Patients must receive written information on their rights in the psychiatric facility. Where young people are concerned, this information should be provided in an age-appropriate form.

### 6.5 – CCTV monitoring

Persons held in psychiatric facilities should not be subjected to uninterrupted and indiscriminate CCTV monitoring. Under no circumstances can CCTV monitoring replace the presence of members of staff. The reasons for the use of CCTV monitoring should be documented. In addition, the person concerned must be informed that monitoring is taking place. The mere fact that the camera is visible is not sufficient. It should be possible for the person concerned to discern whether the camera is running.

### 6.6 – Respectful treatment

Patients should be treated respectfully. For example, staff members should indicate their presence by knocking on the door before entering a room, and should, as a rule, speak to patients using polite forms of address.

### 6.7 – Confidentiality of conversations

In psychiatric facilities, measures should be introduced to ensure that phone calls can be made confidentially and personal conversations can be conducted in private.

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<sup>80</sup> For definition, See part IV 2.6- Physical restraint.

<sup>81</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 69.

<sup>82</sup> DGPPN [German Society for Psychiatry and Psychotherapy] (2018): “S<sub>3</sub>-Leitlinie: Verhinderung von Zwang-Prävention und Therapie aggressiven Verhaltens bei Erwachsenen”, [https://www.dgppn.de/\\_Resources/Persistent/154528053e2d1464d9788cob2d298ee4a9dcca3/S3%20LL%20Verhinderung%20von%20Zwang%20LANG%20BLITERATUR%20FINAL%2010.9.2018.pdf](https://www.dgppn.de/_Resources/Persistent/154528053e2d1464d9788cob2d298ee4a9dcca3/S3%20LL%20Verhinderung%20von%20Zwang%20LANG%20BLITERATUR%20FINAL%2010.9.2018.pdf) (retrieved on 18 March 2021).

<sup>83</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 85.

## 7 – DETENTION FACILITIES OF THE FEDERAL ARMED FORCES

### 7.1 – Detention cells of the Federal Armed Forces: conditions, furnishing and fittings

In the detention facilities of the Federal Armed Forces, the conditions in the cells, including furnishings and fittings, must uphold the human dignity of detainees. Every detention cell should be equipped with a smoke detector, an emergency button, adjustable lighting, a non-flammable, washable mattress, a blanket and a pillow. In addition, it should have seating at standard height and a table.

To ensure the protection of detainees in the event of a fire, all detention cells must be equipped with a smoke detector.

In addition, it must be possible for persons deprived of their liberty to call for attention through an emergency button. It must be guaranteed that the alarm system is working. This should be checked before each occupancy of a detention cell.

It should be possible to adjust the lighting in detention cells to ensure that detainees are able to sleep, while at the same time reducing the risk of injury and enabling them to find their way in the dark.

In the detention facilities of the Federal Armed Forces, detainees should have access to natural, unfiltered light in their cells. Their view outside may not be obstructed by opaque plexiglass panes, for instance. Furthermore, a suitable room temperature should be ensured in detention cells.

### 7.2 – Instruction about rights

Each and every person deprived of their liberty must be informed of their rights, immediately and without exception. To this end, forms containing all the relevant information – at the very least information about the fact that the persons concerned have the right to be examined by a doctor, to consult a lawyer and to notify a trusted third party – must be kept available.

### 7.3 – Specially secured cells

In specially secured cells, there must be no objects that could enable detainees to injure themselves.

In addition, close supervision and medical observation of detainees must be ensured.

Where a person is placed in a specially secured cell and is therefore isolated, it is critical that the medical staff give particular attention to the person's health and that regular medical checks are ensured in order to prevent health damage. Close supervision must be ensured in order to exert a de-escalating influence on the detainee and to help terminate the measure in a timely manner.

### 7.4 – Documentation

Documentation in detention facilities should be clear and comprehensible. In order to protect the individuals held in detention as well as the soldiers in charge (detention enforcement officers), all information related to the detention must be fully documented.

The following details should be documented:

- + The detainee's personal details
- + When the deprivation of liberty began
- + The soldiers in charge (detention enforcement officers) at the time the person to be detained is taken to the facility
- + The fitness for detention of the person concerned
- + The health condition of the person concerned
- + Whether the person was informed of their rights
- + Whether the person was informed of the reason for the deprivation of liberty
- + Whether a judicial order has been obtained
- + The times of checks, including the initials of the soldiers in charge
- + The time and type of meals
- + Outdoor exercise
- + The daily routine of the person concerned (whether they leave detention to perform

their duties or to engage in purposeful activities)

- + The removal and subsequent return of personal objects
- + The time of release

Senior officers should check at regular intervals whether the documentation is complete. These checks should be recorded.

#### **7.5 – Visibility of toilets**

The soldiers in charge (detention enforcement officers) should indicate their presence in an appropriate manner before entering a detention cell, especially if the toilet is not partitioned off. The person in the cell might be using the toilet and should be given the opportunity to indicate this.

#### **7.6 – Size of detention cells**

In order for detention conditions to be humane, a detention cell must have a floor space of at least six square metres, excluding the sanitary area. In cases where the sanitary area is not partitioned, approximately one further square metre should be added for that area, giving a total floor space of at least seven square metres.

#### **7.7 – Respectful treatment**

Persons being held in detention should be treated respectfully. This includes staff indicating their presence in a suitable manner before entering the detention cell, and speaking to detainees using polite forms of address. Should peepholes be deemed necessary in substantiated individual cases, the soldiers in charge (detention enforcement officers) should make themselves heard before looking through the peephole.

#### **7.8 – Fitness for detention**

Whether a person to be detained is actually fit for detention should always be determined on the basis of a medical examination.

# V VISITS

# 1 – DEPORTATION

## 1.1 – Introduction

Due to the pandemic, the National Agency observed only the ground handling phase of a charter operation from Düsseldorf Airport to Tbilisi (Georgia) on 10 September 2020.

Apart from that, the Agency requested the documentation of all deportation procedures carried out between March and June as well as in November and December 2020. It focussed particularly on the implementation of measures to prevent the spread of the COVID-19 pandemic and related measures to protect the deportees.<sup>84</sup>

The monitoring of return operations should cover all activities from preparation for departure until reception in the country of return or – in the event of a failed deportation attempt – until return to the place of departure. This also applies to Germany. As far as this monitoring is concerned, the National Agency has identified particular challenges.

### 1.1.1 – Collection and transfer to the airport

As a rule, the immigration authorities of the respective *Länder* are responsible for the enforcement of deportation procedures. Deportees are generally picked up by the relevant immigration authorities and/or *Land* police and taken to the airport.

The fact that multiple actors are involved makes it more difficult for the National Agency's standards to be implemented nationwide.

The procedures followed (e.g. avoiding collection at night, transferring persons together with their luggage and handing out of a cash lump sum) should be uniform throughout Germany and in line with the standards set by the National Agency.

Another problem is that, in contrast to the Federal Police, the immigration authorities and the *Land* police do not generally have any staff units specially trained for deportation procedures. The National Agency's work has demonstrated in several respects that the staff of the *Länder* may be faced with difficult situations prior to the arrival

of deportees at the airport. For instance, when the deportees were taken to Düsseldorf Airport on 10 September 2020, it was observed that some of the officers of the *Land* police and the immigration authorities from the returning *Länder* who were involved in the transfer did not seem to be sufficiently prepared for the procedure. In one case, for example, they were not able to give a satisfactory answer to the question of whether a deportee had any injuries and how much cash the person concerned was carrying.

### 1.1.2 – Time at the airport and security staff

Before the *Länder* started to carry out return operations autonomously, the Federal Police generally took control of the deportation procedure and were thus responsible for enforcing it humanely.

#### Private security staff as escorts

In 2019, the National Agency became aware of the fact that, in some cases, private security staff are entrusted with escorting the deportees during the flight until they are handed over in the country of destination.

While the escorting of deportees by an airline's private security staff is, in principle, compatible with Article 8 of the Return Directive, this does not mean that the state can evade its general duty of supervision.<sup>85</sup>

The National Agency encountered this problem when observing a charter operation from Nuremberg to Kosovo, which was organised by Bavaria and took place on 20 November 2019, on the flight, the deportees were escorted by private security staff employed by the airline Air Bulgaria. The National Agency's delegation was refused access to the aircraft.

Following an exchange on the matter with the Bavarian State Ministry of the Interior, Sport and Integration, the National Agency was assured that the *Land* Office for Asylum and Returns (Landesamt für Asyl und Rückführungen, LfAR) had obtained, from the charter company carrying

<sup>84</sup> See chapter III 3.9 COVID-19 pandemic – Findings and recommendations according to type of facility – Deportation.

<sup>85</sup> The Committee of Ministers of the Council of Europe, 24 May 2005, "Twenty Guidelines on Forced Return", p. 51, [https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20\\_Guidelines\\_Forced\\_Return\\_en.pdf](https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf). "Privatization should not lead the public authorities to escape or diminish their responsibilities." (Retrieved on 18 March 2021).

out the flight, a verbal assurance of a right to access the aircraft in connection with any measures carried out in the future. In addition to LfAR staff members, this right of access also applied to third parties designated by the LfAR, thus including representatives of the National Agency for the Prevention of Torture. As part of the award procedure for carrying out future charter operations, it was also envisaged to extend the contractual conditions to include a right, expressly stipulated by contract, for staff members of the *Land* of Bavaria and for persons designated by them – thus also including the National Agency – to access the aircraft. In order to allow the National Agency to exercise its mandate effectively, this must also apply to the persons escorting deportees during flights.

### Autonomous organisation of charter operations by the *Länder*

As an enquiry carried out by the National Agency in December 2020 revealed, several *Länder* have started organising return operations autonomously in recent years. With the exception of Bavaria, none of the *Länder* informed the National Agency of these operations, which prevented it from effectively carrying out its mandate.

According to the information provided by the competent ministries, a total of 2067 deportees were involved in operations organised at *Land* level in 2020 alone.<sup>86</sup>

Since the ministries of some *Länder* questioned the National Agency's competence in this respect, reference is once again made to the National Agency's mandate.<sup>87</sup>

### Independent deportation monitoring and reg-

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<sup>86</sup> These figures are based on the responses to the National Agency's enquiry. Some of the operations carried out in December 2020 are not included in the information provided. Lower Saxony did not provide any comprehensible information on operations it organised autonomously.

<sup>87</sup> See chapter II 2 – Mandate of the National Agency. Regarding this issue, cf. *inter alia*: Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/57/4: "The preventive approach underpinning the Optional Protocol means that as extensive an interpretation as possible should be made in order to maximize the preventive impact of the work of the national preventive mechanism."; APT, OPCAT Briefings, NATIONAL PREVENTIVE MECHANISMS: Monitoring the forced deportation flights of migrants, <https://www.apt.ch/en/resources/publications/monitoring-forced-deportation-flights-migrants-briefing-paper-2012> (retrieved on 18 March 2021).

ular exchanges between authorities and non-state actors help to ensure that the legal requirements regarding return operations and the stipulations regarding their humane execution are observed. In addition, they can help to prevent or at least address misconduct during deportation operations.

### 1.2 – Positive examples

During the charter operation from Düsseldorf Airport to Tbilisi (Georgia), the Federal Police staff exhibited a high degree of professionalism and empathy in dealing with the deportees.

### 1.3 – Findings and recommendations

#### 1.3.1 – Time of collection

Due to the early transfer, with the procedure at Düsseldorf Airport starting at 6:00 a.m., all deportees, including children and other vulnerable persons, were collected at night time.

Beyond the observation of this particular deportation procedure, the National Agency, when reviewing the documentation regarding several charter operations, also noted with concern that deportees have been regularly collected at night since the COVID-19 pandemic began.<sup>88</sup> The visiting delegation was told that this was necessary due to flight departure times.

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<sup>88</sup> See chapter III 3.9: This finding is based on the documentation which was made available regarding 46 deportation procedures during the COVID-19 pandemic. Cf., *inter alia*, the written question submitted by the MP Katina Schubert (LINKE) dated 18 August 2020 (received by the Berlin House of Representatives on 21 August 2020) on the subject: deportations from the *Land* of Berlin in 2020 and the reply dated 21 August 2020 (received by the Berlin House of Representatives on 1 September 2020), printed matter 18 / 24 586, p. 9: "From 1 January 2020 to 25 August 2020, there were 414 cases of persons being taken into custody for the purpose of deportation between 9 p.m. and 6 a.m."



Collections at night must always be avoided in order to ensure that the burden on deportees, especially families with children, is kept at a minimum. Mere organisational considerations, such as the departure times of the chartered aircraft, do not justify deviating from this guarantee.<sup>89</sup>

Collections at night should be avoided. Where children are deported, this must be guaranteed as a general principle.

### 1.3.2 – Respect for the best interests of children

Due to the layout of Düsseldorf Airport, the possibility of coercive measures being carried out in front of other deportees – particularly in front of the deportees’ own children – cannot be ruled out. There were also no mobile partitions in place during the procedure. In addition, it was observed that the operation did not involve a person specifically tasked with ensuring the best interests of children.

Article 3 para. 1 of the UN Convention on the Rights of the Child provides that, in all actions concerning children, the best interests of the child shall be a primary consideration.

Coercive measures against parents should not be carried out in front of their children, not even in isolated cases. If children are deported, there should always be one person who is tasked with ensuring the child’s best interests are respected during the deportation procedure.

### 1.3.3 – Suspension of operations during the COVID-19 pandemic

At the airport, the deportees spent several hours in a tight space. This limited space made it considerably more difficult to comply with social distancing and hygiene rules. While deportees were provided with masks, it was not possible to verify and ensure at all times that they actually wore them.

As part of the medical examination at Düsseldorf Airport, the persons concerned were also tested for symptoms of a COVID-19 infection. A negative test was not a precondition for carrying out the operation. According to the Robert Koch Institute, however, the virus can also be transmitted by persons who do not exhibit any symp-

<sup>89</sup> See, along the same lines, Düsseldorf Administrative Court, order of 16 November 2020 – file no.:7 I 32/20.

toms.<sup>90</sup>

In this context, the National Agency also noted with concern that even sick and elderly persons were deported. With regard to the observed procedure, one notable aspect was the situation of a woman born in 1942. For her, the modalities of deportation involved a particular risk of infection and thus of severe disease due to her age.<sup>91</sup>

Deportation procedures should be suspended while it is not possible to avoid a serious risk to deportees and to prevent the spreading of the virus.

### 1.3.4 – Shackles

During the ground handling phase of the deportation procedure observed, one individual’s hands and feet were tied with plastic cuffs. This coercive measure was continued throughout the ground handling phase and, according to the documentation, the individual’s feet also remained cuffed during the flight. Thus, the measure was in place for more than just a short period of time.

The use of plastic cuffs can result in haematomas or compressed nerves. The same applies when velcro cuffs are used, since these are not lockable and can thus continuously tighten around the wrist.

In order to protect the right to physical integrity, any shackling in deportation procedures should be carried out using textile hand restraint belts<sup>92</sup>, which should be kept in stock at all times.

### 1.3.5 – Confidentiality of conversations

The so-called “pick-up charter” was accompanied by Georgian security staff (one escort leader, 18 security escorts) and a Georgian doctor during the flight phase. The ground handling phase at Düsseldorf Airport was dealt with by Federal Police staff.

<sup>90</sup> Cf. [https://www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/Steckbrief.html](https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Steckbrief.html); [https://www.rki.de/DE/Content/Infekt/EpidBull/Archiv/2020/Ausgaben/39\\_20.pdf?\\_\\_blob=publicationFile](https://www.rki.de/DE/Content/Infekt/EpidBull/Archiv/2020/Ausgaben/39_20.pdf?__blob=publicationFile) (retrieved on 18 March 2021).

<sup>91</sup> [https://www.rki.de/DE/Content/InfAZ/N/Neuartiges\\_Coronavirus/Risikogruppen.html](https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Risikogruppen.html) (retrieved on 18 March 2021): According to the Robert Koch Institute, the risk of severe illness increases with age for people aged between 50 and 60. Elderly people in particular may have more severe outcomes following infection as a result of their immune systems being less responsive (immunosenescence).

<sup>92</sup> An example of this can be seen in the model used by Frontex during deportation flights.

When the deportees were handed over to the Georgian security staff, the conversations between the German doctor and the Georgian doctor and the conversations between the doctors and the deportees concerned took place in the waiting area where the other deportees were being held. Moreover, some of the deportees were in the immediate vicinity of these conversations. Thus, the confidentiality of conversations was not ensured.

Conversations with doctors should be confidential.

## 2 – CUSTODY AWAITING DEPORTATION

### 2.1 – Introduction

In 2020, the National Agency visited the facility for custody awaiting deportation in Eichstätt, Bavaria. In addition, the report on the visit to the facility for custody to secure departure in Ingelheim, Rhineland-Palatinate, and the response to the report were published in the year under review.

### 2.2 – Positive examples

The National Agency highlighted the following positive examples during its visits:

At the Eichstätt facility for custody awaiting deportation, detainees have access to telephones inside their cells. Moreover, all cells are equipped with a “prison media system” which, via television, allows detainees to listen to the radio and retrieve relevant documents such as house rules or information on counselling centres. Monitored use of the Internet, the sending of e-mails and the drafting of requests to prison management would be technically possible by attaching a keyboard. As these possibilities will increasingly become the norm as digitalisation progresses, the National Agency would welcome it if such possibilities were utilised.

While the written house rules of the Eichstätt facility for custody awaiting deportation are only available in German, a version using pictograms was being drafted at the time of the visit. While this may be a useful addition, it cannot replace the translation of the rules into several languages. For persons required to leave the country who are held at the facility for custody to secure departure in Ingelheim, access – for example to information on the daily routine and to contact details of complaints offices and spiritual advisers – is facilitated by means of notices drafted in several languages and using pictograms. A large number of information sheets are translated into 21 languages.

Since the National Agency’s previous visit in 2013, the facility for custody to secure departure in Ingelheim has reorganised the detention of women. In order to avoid the isolation of female detainees awaiting deportation, Rhineland-Palatinate now cooperates with other *Länder*, thus

allowing for shared accommodation with female persons required to leave the country from Hesse, Saarland and Thuringia.

### 2.3 – Findings and recommendations

The visited facilities were given recommendations *inter alia* on the following topics:

#### 2.3.1 – Distance requirement

Pursuant to the case law of the Court of Justice of the European Union, the enforcement of custody awaiting deportation should differ significantly from a prison sentence in terms of detention conditions, the restrictions of liberty that are specific to a prison sentence, and security measures.<sup>93</sup> According to the CJEU, “making men, women and children awaiting removal look like criminals [...] by treating them as such” is, in itself, prejudicial to human dignity.<sup>94</sup>

#### Structural conditions

The facility for custody to secure departure in Ingelheim is surrounded by high barbed wire fences. In addition, extensive structural security measures were observed, such as bars in front of the windows and CCTV monitoring. The National Agency considers such extensive security measures to be disproportionate.

Custody awaiting deportation and custody to secure departure should differ significantly from the enforcement of a prison sentence.

The National Agency has general concerns about the extensive security measures in place at facilities for custody awaiting deportation. Razor wire, which is used frequently, has the potential to cause serious injuries. Its usage appears disproportionate in relation to the danger posed by escaped deportees. The CPT also believes that the use of former prison establishments as facilities for custody awaiting deportation without any structural changes should, as a rule, be avoided.<sup>95</sup>

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<sup>93</sup> CJEU, judgment of 17 July 2014, file nos.: C-473/13 and C-574/13. Opinion of Advocate General Yves Bot of 30 April 2014 in joined cases C-473/13 and C-574/13 as well as in case C-474/13, margin no. 99.

<sup>94</sup> The Advocate General made it clear that in order to respect the human dignity and fundamental rights of migrants, detention conditions during custody awaiting deportation must differ considerably from conditions during the execution of a prison sentence (*ibid.*, margin no. 94).

<sup>95</sup> CPT/Inf (2019) 14, paragraph 65.

### Legal basis for the enforcement of custody awaiting deportation

Neither Rhineland-Palatinate nor Bavaria has special legislation governing the enforcement of custody awaiting deportation.

In Rhineland-Palatinate, section 5 (2) sentence 1 of the Law on the Acceptance of Immigrants (*Landesaufnahmegesetz*) provides that large parts of the Federal Prison Act apply.<sup>96</sup> However, it stipulates that “persons held in facilities for custody awaiting deportation may only be subjected to restrictions for the purposes of executing custody awaiting deportation and to maintain safety and order in the facility”. “The nature and purpose of custody awaiting deportation” and the “special conditions of facilities for custody awaiting deportation” should be taken into consideration. The National Agency welcomes the fact that the law provides for a difference between the enforcement of prison sentences and custody awaiting deportation.

Encouragingly, the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection has confirmed that there are plans to create a separate legal basis for the enforcement of custody awaiting deportation.

In Bavaria, there is no *Land* legislation governing the enforcement of custody awaiting deportation. Instead, various provisions from the Federal Prison Act<sup>97</sup> are applicable pursuant to section 422 (4) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG*).<sup>98</sup> Pursuant to section 422 (4), a prerequisite for this is that custody awaiting deportation is enforced in prisons by way of administrative assistance. The facility for custody awaiting deportation in Eichstätt is a former prison which is now used exclusively for the enforcement of custody awaiting deportation.

In this context, section 171 of the Federal Pris-

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<sup>96</sup> Sections 3 to 108, 173 to 175 and 179 to 187 of the Prison Act and section 62a of the Residence Act.

<sup>97</sup> Act on the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty (Prison Act).

<sup>98</sup> Sections 3 to 49, 51 to 121b, 171, 173 to 175 and 178 para. 3 of the Prison Act and sections 62, 62a of the Residence Act.

on Act stipulates that the provisions of the Federal Prison Act apply to the enforcement of custody awaiting deportation “unless the nature and purpose bar detention [...]”.

In the National Agency’s view, this reservation prevents the applicability of provisions which were not contained in the former Federal Prison Act but which would nevertheless need to apply in relation to custody awaiting deportation due to the nature and purpose of such detention – for example, provisions regarding the detention regime<sup>99</sup> or an obligation on the part of the facility to inform detainees of their rights and duties in a language they understand.<sup>100</sup>

Furthermore, it is not clear from the wording of the Federal Prison Act whether a given provision may be fully applicable, applicable to a limited extent or not applicable, subject to the reservation provided for under section 171 of the Prison Act. As a result, the persons concerned cannot clearly foresee the nature and extent of the possible interference with fundamental rights or the prerequisites for such interference. However, all material aspects of the various forms of interference with fundamental rights must be regulated by law – that is, by Parliament – so that the person concerned is able to foresee and predict them “in terms of their content, subject, purpose and extent”.<sup>101</sup> Only a specific legal basis that firmly governs the enforcement, organisation and implementation of custody awaiting deportation will ensure that the legal bases are clear – which is also in the interests of detainees – and establish a significant distance to the enforcement of prison sentences. In addition, due to the severity of the possible intervention measures (e.g. holding detainees in specially secured cells), a specific legal basis is also required for the enforcement of cus-

tody awaiting deportation. This must be created by the *Land* legislatures.

In view of Article 16 para. 1 of Directive 2008/115/EC (“Return Directive”) which obliges the Member States of the European Union to ensure that, as a rule, custody awaiting deportation takes place in specialised detention facilities, many *Länder* no longer considered it permissible to enforce custody awaiting deportation under sections 62 and 62a of the Residence Act in prisons by way of administrative assistance, as previously practised.<sup>102</sup> As a result, they introduced specific legal provisions for the enforcement of custody awaiting deportation.

Specific legal bases also exist for the enforcement of remand detention, preventive detention and juvenile custodial sentences in order to take account of the differences between the various types of detention.

Since custody awaiting deportation should differ from custody to secure departure in terms of the detention conditions, a specific legal basis is to be created for the enforcement of custody awaiting deportation and custody to secure departure.

### 2.3.2 – Documentation of attempted suicide and self-harm

At the Eichstätt facility for custody awaiting deportation, completed suicides are documented, but attempted suicides or attempted and completed self-harm are not.

As a knowledge base for preventing suicide sufficiently and effectively, attempted suicide as well as attempted and completed self-harm by detainees should be documented and evaluated on a regular basis.

### 2.3.3 – Strip-searches

At the Eichstätt facility for custody awaiting deportation, deportees are subjected to a strip-search upon arrival.

Strip-searches involving a visual inspection

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<sup>99</sup> For instance, section 2 of the Baden-Württemberg Act on the Execution of Custody Awaiting Deportation (*Abschiebungshaftvollzugsgesetz*) provides for the following: “[Detainees] may only be subjected to such restrictions which serve the purpose of custody awaiting deportation or which are required to ensure security and order in the facility or to prevent a significant threat posed by detainees to the life and limb of others or to significant legally protected internal security interests.”

<sup>100</sup> Section 3 of the Hamburg Act on the Execution of Custody Awaiting Deportation, section 4 para. 1 of the Baden Württemberg Act on the Execution of Custody Awaiting Deportation.

<sup>101</sup> Hofmann in Schmidt-Bleibtreu/Hofmann/Henneke, Grundgesetz Kommentar [Commentary on the Basic Law], 13th ed., Article 20, margin no. 84.

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<sup>102</sup> Cf. for example, the introduction of the draft Act on the Execution of Custody Awaiting Deportation in Baden-Württemberg, Printed Paper 15/764, cf. also the statement of the German Bar Association concerning the Saxon Act on the Execution of Custody Awaiting Deportation, p. 13 et seq., as well as its statement on the Hesse Act on the Execution of Custody Awaiting Deportation, p. 39 et seq.

of the detainee's genital area represent a severe interference with the detainee's general right of personality. It should therefore be decided on a case-by-case basis whether there are indications of a danger to security and order that would justify a strip-search. Any such measures must adhere to the principle of proportionality. If a strip-search is carried out, the reasons for this should be documented in a clear and comprehensible manner. Furthermore, the search should be conducted as respectfully as possible, for example involving two stages where half the body remains dressed in each stage.

#### **2.3.4 – Luggage**

Staff both at the Eichstätt facility for custody awaiting deportation and the Ingelheim facility for custody to secure departure told the visiting delegation that, time and again, individuals awaiting deportation were brought in by the police without any luggage as they were apprehended on the streets, for example, and were not given the opportunity to pack their personal belongings.

The detention and subsequent deportation of a person must not lead to them losing their belongings. Therefore, the responsible staff must always give the individuals being deported the opportunity to pack their personal belongings. These must be handed over to the facility at the time of arrival.

Where this is impossible in justified exceptional cases, the competent authority must take steps to ensure that an individual's luggage is forwarded in a timely manner. It must be available at the latest when the deportation order is executed. It is up to the facility to ensure that the luggage is handed over.

Staff at the Ingelheim facility for custody to secure departure as well as the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection reported that, in such cases, efforts were made to ensure that the luggage is handed over before the deportation takes place. In Rhineland-Palatinate, the issue of whether luggage should be taken by deportees or forwarded to them subsequently was being discussed with the competent immigration authorities that were responsible for organising this and for carrying it out.

It is essential that a solution is found which ensures that the persons concerned are returned

together with their luggage.

All persons awaiting deportation should be given the opportunity to pack personal belongings. Where this is not possible, the luggage should be forwarded in a timely manner.

#### **2.3.5 – Information on rights**

When admitted to the Eichstätt facility for custody awaiting deportation, detainees are not provided with written information on their rights, particularly on their right to legal representation and access to it. Some detainees did not know how to gain access to the assistance of a lawyer.

Upon their arrival, detainees awaiting deportation must be provided with information on their rights in writing and in a language they understand.

The Bavarian State Ministry of Justice has committed to introducing an information sheet using pictograms, but not to providing translations into other languages.

#### **2.3.6 – Psychiatric treatment**

During the delegation's visit to the Eichstätt facility for custody awaiting deportation, the National Agency was told that detainees were frequently transferred to a hospital in Ingolstadt on suspicion of an acute suicide risk, but that they were regularly taken back to the Eichstätt facility a few hours later. The short duration of their stay at the hospital is enough to raise doubts as to whether diagnoses are made on the basis of a sufficient, individual assessment. According to information provided by the Eichstätt facility for custody awaiting deportation, attempts to recruit a psychiatric expert for the facility have so far been unsuccessful.

The Ingelheim facility for custody to secure departure does not have a psychological service of its own. A contract psychologist has been recruited who is available to detainees for consultation for two hours per week. In the National Agency's view, this is not sufficient given that the facility has a capacity of 40 persons.

Due to the exceptional situation of their upcoming deportation, which is often accompanied by feelings of fear and anxiety, as well as the traumatic experiences they suffered in their countries of origin and when fleeing from them, detainees awaiting deportation are generally under extreme mental pressure and require special treatment.

It must be ensured at all times that psychiatric care is available to detainees awaiting deportation. In addition to the services offered by the psychological service on site, it must thus be ensured that patients can be diagnosed and provided with out-patient or in-patient psychiatric treatment at the facility for custody awaiting deportation itself or close by.

According to information provided by the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection, facilities may extend the time allotted to their external service providers if necessary.

### **2.3.7 – Providing for a complaint mechanism**

At the time of the visit, detainees at the Eichstätt facility for custody awaiting deportation did not have the possibility of complaining about shortcomings anonymously.

The Bavarian State Ministry of Justice reported that, following the National Agency's visit, a letterbox had been installed with a separate compartment each for the management of the facility, the Bavarian State Ministry of Justice, the Bavarian State Parliament and the facility's advisory council.

### **2.3.8 – Personal clothing**

At the Eichstätt facility for custody awaiting deportation, male detainees are not allowed to wear their own clothes due to an alleged lack of laundry facilities.

All detainees awaiting deportation should be permitted to wear their own clothes and to do their own washing. The necessary laundry facilities should be created.

### **2.3.9 – Translations of the house rules**

The house rules of the Eichstätt facility for custody awaiting deportation are only available in German. Currently, a version using pictograms is being drafted. The National Agency welcomes this effort. However, where the house rules comprise multiple pages, it is not possible to transfer all of the details into pictograms. Generally, persons from many different nations are held at facilities for custody awaiting deportation. The house rules regulate the community life of those held in the facility and knowing them can help to prevent or reduce conflicts.

The house rules should be translated into the languages which are common at the facility.

### **2.3.10 – Placement in specially secured cells**

At the Eichstätt facility for custody awaiting deportation, which has a capacity of 96 places, three specially secured cells were built in recent years in addition to the two which already existed.

#### **Ordering of placement in specially secured cells**

At the Eichstätt facility for custody awaiting deportation, the written reasons given for ordering placement in a specially secured cell were in some cases insufficient. In one case, a detainee threatened to harm himself if he was not able to continue sharing a cell with two of his acquaintances. The facility reasoned that an acute risk of self-harm could not be ruled out. In the National Agency's view, this assessment is insufficient to positively establish an increased risk of self-harm<sup>103</sup> in the context of a dispute.

Placement in a specially secured cell constitutes a considerable interference with fundamental rights. It may only be ordered if it is possible to positively determine that the statutory requirements are met and if such placement is unavoidable.

#### **Furnishing and fittings in specially secured cells**

The specially secured cells at the facility for custody awaiting deportation in Eichstätt and the observation rooms at the facility for custody to secure departure in Ingelheim are equipped with a mattress on the floor. The detainees are not provided with seating. In similar facilities, the National Agency observed that covered foam dice were used as seating for the individuals concerned.

At the Ingelheim facility for custody to secure departure, there was reduced access to daylight due to the windows being so small. As a result of the elevated position of the windows, it was also not possible for detainees to see out of them. In addition, at the Ingelheim facility for custody to secure departure, the delegation had the impression that persons held in segregation were not

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<sup>103</sup> Cf. section 88 para. 1 of the Prison Act.

provided with sufficient possibilities to occupy themselves. The facility promised the National Agency that decisions would be made on a case-by-case basis as regards the handing out of newspapers/magazines and books as well as religious writings.

Furthermore, in the observation rooms at the facility for custody to secure departure in Ingelheim, there is no way of adjusting the lighting, which would ensure that the persons concerned are able to sleep, while at the same time reducing the risk of injury and enabling them to find their way in the dark. The light can be switched on and off only from outside the rooms.

If segregation is necessary, the persons concerned should be offered sufficient possibilities to occupy themselves. Persons placed in isolation should also be provided with seating at standard height. Covered foam dice or “challenging” furniture could be used, for example, which would allow the rooms to be designed appropriately even if the persons concerned pose a risk to themselves or others. Detainees should be allowed to sit in a normal position whilst being held in a specially secured cell. In addition, all cells used for segregation should be equipped with adjustable lighting.

According to information provided by the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection, the facility for custody to secure departure in Ingelheim does have foam dice which could be used as seating. The Ministry stated that one of these dice had been put in its proper place right after the visit. In addition, there were plans to procure foldable mattresses which could also be used as seating. Options were also being explored to enable detainees to adjust lighting themselves.

## Documentation

When inspecting the personnel files of detainees who had recently been temporarily held in one of the specially secured cells at the Eichstätt facility for custody awaiting deportation, the delegation observed that the documentation concerning the regular supervision of the persons concerned was incomplete. In many cases, there was no documented supervision over a period of three days. According to the facility’s management, only visits by the duty manager and by the medical service are documented, whereas the daily visits by the general prison staff are not. Pursuant to section 92 (1) of the Prison Act, the medical officer must visit persons held in specially secured cells “soon and, if possible, daily thereafter”. The medical officer of the Eichstätt facility for custody awaiting deportation was on site once per week prior to the pandemic and twice per week during the pandemic.

Persons held in specially secured cells must be supervised at least on a daily basis, if possible by a medical doctor. The necessity of the measure must be verified daily by a person authorised to issue orders and the decision made must be documented.

The Bavarian State Ministry of Justice agreed to modify this documentation practice. In the future, all persons visiting detainees held in specially secured cells were to document such visits. However, the Ministry did not commit to providing for more frequent supervision by medical staff.

According to information provided by the Ingelheim facility for custody to secure departure, the application of special security measures is recorded centrally. However, special incidents are not evaluated on a regular basis. Separate and detailed documentation of special security measures as well as their regular evaluation may help to reduce or prevent the application of such measures. In addition, such documentation provides transparency regarding measures which are often perceived as arbitrary by the persons concerned. It also serves to prevent such special security measures from being applied disproportionately.

The documentation of specific security measures should be evaluated regularly and in detail.

Encouragingly, the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection reported that,

since January 2020, special security measures are being documented in a separate register and that the reasons for such measures and the developments in specific cases were being analysed and discussed with the staff members involved.

### **CCTV monitoring**

As part of the CCTV monitoring of the specially secured cells at the Eichstätt facility for custody awaiting deportation, the toilet area is displayed on the surveillance monitor without pixelation. Moreover, it was not possible during the follow-up visit to confirm that sticky tape was being used to cover the relevant area of the monitor, as had been promised during the National Agency's first visit. In many other facilities visited by the National Agency, systems are in place which pixelate the toilet area but automatically deactivate pixelation once a person has spent a prolonged time in the toilet area. In high-risk situations, this pixelation can also be deactivated manually.

CCTV cameras must be installed in such a way that the toilet area is either not visible on the monitor at all or, alternatively, is only shown in the form of pixelated images. If deemed necessary in individual cases, it may be possible to permit unrestricted monitoring of detainees held in specially secured cells due to an acute danger of self-harm or suicide. However, any such decision should be carefully considered, substantiated and clearly documented. Under no circumstances can CCTV monitoring replace the presence of members of staff.

### **2.3.11 – Meals**

Persons held at the Ingelheim facility for custody to secure departure are provided with shrink-wrapped, pre-portioned meals. According to the persons concerned, the portions are often too small to fill them up. Second helpings are only given if prescribed by a doctor.

The persons concerned should be provided with sufficient meals and should be given second helpings upon request.

According to the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection, the calorie content prescribed per person was increased when the catering contract at the Ingelheim facility for custody to secure departure was re-tendered.

### **2.3.12 – Confidentiality of telephone calls**

At the Ingelheim facility for custody to secure departure, telephones are located in the living area and are not partitioned. Since other deportees and guards may be present in the corridors, it is not possible to make confidential telephone calls. Regular contact with family members in particular may be conducive to preventing stress and tension.<sup>104</sup> However, this requires the possibility for confidential discussions to take place.

Suitable arrangements should be made to ensure the confidentiality of phone calls.

As the Rhineland-Palatinate Ministry for Family Affairs, Women, Youth, Integration and Consumer Protection reported, there are plans to procure acoustic hoods for the telephones in the foyer. In addition, the possibility of installing telephones in the cells is to be explored.

### **2.3.13 – Weapons**

The inspected documentation indicates that pepper spray was used at the Ingelheim facility for custody to secure departure.

Due to the significant health risks involved, the use of pepper spray in confined spaces is not a proportionate measure under any circumstances. Its use should therefore be avoided.

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<sup>104</sup> CPT/Inf (2016) 35, margin no. 23.



## 3 – THE FEDERAL ARMED FORCES

### 3.1 – Introduction

In 2020, the National Agency visited detention facilities of the Federal Armed Forces for the first time in three years. The reason for the temporary break was the suspension of compulsory military service and the ensuing transition to a professional army which resulted in a considerable decrease in incidents giving rise to disciplinary sanctions.

During its return visits, the National Agency found that the implementation of detention (*Arrest*) in facilities of the Federal Armed Forces differs in various respects from detention in prisons and in custody facilities operated by the police and the customs authorities. For this reason, the National Agency has now also set standards for the Federal Armed Forces regarding the conditions of detention.<sup>105</sup> Their purpose is to ensure that the Agency's recommendations are implemented not only in the facilities it visits but in all the relevant facilities. The National Agency considers it particularly important that a doctor assesses whether the person concerned is actually fit for detention before they are subjected to the measure.

In 2020, the National Agency visited the detention facilities of Wilhelmsburg Barracks (Ulm), Camp Heuberg (Stetten am kalten Markt) and Nibelungen Barracks (Walldürn). The places of detention visited were chosen at random.

### 3.2 – Positive examples

The National Agency highlighted the following positive examples during its visits:

In the Federal Armed Forces, detainees are not kept in detention all day *per se*. Instead, there is the possibility for detainees to work on the premises of the barracks and to take part in communal catering. It is also possible for detainees to make telephone calls during the time spent outside the detention cell.

Moreover, the specially secured detention cells are generally not used. Where a detainee (*Arrestperson*<sup>106</sup>) is at an acute risk of suicide or presents a

risk of violence against others, they are taken to a hospital. This ensures that they receive adequate care and medical treatment.

On a particularly positive note, it should be highlighted that officers always remove their firearms before entering the detention quarters.

During the meeting at Wilhelmsburg Barracks, the visiting delegation was told that persons under detention are given the opportunity to participate in religious services. The National Agency welcomes this approach.

When inspecting the documentation kept at Nibelungen Barracks, the visiting delegation noted that fitness for detention is generally assessed on the basis of a medical examination. In addition, as part of the detention procedure, educational measures are implemented according to the needs of the individual concerned. These approaches should be highlighted as particularly positive examples.

### 3.3 – Findings and recommendations

#### 3.3.1 – Furnishing and fittings of detention cells

##### Lighting

The light switches of the detention cells are located in the corridor, which means that detainees are not able to switch the light in their cells on and off as they see fit.

Moreover, detention cells do not have dimmable lighting.

The cells in the detention facilities of the Federal Armed Forces should be equipped with dimmable lighting to ensure that detainees are able to sleep, while at the same time reducing the risk of injury and enabling them to find their way in the dark. Persons under detention should be able to switch the light on and off themselves.

In its response, the Federal Ministry of Defence stated that the possibility of detainees switching the light on and off independently was being considered and that a review of the issue had been initiated.

<sup>105</sup> See Chapter IV 7 Standards – Detention facilities of the Federal Armed Forces.

<sup>106</sup> Soldier who is subjected to a measure involving deprivation of liberty in a detention facility of the Federal Armed Forces.

### Daylight

At Wilhelmsburg Barracks and Camp Heuberg, detention cells are equipped with frosted glass windows which results in less access to daylight. At Nibelungen Barracks, it is ensured that natural light is available.

Every detention cell of the Federal Armed Forces should receive natural light.<sup>107</sup>

### 3.3.2 – Specially secured detention cell

In the specially secured detention cells of the visited detention facilities, taps protruded from the walls. This poses a considerable risk of injury. Where a person under detention is placed in a specially secured detention cell and is therefore isolated<sup>108</sup>, it is critical that the medical staff give particular attention to the person's health and that regular medical checks are ensured. In addition, close supervision must be ensured in order to exert a de-escalating influence on the person concerned and to allow for the measure to be terminated as soon as possible. This cannot be ensured in any of the barracks visited.

As long as the layout of the cell poses a risk of self-harm and the necessary care and medical supervision of detainees cannot be ensured, placement in such a specially secured detention cell must be ruled out.

Furthermore, the necessity of a specially secured detention cell should be reviewed in the light of the purpose of detention. Practical experience seems to show that such cells are not necessary since, as a general rule, the person concerned is taken to a hospital whenever a special incident occurs.

The Federal Ministry of Defence confirmed that the special measure provided for under section 19 (2) no. 4 of the Federal Armed Forces' regulations on the enforcement of detention (*Bunde-*

*swehrvollzugsordnung*) is not applied. It went on to say that detainees who were at risk of self-harm or suicide were not fit for detention anyway and were thus transferred to external facilities.

### 3.3.3 – Documentation

The detention documentation kept by the enforcement officers is incomplete as it does not include any records of the checks carried out to determine the state of the detainees concerned, particularly their mental and medical state.

Complete and comprehensible documentation of all information related to detention<sup>109</sup> serves to protect both detainees and the soldiers in charge (detention enforcement officers). Supervisors should verify at regular intervals whether detention records are being kept correctly. These checks must also be recorded.

The Federal Ministry of Defence announced a review into the question of whether documentation requirements are being complied with.

### 3.3.4 – Fitness for detention

Whether the person to be detained is fit for detention is determined on the basis of questioning by disciplinary superiors or examination by the unit physician.<sup>110</sup>

In the National Agency's view, the health condition of the person to be detained and any resulting need for medical treatment can only be determined on the basis of a medical examination. Such an examination also allows for any signs of psychological or other stress to be identified.

Fitness for detention should always be determined on the basis of a medical examination.

<sup>107</sup> Cf. European Prison Rules, as revised in 2020 (Recommendation Rec(2006)2-rev of the Committee of Ministers, 11 January 2006, No. 18.2 (a), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016809ee581](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809ee581) (retrieved on 18 March 2021)); see also the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), No. 18.2 (a).

<sup>108</sup> With regard to the isolation of a person, the Federal Constitutional Court determined that "insufficient monitoring risks causing considerable damage to the health of the person concerned"; Federal Constitutional Court, judgment of 24 July 2018, file no. 2 BvR 309/15, margin no. 80.

<sup>109</sup> See chapter IV 7 Standards – Detention facilities of the Federal Armed Forces.

<sup>110</sup> Section 7, first sentence, of the Federal Armed Forces' regulations on the enforcement of detention.

### 3.3.5 – Protection of privacy

#### Visibility of toilets

The visited detention cells did not have completely separate toilets with separate ventilation. Moreover, the toilets, which were not partitioned off, were not equipped with a screen.

From the National Agency's point of view, it is desirable for a detention cell to be equipped with a completely separate toilet with separate ventilation. Where this is not the case, the toilet area must not be visible through the peephole. If the toilet is not partitioned off, it is essential that staff indicate their presence in a suitable manner before entering the cell. The person in the cell might be using the toilet and should be given the opportunity to indicate this.

At Nibelungen Barracks, while the visit was still ongoing, the peephole was adjusted so that the toilet was no longer visible.

The Federal Ministry of Defence stated that, in all new building projects, there were plans to install toilets with a screen made of non-breakable material allowing only the detainee's silhouette to be seen.

#### Peephole

The visiting delegation was told on site that the peephole was used without giving advance warning by knocking on the door.

The privacy of persons under detention must be protected. Should the use of peepholes be deemed necessary in substantiated individual cases, the persons using them should give an appropriate warning beforehand.

The Federal Ministry of Defence confirmed that the peephole was only to be used after giving advance warning by means of knocking on the door, and it gave assurances that this issue was pointed out in (further) training courses.

## 4 – YOUTH DETENTION

### 4.1 – Introduction

In 2020, the National Agency spoke to the Schleswig Youth Detention Centre in Schleswig-Holstein as part of a follow-up visit by telephone. During this follow-up by telephone, the National Agency enquired in particular about the implementation of recommendations issued after its first visit in 2016 and about the Centre's handling of the pandemic.

### 4.2 – Positive examples

The National Agency welcomes the fact that, according to the management of the facility, strip-searches always involve two stages.

### 4.3 – Findings and recommendations

The visited facility was given recommendations on the following main topics:

#### 4.3.1 – Observation rooms

The so-called observation rooms at Schleswig Youth Detention Centre are almost identical to the specially secured cells, both in terms of how they are used, their construction and their fitting and furnishings. The only difference is that only specially secured cells are equipped with means of physical restraint. In 2019, a total of two detainees were held in a specially secured cell. By contrast, persons were held in an observation room in a total of 29 cases and thus much more frequently. Linguistically, the term "observation room" sets a much lower threshold for placing a person in such a room than the threshold that applies for "specially secured cells". There is therefore a risk of observation rooms being used more frequently.

As a preventive measures, rooms which are similar to specially secured cells should be referred to as such. Moreover, the statutory requirements for using such rooms must be applied.

#### 4.3.2 – Seating

Specially secured cells and observation rooms do not have any seating. Detainees are provided with mattresses which are placed on the floor.

Detainees should be allowed to sit in a normal position whilst they are placed in a specially secured cell or an observation room.

The Schleswig-Holstein Ministry for Justice, European Affairs and Consumer Protection made a commitment to procure adequate seating.

#### 4.3.3 – Statutory regulation of strip-searches

Under section 102 (3), 2nd half-sentence, of the Schleswig-Holstein Prison Act (*Landesstrafvollzugsgesetz Schleswig-Holstein*), a margin of discretion for strip-searches, as stipulated by the Federal Constitutional Court, applies in adult prisons.<sup>111</sup> Accordingly, where general orders by the prison management require that newly admitted prisoners be strip-searched, it must be ensured that officers are afforded a margin of discretion to assess in each individual case whether or not it is necessary for the person concerned to fully undress. As a result, the measure may be dispensed with in justified cases.

However, the required margin of discretion was not implemented in respect of juvenile prisons and the execution of remand detention. Following the National Agency's first visit, this issue was regulated by way of a ministerial decree. Pleasingly, an amendment of the relevant laws is now the subject of a legislative procedure.<sup>112</sup>

#### 4.3.4 – Confidentiality of medical consultations

During the telephone conversation, the prison doctor reported that, in the event of language difficulties, interpreters or inmates are sometimes called in to translate in order help the inmates concerned describe their symptoms. No third parties were present during the actual examinations. However, medical conversations which involve content subject to medical secrecy must be treated confidentially. Translation by fellow inmates or any of the facility's non-medical staff is therefore not appropriate.

In addition, there is a danger in such cases that the medical context will not be translated correctly. For these reasons, external interpreters or video interpreting services should be used.

Other inmates or staff members should not be called in to assist in medical consultations.

The management of the facility and the Ministry for Justice, European Affairs and Consumer Protection reported that there were plans to implement a video interpreting service and that the fibre-optic connection required for this purpose was still under construction.

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<sup>111</sup> Federal Constitutional Court, order of 10 July 2013, file no.: 2 BvR 2815/11.

<sup>112</sup> Schleswig-Holstein *Land* Parliament, printed matter 19/2381, Article 2 section 100 para. 2, Article 3 section 65 para. 2.

## 5 – PRISONS

### 5.1 – Introduction

In 2020, the National Agency visited five prisons: Würzburg Prison in Bavaria, Karlsruhe Prison in Baden-Württemberg, Brandenburg an der Havel Prison in Brandenburg, Schwalmstadt Prison in Hesse and Bremervörde Prison in Lower Saxony. The visits to the prisons in Brandenburg an der Havel and Karlsruhe were follow-up visits to see whether and to what extent previous objections and recommendations had been dealt with.

The respective ministries to which these facilities are subordinate are obliged to enter into a dialogue with the National Agency on the implementation of the recommendations made. However, the ministries vary in their willingness to consider, accept and implement the National Agency's recommendations. For instance, it is evident from the response of the Hessian Ministry of Justice that it sees no need to implement the National Agency's recommendations. This also applies to the responses provided by the Bavarian State Ministry of Justice in 2020 and in previous years. The Baden-Württemberg Ministry of Justice and European Affairs stated once again that the unconstitutional double occupancy of single-occupancy cells could not yet be dispensed with.

The National Agency considers it vital that, in all *Länder*, detention conditions are created that are in conformity with the constitution.

### 5.2 – Positive examples

The National Agency highlighted the following positive examples during its visits:

Overall, the National Agency welcomes the fact that prisons made efforts to ensure open communication between prison management, staff and prisoners with regard to the measures that had to be taken during the COVID-19 pandemic. The transparency surrounding these measures has led to a greater willingness to accept restrictions among the majority of prisoners. Brandenburg an der Havel Prison supported prisoners by providing for additional possibilities for them to occupy themselves, for example books and games.

Brandenburg an der Havel Prison introduced video telephony, while Bremervörde Prison significantly extended the times where prisoners

were allowed to use it. This medium allows prisoners to at least see their family members regularly via a video screen, even though visits are restricted. In addition, the cells in both prisons are equipped with telephones, which allows prisoners to have confidential conversations. This deserves positive mention, especially given the current COVID-19 pandemic and the associated restrictions on visits. The National Agency suggests maintaining the extended time allowance for using video telephony after the pandemic, provided the additional time is not then deducted from the time allowed for actual visits.

The Agency welcomes the fact that Brandenburg an der Havel Prison has its own medical wing and is well-connected to the hospitals in the surrounding area. In addition, the nearby psychiatric hospital has a separate prison unit for prisoners at the facility who are in need of treatment.

Encouragingly, an increasing number of prisons have video interpreting systems in place. This development was also confirmed during the visit to Würzburg Prison. Where language difficulties arise, this makes it possible for inmates to be informed in a language they can understand while at same time giving them the opportunity to ask any questions they might have. In this context, Karlsruhe Prison reported about its newly introduced "telemedical" care, which ensures that medical consultations with the help of professional interpretation are also available outside of the prison doctors' consulting hours.

Schwalmstadt Prison offers an alternative method of drug testing, i.e. a marker system, in addition to the passing of urine while under observation. Prisoners can thus choose the method they find to be the least intrusive.

### 5.3 – Findings and recommendations

The visited facilities were given recommendations *inter alia* on the following topics:

#### 5.3.1 – Design and furnishing of specially secured cells

In several prisons, the specially secured cells are equipped only with a mattress on the floor. No other seating is available.

If the period of detention lasts for several hours or days, it is inhumane to force prisoners to stand or sit on the floor.

Where detention lasts for a prolonged peri-

od of time, prisoners should be allowed to sit in a normal position. In similar facilities, the National Agency observed that covered foam dice or “challenging” furniture were used as seating. This allows the cells to be designed appropriately – even if there is a risk of the persons concerned harming themselves or others – without having to sacrifice furniture for safety reasons.

Pleasingly, the Ministry of Justice of the *Land* Brandenburg stated that a sample piece of seating furniture which was already being used in psychiatric institutions was in the process of being tested and that all specially secured cells in the whole of Brandenburg would potentially be equipped with this type of seating.

In its response, the Hessian Ministry of Justice initially stated that prisoners could sit on the mattress on the floor and lean against the wall. In the National Agency’s view, this is not a normal sitting position and does not respect human dignity. Following the National Agency’s reply, the Hessian Ministry of Justice stated that it was considering the possibility of using seating furniture and of procuring such furniture for all facilities in Hesse.

### 5.3.2 – Physical restraint

Pursuant to section 83, 1st and 2nd sentence, of the Lower Saxony Prison Act (*Niedersächsisches Justizvollzugsgesetz*), shackles may, as a rule, be applied to prisoners on their hands or feet only. In the prisoners’ interest, the use of a different type of shackling may be ordered. The existing provision thus includes, as a general rule, shackles applied to prisoners on their hands and feet, for example during transport. However, this provision cannot be relied on as a legal basis for physical restraints (*Fixierungen*). The use of physical restraints is outside the scope covered by this legislation, which means that there is no suitable legal basis for it. The provision on shackling does not fulfil the requirement of being sufficiently precise.<sup>113</sup> However, Bremervörde Prison has a 7-point restraint system with straps in place.

When consulting the Hessian Prison Act (*Hessisches Strafvollzugsgesetz*), it was noted that, according to section 50 (8), “a specially trained member of staff shall keep seated watch while prisoners are held in physical restraint”. In the

<sup>113</sup> Cf. Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 502/16, margin no. 72.

view of the National Agency, this guarantee is not sufficient. The National Agency believes that persons under physical restraint must be observed continuously and personally by therapeutic or care staff who are in direct proximity to the individual concerned (one-on-one supervision).<sup>114</sup> Only in this way can such staff, based on their therapeutic or nursing training, provide care which exerts a de-escalating influence on the person concerned in order to allow for the measure to be terminated as soon as possible. This is also the only way to effectively prevent health damage.

### 5.3.3 – Privacy

#### Double occupancy of cells

At Karlsruhe Prison, several cells with non-partitioned toilets are occupied by two persons. In addition, there is double-occupancy of cells with a floor space of approximately eight square metres, including the sanitary area. This constitutes a violation of the human dignity of the individuals held there.

At the time of the visit, occupancy levels at Karlsruhe Prison were such that it would have been possible to use only those cells for double-occupancy which have a partitioned toilet with separate ventilation. There was no prioritisation with the aim of ensuring humane detention.

The National Agency previously criticised this situation in 2017. Even after the follow-up visit to Karlsruhe Prison, the Baden-Württemberg Ministry of Justice and European Affairs still has not fully committed to ending double-occupancy in cells without partitioned toilets, which means that prisoners still have to go to the toilet in the presence of fellow inmates.

In order for detention conditions to be humane, cells must have a floor space of at least six square metres, excluding the sanitary area. For multiple-occupancy, a further four square metres of floor space must be added to this figure for each additional person, excluding the sanitary area. Moreover, for multiple-occupancy, cells must have a partitioned sanitary area with separate ventilation. It is vital that the conditions of detention at Karlsruhe Prison are promptly ad-

<sup>114</sup> Ibid., margin no. 83.

justed to be in conformity with the constitution.

### Drug tests

The drug tests carried out at Würzburg Prison require prisoners to submit a urine sample under the observation of the medical service and general prison officers.

Submitting a urine sample while under the direct observation of general prison officers may considerably interfere with the privacy of the persons concerned.<sup>115</sup> During its visits, the National Agency encountered various drug testing methods which minimised the degree of interference with prisoners' privacy, such as the administration of a marker prior to the test. With these procedures, it is no longer necessary to observe the passing of the urine sample.

Apart from submitting a urine sample under observation, at least one alternative method of drug testing should be available so that prisoners can choose the method they find to be the least intrusive.

According to information provided by the Bavarian State Ministry of Justice, a working group has been tasked with looking into alternative testing methods.

### Showers

As regards the communal showers at Karlsruhe Prison, there are still no arrangements in place to ensure privacy protection, such as partition walls.

In order to sufficiently protect the privacy of prisoners in communal showers, at least one shower should be partially partitioned off.

The Baden-Württemberg Ministry of Justice and European Affairs informed the National Agency that shower partitions would be installed in 2021.

### Strip-searches

At all the prisons visited in the year under review, prisoners are strip-searched upon admission.

At Bremervörde Prison, prisoners are additionally required to stand on a mirror with their legs spread. This procedure allows for even greater visibility of their genital area than a mere "direct" observation. The Lower Saxony Prison Act re-

quires that prisoners' sense of modesty must not be offended when they are searched.<sup>116</sup> Looking at a naked person standing on a mirror with their legs spread apart is not compatible with this requirement.

According to the Federal Constitutional Court, strip-searches involving a visual inspection of detainees' genital area represent a severe interference with their general right of personality.<sup>117</sup> It is not permissible to carry out strip-searches routinely and without case-specific suspicions.<sup>118</sup> General strip-search orders must allow for exceptions if the principle of proportionality so demands.

Staff must be made aware that in individual cases it may not be necessary for the prisoner to undress fully. If it is indeed necessary that the prisoner undress fully, the grounds must be documented. In addition, the search should be conducted in a respectful procedure, for example involving two stages where half the body remains dressed in each stage.

In terms of prevention, the practice of carrying out searches using a mirror should be reviewed, since the mirror can be used as a means of examining body cavities (albeit only by the medical service).

### Visibility of toilets

The specially secured cells in the psychiatric ward of Würzburg Prison were completely visible on CCTV-monitoring, including the toilet area the toilet area. While the toilet areas of the specially secured cells at Brandenburg an der Havel Prison were shown in the form of pixelated images, pixelation in one case did not appear to achieve the purpose of sufficiently protecting the privacy of the person concerned, as this person was still clearly recognisable in the pixelated area.

Even when they are placed in a specially secured cell, the humane treatment of persons deprived of their liberty requires that measures be taken to protect their privacy.

Prisoners' genital area should always be protected, for example by pixelating the camera images

<sup>115</sup> Zweibrücken Higher Regional Court, order of 30 March 1994, file no. 1 Ws 44/94.

<sup>116</sup> Section 77 para. 1, 4th sentence, of the Lower Saxony Prison Act.

<sup>117</sup> Federal Constitutional Court, order of 5 March 2015, file no.: 2 BvR 746/13.

<sup>118</sup> Federal Constitutional Court, order of 10 July 2013, file no.: 2 BvR 2815/11.

of the toilet area. Only where there is an acute danger of self-harm or suicide does it appear conceivable, in carefully considered, substantiated and documented individual cases, to permit unrestricted monitoring of specially secured cells.

The Brandenburg Ministry of Justice has committed to adjusting the pixelation of toilet areas in line with the National Agency's recommendations.

### **CCTV monitoring**

At the prisons in Brandenburg an der Havel, Bremervörde and Schwalmstadt, it was observed that the individuals concerned were not able to discern whether the cameras were running in the specially secured cells with CCTV monitoring.

The mere fact that a camera is visible is not sufficient. It should be possible for the person concerned to discern whether the camera is running, for example by means of a status light. In addition, there needs to be a permanently visible indication that CCTV monitoring is in place (e.g. pictograms).

The Brandenburg Ministry of Justice gave instructions for the cells in these prisons to be equipped with pictograms, and it recommended that the same be done in the other facilities in Brandenburg.

### **Monitoring of private telephone conversations in preventive detention centres**

Each telephone call made from the preventive detention centre at Schwalmstadt Prison is preceded by a recorded message indicating the fact that telephone conversations may be monitored acoustically. This is done irrespective of whether there are any facts justifying acoustic surveillance or whether surveillance actually takes place. Pursuant to section 36 (3) in conjunction with section 34 (4) of the Hessian Act on the Execution of Preventive Detention (*Hessisches Sicherungsverwahrungsvollzugsgesetz*) as applicable at the time of the visit, it was permissible to openly monitor telephone conversations only for reasons related to security and order in the facility or for treatment-related reasons. Thus, every surveillance measure carried out should have been announced individually; otherwise, no such message should have been played.

In terms of fundamental rights, such an interference is relevant from two different perspec-

tives. Announcing that the content of a telephone conversation will be monitored may have an impact on the way in which the individual concerned conducts the conversation.<sup>119</sup> In addition, the individuals concerned have no way of knowing whether they are actually being monitored, and access to effective judicial control is rendered more difficult.<sup>120</sup>

The Hessian Act on the Execution of Preventive Detention has since been amended to provide that permission to use the telephone system is subject to the detainees and the other parties to a telephone conversation giving their consent to possible random monitoring of telecommunications. However, such provisions have already been found to be unlawful.<sup>121</sup> The Hessian Ministry of Justice stated that it wanted to await a decision by Frankfurt am Main Higher Regional Court following an order of the Federal Constitutional Court dated 12 March 2019.<sup>122</sup>

Announcements that telephone conversations will be monitored must be restricted to cases where surveillance is permissible and actually carried out.

### **Confidentiality of conversations**

In the closed section of Schwalmstadt Prison, telephones are located in the corridors of the various units and are not partitioned, which means that confidential conversations are not possible.

Given that cells in other prisons are already equipped with telephones and no security concerns have been expressed in this regard, Schwalmstadt Prison should also provide facilities which ensure that confidential conversations are possible.

In response, the Hessian Ministry of Justice stated that, on account of the limited space available, no constructional measures were envisaged to shield conversations. The Ministry added that the prisoners themselves could ensure the confidentiality of their conversations by lowering their voices.

<sup>119</sup> Informational self-determination (Federal Constitutional Court, judgment of 15 December 1983, file no.: 1 BvR 209/83, margin no. 146).

<sup>120</sup> Federal Constitutional Court, order of 12 March 2019, file no.: 2 BvR 2255/17, margin no. 25.

<sup>121</sup> Cf. Naumburg Higher Regional Court, NStZ 2012, 433; Hamm Higher Regional Court, NStZ 2009, 575.

<sup>122</sup> Federal Constitutional Court, order of 12 March 2019, file no.: 2 BvR 2255/17.



In the National Agency's view, this is not sufficient. Prisoners should be able to have a telephone conversation at a normal volume. If confidentiality cannot be ensured by installing acoustic hoods, other options should be provided, such as telephones in the cells, telephone rooms or booths.

## 6 – PSYCHIATRIC CLINICS

### 6.1 – Introduction

Due to the COVID-19 pandemic, only a few visits were possible in the year under review. In the area of psychiatric clinics, the National Agency in 2020 visited the forensic psychiatric clinic of the Ecumenical Hainich Clinic in Mühlhausen, Thuringia, which was chosen at random. Forensic psychiatric detention in Thuringia is privatised. In order to fulfil the state's responsibility to ensure that its tasks are performed properly,<sup>123</sup> the Thuringian Act on Forensic Psychiatric Detention (*Thüringer Maßregelvollzugsgesetz*) provides for parliamentary control by the *Land* parliament (section 44) and for supervision by the so-called intervention commissioners<sup>124</sup> (section 6 in particular), in addition to the competent supervisory authority.

### 6.2 – Positive examples

The National Agency highlighted several positive examples during its visit:

During the visit it was noted that the clinic made efforts to ensure that the restrictions imposed in the fight against the pandemic were proportionate and that the impact of these restrictions was compensated for. Where individuals were isolated, for instance, it was ensured that this measure could be lifted as quickly as possible by repeatedly testing the individuals concerned. Attempts were made to compensate for the necessary suspension of visits by offering video telephony. At the same time, efforts were made to implement the relaxation of measures stipulated by a *Land* ordinance as quickly as possible in the facility.

Strip-searches of persons held in the clinic are only carried out after an examination of the individual case. If such a search is in fact necessary, it is conducted in a more respectful procedure, i.e. involving two stages where half the body remains dressed in each stage.

Moreover, the clinic employs a video interpreting system to complement the use of interpreters on site. Communication with persons who are not primarily German-speaking can thus be made

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<sup>123</sup> Federal Constitutional Court, judgment of 18 January 2012, file no.: 2 BvR 133/10, margin no. 166.

<sup>124</sup> At the time of the visit, there were two intervention commissioners tasked with supervising the three Thuringian forensic clinics.

much easier and communication difficulties can be prevented. It also ensures that conversations remain confidential.

### 6.3 – Findings and recommendations

The visited facility was given recommendations on the following main topics:

#### 6.3.1 – Measures involving deprivation of liberty

##### Segregation

During its past visits to forensic psychiatric clinics, the National Agency has repeatedly noted cases where individuals have been segregated for several weeks at a time in a separate room without any access to the wider community, for example at the forensic clinic in Thuringia. It would be desirable to provide at least a few hours of one-on-one supervision in order to ensure the best possible level of interpersonal contact and exercise outdoors.

Insufficient social contact and constant isolation usually have a negative impact on patients' mental health. Interpersonal contact, on the other hand, helps achieve the aim of rehabilitating criminal offenders.

The Federal Constitutional Court takes the view that "isolation may not always be considered a less severe measure [than physical restraints], since the intensity of its effects in the specific case can be equal to those of five-point or seven-point restraints".<sup>125</sup> Furthermore it has held that "[i]f persons placed in isolation are not sufficiently monitored, isolation also entails the risk of considerably damaging their health".<sup>126</sup>

Particularly where segregation lasts for a long period of time, therapeutic and nursing care should be ensured. Segregation should be closely monitored, especially with regard to its duration, in order to bring about a relaxation of the measure as soon as possible. Detailed reasons should be given if the measure is to be continued.

##### Statutory basis

During visits to psychiatric clinics, greater attention is now paid to the implementation of constitutional requirements on the use of phys-

ical restraints due to the Federal Constitutional Court judgment of 24 July 2018. The visited clinic meets the requirements set out in the Federal Constitutional Court judgment when physical restraints are applied.

At the time of the visit, however, section 26 of the Thuringian Act on Secure Psychiatric Detention did not comply with the requirements set by the Federal Constitutional Court. It merely provides that "the competent court and the enforcement authority shall be informed". According to the requirements established by the Federal Constitutional Court judgment, however, physical restraints are subject to the requirement of judicial authorisation pursuant to Article 104 (2), 1st sentence, of the Basic Law. The guarantee of the requirement of judicial authorisation should be set down in statute.

Moreover, section 26 (5) of the Thuringian Act on Secure Psychiatric Detention requires that "uninterrupted observation shall be ensured unless personal supervision (seated watch) can be arranged for". According to the case law of the Federal Constitutional Court, persons under physical restraint must be observed continuously and personally by therapeutic or care staff who are in direct proximity to the detainee (one-on-one supervision).<sup>127</sup> It is essential that supervision is provided by suitably qualified staff, since this allows for a de-escalating influence to be exerted on the person concerned in order to enable the measure to be terminated as soon as possible. In addition, health damage can be prevented effectively in this way. Thus, the guarantee of constant and personal one-on-one supervision by therapeutic or care staff must be ensured by law.

<sup>125</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 80.

<sup>126</sup> Ibid.

<sup>127</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 83.

### 6.3.2 – Privacy

#### Visibility of toilets

At the forensic clinic, some of the patients' rooms as well as the so-called time-out rooms and crisis intervention rooms are CCTV monitored. CCTV monitoring of the crisis intervention rooms also covered the toilet area. The images were displayed on the surveillance monitor in the staff room without pixelation.

Placement in a room with constant CCTV monitoring significantly interferes with the privacy of the persons concerned. It must be ensured that persons held in psychiatric facilities are not subjected to uninterrupted and indiscriminate CCTV monitoring. Under no circumstances can CCTV monitoring replace the presence of members of staff. In order to protect the patients' personality rights, CCTV cameras must be installed in such a way that the toilet area is either not visible on the monitor at all or, alternatively, is only shown in the form of pixelated images. If deemed necessary in individual cases, it may be possible to permit unrestricted monitoring of a room due to an acute danger of self-harm or suicide. However, any such decision should be carefully considered, substantiated and clearly documented. The reasons for CCTV monitoring must be documented. In addition, the person concerned must be informed that monitoring is taking place. The mere fact that the camera is visible is not sufficient. It must be possible for the persons concerned to discern whether the camera is running.

The Thuringian Ministry for Labour, Social Affairs, Health, Women and Families announced that cameras would be adjusted in such a way that only the movement patterns of the person concerned would be displayed in the form of a coloured line. Using this method, the individual's genital area would not be visible. In addition, staff would be trained and a visible notice would be put up stating that the camera is only running when the indicator light is on.

#### Protection of sense of modesty

Physical restraints constitute a serious interference which also affects the privacy and sense of modesty of the person concerned. The National Agency therefore takes the view that such measures may only be applied in cells that are not visible to third parties (other detainees or visitors). In this way, the privacy of the individuals concerned is respected to the greatest extent possible. In addition, persons being physically restrained should, at the very least, be given paper underwear and a paper shirt to wear in order to protect their sense of modesty.

## 7 – CUSTOMS

### 7.1 – Introduction

Due to the COVID-19 pandemic, the members of the Commission temporarily suspended their visits. It was therefore all the more important for the National Agency to continue and consolidate its dialogue with the Central Customs Authority. By making enquiries, it obtained information on the measures taken as a result of the pandemic.<sup>128</sup> In addition, the exchange with the supervisory authority enabled the Agency to continue to push for its recommendations to be implemented effectively. As part of this exchange and taking into account the issues identified during the discussions held in 2019, the Central Customs Authority issued an order on 16 October 2020 which largely reflects the National Agency's recommendations. In particular, it aims at raising staff awareness of issues relating to human rights.

In 2020, the National Agency visited the Essen Customs Investigation Office (Düsseldorf office). The visited place of detention was chosen randomly. Nonetheless, the National Agency was confronted with the specific issue of persons being taken into custody having internally concealed small packages of drugs (including so-called body packers) and the associated use of a “swallowers’ toilet”.<sup>129</sup>

### 7.2 – Positive examples

One positive example noted by the National Agency during its visits was the fact that officers at the Düsseldorf office always remove their firearms before entering a custody suite. This method should generally be applied in all customs facilities.

Another positive aspect was that persons taken into custody are not shackled.

As a rule, minors are not held in custody cells but rather in the offices under the supervision of the competent officers. In the National Agency's view, it is essential that this practice is upheld across the board.

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<sup>128</sup> See III 3.6 COVID-19 pandemic – Findings and recommendations according to type of facility – Federal and *Land* police and customs.

<sup>129</sup> Customs officers use a device they call a “swallowers’ toilet” in order to monitor the excretion of the foreign objects concerned (body packs).

### 7.3 – Findings and recommendations

Since the National Agency encountered different terms – custody and detention (*Gewahrsam* and *Verwahrung*) – it would like to highlight that its standards and recommendations apply to all forms of deprivation of liberty in the area of customs. Specifically, the visited facility was given recommendations *inter alia* on the following topics:

#### 7.3.1 – Furnishings and fittings of the custody facilities

The spatial conditions at the Düsseldorf Airport office neither meet the National Agency's standards nor are they in line with the custody regulations of the customs authorities. For instance, the custody cells are equipped with floor-to-ceiling bars on one side and are thus fully visible from outside.

The National Agency accepts that special security measures are necessary whenever persons are taken into custody who have internally concealed small packages of drugs. Fulfilling the state's duty to protect and promote life, averting any impairments of health and securing evidence all constitute legitimate aims which may justify the constant observation of the person concerned. However, the spatial conditions on site do not justify such observation.

In the National Agency's view, it is expedient to have a staff member keep seated watch inside the custody cell or at the open door of the cell, as the person concerned is then not only monitored but also provided with constant supervision. This allows for self-harm to be prevented and for staff to exert a calming and de-escalating influence on the person concerned. During visits to police stations, the National Agency actually observed such an approach and highlighted this as a particularly positive aspect.

The conditions in custody cells, including furnishings and fittings, must uphold the human dignity of detainees. The circumstances at the facility in question should be aligned with the current norms and standards.

On 10 February 2021, the National Agency and the Central Customs Authority held an exchange on the issue of persons who are taken into custody having internally concealed small packages of drugs. During this meeting, the Central Customs Authority gave assurances that the spatial condi-

tions would be aligned with the National Agency's standards and to the custody regulations of the customs authorities.

### 7.3.2 – Documentation

At the time of the visit, the Düsseldorf Airport office did not keep any custody records. Custody was documented merely in the form of file entries. During the visit, the delegation was therefore unable to inspect the documentation.

Irrespective of the terms used for measures involving deprivation of liberty (custody or detention), documentation should be clear and comprehensible. The following details should be documented:

- + The detainee's personal details
- + When the deprivation of liberty began
- + The staff members responsible for taking the person concerned into custody and for supervising them during custody
- + The health condition of the person concerned
- + Whether the person was informed of their rights
- + Whether the person was informed of the reason for the deprivation of liberty
- + Whether a judicial order had been obtained
- + If a strip-search was conducted, the reasons for this
- + The name of the staff member conducting the strip-search
- + The times of checks, including the initials of the responsible staff member
- + The time and type of meals
- + The removal and subsequent return of personal objects
- + The time of release
- + If it was not possible to inform the persons concerned of their rights when they were brought into custody, it should be documented whether this was done at the latest by the time they were released.

Complete documentation serves to protect those being held in custody, as well as the responsible staff members. Supervisors should verify at regular intervals whether custody records are being kept correctly. These checks should be recorded.

In its response, the Central Customs Authority reiterated that pursuant to the custody regulations, custody records must be kept for each custody cell. The National Agency was assured that such custody records were now also kept at the Düsseldorf office.

### 7.3.3 – Strip-searches

According to information provided by members of staff, every person deprived of their liberty is subjected to a strip-search upon entering custody.

Strip-searches involving a visual inspection of the detainee's genital area represent a severe interference with the detainee's general right of personality.<sup>130</sup> According to recent court decisions, it should be decided on a case-by-case basis whether there are specific indications of a danger to public security and order that would justify a strip-search. Any such measures must adhere to the principle of proportionality.<sup>131</sup> Since this measure constitutes a severe interference with fundamental rights, the reasons for doing so must be documented in a clear and comprehensible manner. Furthermore, the search should be conducted as respectfully as possible, for example involving two stages where half the body remains dressed in each stage.

In its response, the Central Customs Authority endorsed this recommendation and instructed its officers accordingly.

### 7.3.4 – Further training

The customs administration does not offer any further training specifically dealing with the topic of "custody".

However, the work in custody facilities differs in many respects from officers' usual tasks. Training on subjects such as the rights of persons deprived of their liberty, intercultural skills, suicide prevention and de-escalation is important for staff members and can strengthen the competence and confidence needed for the special cir-

<sup>130</sup> Federal Constitutional Court, order of 4 February 2009, file no.: 2 BvR 455/08; Federal Constitutional Court, order of 5 March 2015, file no.: 2 BvR 746/13.

<sup>131</sup> Cologne Administrative Court, judgment of 25 November 2015, file no.: 20 K 2624/14; Hamburg Regional Court, decisions on complaints against G20 detentions, 18 June 2018, URL: <http://justiz.hamburg.de/pressemitteilungen/11228482/pressemitteilung-2018-06-18-olg-01/> (retrieved on 18 March 2021).

cumstances of custody.

### 7.3.5 – Custody of persons who internally conceal small packages of drugs

At the Düsseldorf office, persons taken into custody who have internally concealed small packages of drugs or who are strongly suspected of doing so based on testimony have to use a “swallowers’ toilet” while being subject to constant monitoring. This toilet is located in the custody suite on an elevated platform in the centre of the cell, and is completely visible from all sides. The toilet is connected to a collecting basin partitioned off by a glass pane. An examination of the excrement collected in this basin allows officers to secure evidence. In this context, the National Agency made recommendations which, in its view, relate to minimum human rights guarantees:

#### Medical care

During its visit, the delegation was informed that medical care is not ensured while in custody at the Düsseldorf office and while using the so-called “swallowers’ toilet”.

In the National Agency’s view, it is essential to grant the persons concerned the right to medical care and treatment.<sup>132</sup> Medical supervision to ensure the timely detection of ruptured body packs appears to be indispensable<sup>133</sup> in view of the acute danger to the detainee’s life this involves. The fact that the person concerned is constantly monitored by staff during the process of excretion is not sufficient in this case.

The CPT has already pointed out the risk of so-called body pack syndrome (risk of poisoning due to perforation of the swallowed package, risk of gastrointestinal obstruction) and recommended increased medical supervision of the individuals concerned, preferably in a medical ward.<sup>134</sup>

Since persons who internally conceal small packages of drugs are potentially exposed to a health risk that may lead to death,<sup>135</sup> they should

always be under constant medical supervision before, during and after excretion of the foreign objects.

The Central Customs Authority pointed out the possibility of taking them to a hospital or to a prison with its own hospital ward, which seems equally adequate in this context.

However, in the National Agency’s view, the qualifying arguments given by the Central Customs Authority in its response – i.e. that a medical examination was carried out only “as a general rule” and that constant medical supervision was not considered necessary where a doctor was of the opinion that the person’s state of health did not raise any concerns – are not reasonable in respect of persons who have internally concealed small packages of drugs.

During the exchange held on 10 February 2021, the Central Customs Authority gave assurances that the possibility of constant medical supervision was being considered.

#### Privacy

During the process of excreting foreign objects using the “swallowers’ toilet”, the person concerned is constantly monitored by staff.

As far as the protection of privacy is concerned, the National Agency has fundamental reservations about a person being observed while using the toilet. In this context, the National Agency acknowledges that special consideration must be given to security needs and the securing of evidence.

However, in the case of the “swallowers’ toilet”, the interference is substantially aggravated by the material circumstances, and, in the National Agency’s view, this affects human dignity. The toilet, which is not partitioned off, is located in an open room on an elevated platform and is completely visible from all sides. Additionally, sitting on an elevated toilet located in the centre of the room for an extended period of time, combined with constant monitoring by staff, can only

<sup>132</sup> See also: Praxis 2013; 102 (15): 891 - 901.

<sup>133</sup> Cf., *inter alia*, the medical-ethical guidelines of the central ethics commission of the Swiss Academy of Medical Sciences (Schweizerische Akademie der Medizinischen Wissenschaften, SAMW), H. Medical care for persons suspected of body packing (H. *Medizinische Betreuung von Personen mit mutmaßlichem Bodypacking*). <https://www.samw.ch/de/Publikationen/Richtlinien.html> (retrieved on 18 March 2021).

<sup>134</sup> CPT/Inf (2008) 33, paragraph 39.

<sup>135</sup> This view is shared by the customs administration: “If only

one of these containers ruptured inside the stomach, this would lead to certain death in most cases.” ([https://www.zoll.de/SharedDocs/Pressemitteilungen/DE/Rauschgift/2020/284\\_bodypacker\\_m.html](https://www.zoll.de/SharedDocs/Pressemitteilungen/DE/Rauschgift/2020/284_bodypacker_m.html)). See also: Praxis 2013; 102 (15): 891 - 901, p. 896: “Unsealed drug packages can release lethal doses of narcotics within a very short time and, depending on the substance, result in fulminant intoxication due to rapid transmucous absorption.”

be described as degrading.

The privacy of individuals held in custody must be protected. With these aspects in mind, it seems crucial to ensure that the constant observation of persons using the toilet is as non-intrusive as possible.

During the exchange held on 10 February 2021, the Central Customs Authority gave assurances that the possibility of adequately protecting the privacy of the person concerned was being reviewed.

# **VI STATEMENTS ON DRAFT LEGISLATION**



## 1 – INTRODUCTION

Pursuant to Article 19 (c) of the OPCAT, the National Agency has the power to submit proposals and observations concerning existing or draft legislation.

In order to have a preventive effect, the Agency endeavours to submit comments during the legislative process.

In the year under review, the National Agency had the opportunity to submit comments on ten draft bills and thus to participate in the legislative procedures (in some cases as part of several readings):

Date	Legislation
8 January 2020	Ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts
14 February 2020	Draft bill on secure psychiatric detention, Schleswig-Holstein
18 March 2020	Draft bill to amend Berlin prison acts
26 March 2020	Draft of a revised <i>Land</i> prison data protection act, Rhineland-Palatinate
15 April 2020	Draft of a second act amending Hessian prison acts (Hesse Ministry of Justice)
15 April 2020	Draft bill to modernise the judicial system, Schleswig-Holstein, (Ministry of Justice, Europe, Consumer Protection and Equality)
8 May 2020	Draft bill on assistance and placement of persons requiring assistance as a result of mental disorders, Schleswig-Holstein
31 August 2020	Draft of a second act amending Hessian prison acts (Hesse <i>Land</i> Parliament), oral hearing in the Legal Policy Committee and in the Sub-committee on the Prison System of the <i>Land</i> Parliament of Hesse on 17 September 2020
2 November 2020	Draft bill to modernise the judicial system, oral hearing in the Committee on Internal and Legal Affairs of the <i>Land</i> Parliament of Schleswig-Holstein on 25 November 2020
4 November 2020	Draft bill on criminal law-related committal to a psychiatric hospital or an institution for withdrawal treatment, North Rhine-Westphalia
27 November 2020	Draft bill on implementing Directive (EU) 2016/680 in the area of the prison system and on the constitutive revision of the Act on the Protection of Personal Data in the Prison System and in the Social Services of the Justice System of the <i>Land</i> of Berlin
4 December 2020	Expert discussion on a legislative project to streamline the Federal Prison Act, Federal Ministry of Justice and Consumer Protection

Positive mention should be made of the fact that Schleswig-Holstein involved the National Agency to a greater extent in the legislative procedures regarding the Act on Secure Psychiatric Detention (*Maßregelvollzugsgesetz*) and the Act on Assistance and Placement of Persons Requiring Assistance as a Result of Mental Disorders

(*Gesetz zur Hilfe und Unterbringung von Menschen mit Hilfebedarf in Folge psychischer Störungen*).

Several recommendations made by the National Agency in the consultation procedure were taken into account and implemented in the legislation concerned.

## 2 – RECOMMENDATIONS

The National Agency's work and statements on draft legislation are based on the UN Convention against Torture and other relevant UN norms concerning the treatment of persons deprived of their liberty. In addition, the National Agency takes into account relevant European norms and international case law, recommendations by the European Committee on the Prevention of Torture (CPT) and other bodies as well as German legislation and court decisions.

Based on the findings from its visits and taking account of the national and international legal bases and other documents referred to above, the National Agency develops recommendations which should be enshrined in law in order to prevent the ill-treatment and inhumane treatment of persons deprived of their liberty.

With these aspects in mind, it made the following comments on the draft legislation in question:

### 2.1 – Exercise of the mandate of the National Preventive Mechanism

#### 2.1.1 – Access to files

Several draft bills provided that the members of the National Agency for the Prevention of Torture should be granted access to all files when visiting a facility, insofar as this is “strictly necessary”<sup>136</sup> or “necessary”<sup>137</sup> for the performance of the Preventive Mechanism's tasks.

However, the type and scope of the National Agency's mandate arise from Article 20 of the OPCAT. Thus, in order to exercise their statuto-

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<sup>136</sup> Section 42a of the draft bill on the implementation of Directive (EU) 2016/680 in the area of the prison system and on the constitutive revision of the Act on the Protection of Personal Data in the Prison System and in the Social Services of the Justice System of the *Land* of Berlin (*Gesetz zum Schutz personenbezogener Daten im Justizvollzug und bei den Sozialen Diensten der Justiz des Landes Berlin*); section 18 of the ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts; section 23 of the draft bill to modernise the judicial system (Schleswig-Holstein); section 43 of the draft bill on secure psychiatric detention (Schleswig-Holstein); section 40 of the draft bill on criminal law-related committal to a psychiatric hospital or an institution for withdrawal treatment (North Rhine-Westphalia).

<sup>137</sup> Section 37 of the draft bill on assistance and placement of persons requiring assistance as a result of mental disorders (Schleswig-Holstein).

ry tasks in accordance with Article 20 (b) of the OPCAT, the Members of the National Agency must be granted access to all information concerning persons who are or may be deprived of their liberty.<sup>138</sup>

Purpose limitation is ensured in that the fulfilment of the Preventive Mechanism's mandate is based on it being granted access to information “referring to the treatment of those persons as well as their conditions of detention”.<sup>139</sup> In turn, the absolute necessity of access to such documents results from the National Agency's mandate to prevent torture and other cruel, inhuman and degrading treatment or punishment.

In order to perform its tasks, it is essential that the National Agency is free to decide which files and documents it wants to inspect. The impression must not be created that institutions or *Land* legislatures may restrict the National Agency's right of access to information, as derived from the OPCAT.

For this reason, any restrictions should be deleted from the relevant legislation.

#### 2.1.2 – Correspondence with the National Agency

To the extent that such a guarantee was not already enshrined in legislation, the National Agency stressed that correspondence with the National Preventive Mechanism, as well as the confidentiality of such correspondence, must be protected by law.

It must be ensured that written correspondence and telephone conversations between persons deprived of their liberty and the National Agency for the Prevention of Torture are not restricted. Furthermore, correspondence must not be inspected and conversations must not be intercepted.<sup>140</sup>

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<sup>138</sup> The National Agency's right to access all information, i.e. including medical and care-related documents, is comprehensively defined in Article 20 (b) of the OPCAT.

<sup>139</sup> Article 20 (b) of the OPCAT.

<sup>140</sup> Cf. Article 21 of the OPCAT.

## 2.2 – Special security measures

### 2.2.1 – General remarks

In several of its statements, the National Agency expressed concerns about the fact that the legal requirements for the measures of segregation and placement in a specially secured cell (prisons) and isolation (psychiatric clinics) were intended to be considerably lower than those for physical restraints. According to a judgment by the Federal Constitutional Court, isolation of an affected person may not always be considered a less severe measure, since the intensity of its effects in the specific case can be equal to those of five-point or seven-point restraints.<sup>141</sup> Statutory regulation must not create incentives to prefer particular measures even if they do not constitute a less severe measure in an individual case.

In the National Agency's view, this applies equally to sedative medication in psychiatric clinics. In terms of fundamental rights, such an interference is doubly relevant since it not only affects the freedom to move of the person concerned but also their physical integrity.

Treatment with sedative medication against the will or without the consent of the person concerned requires an assessment that is independent of the detention facility. Where a person is deprived of their freedom to move by means of medication, such a measure requires judicial authorisation.<sup>142</sup>

The National Agency also took a critical view of a transition clause which it considered disproportionate. The provision in question, which was included in a draft bill submitted to the National Agency, provided that until 31 December 2026 “special security measures can also be imposed if and to the extent that less severe measures are not available due the structural features of the hospital”.<sup>143</sup>

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<sup>141</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 80.

<sup>142</sup> Cf. Article 104 para. 2 of the Basic Law: “Only a judge may rule upon the permissibility or continuation of any deprivation of liberty. If such a deprivation is not based on a judicial order, a judicial decision shall be obtained without delay. The police may hold no one in custody on their own authority beyond the end of the day following the arrest. Details shall be regulated by a law.”

<sup>143</sup> Section 44 of the draft bill on assistance and placement of persons requiring assistance as a result of mental disorders (Schleswig-Holstein).

The National Agency is of the opinion that the generally worded formulation, whereby special security measures can also be imposed if “less severe measures are not available due the structural features of the hospital”, is not in line with the constitutionally guaranteed rights of the persons concerned. In fact, it is the structural features which need to be designed accordingly.

By formulating the possibility of applying special security measures in such a general manner, the effect of the preceding restrictions on such interference with the affected persons' fundamental rights is cancelled out. This disproportionately undermines the duty of hospitals “to ensure that, where coercion is used, the appropriate and least intrusive means are available according to current scientific knowledge”. In addition, the wording of the legislation does not specify which structural features may render the application of less severe measures impossible.

Special security measures constitute a serious interference with the fundamental rights of the individuals concerned. According to the Federal Constitutional Court's judgment of 24 July 2018, the use of physical restraint, for instance, constitutes a serious interference with a person's liberty<sup>144</sup>, and also presents a serious risk of injury. Thus, any restrictions to this right may only take place on the basis of a formal law that is sufficiently precise and takes sufficient account of the principle of proportionality. The provision in question does not meet these requirements.

### 2.2.2 – Physical restraint

In order to be consistent with the requirements established by the case law of the Federal Constitutional Court, the legislation of the *Länder* must be sufficiently precise, i.e. it must set clear standards as to the content, purpose and extent of the restrictions of liberty.<sup>145</sup>

The National Agency believes that the guarantees enshrined in the judgment of 24 July 2018<sup>146</sup> must apply in all places of deprivation of liberty. Physical restraints constitute a serious interference with the right to liberty in and of themselves

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<sup>144</sup> Article 2 (2), 2nd sentence, in conjunction with Article 104 of the Basic Law.

<sup>145</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 77.

<sup>146</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15.

and expose the persons concerned to a considerable risk of injury.

In its relevant statements on the draft bills submitted,<sup>147</sup> the National Agency made the following recommendations:

### Scope of statutory guarantees (definition of physical restraint)

In two draft bills, physical restraint was defined as shackling whereby the person concerned was fully deprived of their freedom to move.<sup>148</sup>

This wording suggests that the statutory conditions apply exclusively to five-point restraints and above.

With such a restriction, there is a risk that alternative, but not necessarily less severe, measures such as three-point restraints could be applied without obtaining a judicial decision.

The National Agency defines physical restraint as the act of depriving a person of their freedom to move by binding their arms, legs and in some cases the centre of the body, with the result that they are unable to change their sitting or lying position independently.

It believes that constitutional requirements must also be met for forms of physical restraint other than five-point or seven-point restraint. In all of these cases, the person concerned is deprived of their liberty to move within the space they are in.<sup>149</sup> In addition, such measures can pose an equally serious risk of injury.<sup>150</sup>

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<sup>147</sup> Statements by the National Agency on the draft bill to amend Berlin prison acts, on the ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts; on the draft bill to modernise the judicial system (Schleswig-Holstein); on the draft bill on criminal law-related committal to a psychiatric hospital or an institution for withdrawal treatment (North Rhine-Westphalia); and on the draft bill on assistance and placement of persons requiring assistance as a result of mental disorders (Schleswig-Holstein).

<sup>148</sup> See ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts; draft bill to modernise the judicial system (Schleswig-Holstein).

<sup>149</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 70 would thus be correct: "With this kind of physical restraint, the person concerned is completely deprived of their freedom to move in any direction. Freedom of movement is thus curtailed beyond what placement in a closed institution already involves, that is, the person's radius of movement being restricted to the premises of the institution."

<sup>150</sup> *Ibid.*, margin no. 71.

Tying a person's wrist or ankle to the wall or to other objects violates human dignity.

Since so-called one-point and two-point restraints ultimately mean that an individual is bound by their limbs, such measures should generally be avoided.

### Requirement of judicial authorisation

In the National Agency's view, it is essential that the authorisation to use physical restraint does not lead to a departure from the fundamental objective, which is to avoid the use of such a measure as far as possible.

With this in mind, the Federal Constitutional Court ruled "that judicial authorisation to use physical restraint must meet a strict standard of proportionality, especially with regard to the length of the measure, and be limited to what is absolutely necessary. The constitutional requirement of judicial authorisation must not be undermined by the ordering of physical restraint beyond the necessary period in order to avoid having the court that issued the order decide on the matter again."<sup>151</sup>

During its visits, the National Agency found court orders authorising the repeated use of physical restraint over a period of several months.

In order to satisfy the constitutional requirements, the respective laws must be amended to include a formulation stating that physical restraint must always meet a strict standard of proportionality, including with regard to the length of the measure, and be limited to the absolutely necessary period of time.

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<sup>151</sup> Federal Constitutional Court, judgment of 19 March 2019, file no.: 2 BvR 2638/18, margin no. 30.

### One-on-one supervision by therapeutic or care staff

Some of the draft bills submitted to the National Agency did not provide for one-on-one supervision by therapeutic or care staff.

According to the case law of the Federal Constitutional Court, persons under physical restraint must be observed continuously and personally by therapeutic or care staff who are in direct proximity to the individual concerned (one-on-one supervision).<sup>152</sup>

The National Agency takes the view that this requirement – which also relates to the qualification of staff – must apply to all places of detention since care provided by qualified staff is essential, irrespective of the type of institution. Only staff with suitable therapeutic or caregiving training can effectively identify the specific health hazards of physical restraint when they occur and respond appropriately.

Only then is it possible to exert a de-escalating influence on the person concerned in order to allow for the measure to be terminated as soon as possible. In addition, health hazards can be identified and prevented effectively in this way. Because of the health hazards, it is desirable for staff to additionally receive instruction by a doctor.

### Protection of privacy

In its observations, the National Agency stressed the necessity of a statutory guarantee to protect an individual's sense of modesty while they are physically restrained.

In order to protect the privacy of the persons concerned to the greatest extent possible, the National Agency takes the view that physical restraints should be used only in cells the interior of which is not visible to third parties. In addition, persons being physically restrained should, at the very least, be given paper underwear and a paper shirt to wear in order to protect their sense of modesty.

### Debriefing

Not all of the submitted draft bills provide for a right to a debriefing of the person concerned following the use of physical restraints.

Such a debriefing is essential, as it can create transparency regarding measures which may be perceived by the person concerned as arbitrary when they are applied. It can thus have a preventive effect and serve to reduce measures involving deprivation of liberty.<sup>153</sup>

Debriefing following the use of physical restraints should be provided for by law.

### Documentation

In several of its statements, the National Agency referred to the necessity of specifying in more precise terms the obligation to maintain complete and comprehensible documentation of the measure. Such an obligation should generally include the documentation of medical checks, the less severe measures tried in advance and the debriefing with the persons concerned.

In addition, the National Agency repeatedly recommended that regular evaluation of the documentation of security measures should be provided for by law. Separate documentation and the evaluation thereof can help to reduce or prevent the use of special security measures. This also provides transparency regarding measures which are often perceived as arbitrary by the persons concerned.

In this way, the separate documentation of measures, including the less severe measures that were tried and failed, serves not only to improve recollection of the incidents and the frequency with which they occurred, but also to prevent special security measures from being applied disproportionately.

### 2.3 – Outdoor exercise

Some draft bills relating to the prison service provided for restrictions on guaranteed outdoor exercise for sentenced prisoners and juvenile prisoners. In one example, persons deprived of their liberty were to be allowed to spend at least one hour per day outdoors “only if the weather at the scheduled time permits”.<sup>154</sup>

The requirement to ensure one hour of outdoor exercise is an internationally recognised minimum standard.<sup>155</sup> Where restrictions are provid-

<sup>152</sup> Federal Constitutional Court, judgment of 24 July 2018, file no.: 2 BvR 309/15, margin no. 83.

<sup>153</sup> Cf. CPT/Inf (2006) 35, paragraph 46.

<sup>154</sup> Cf. the National Agency's statement on the draft bill to modernise the judicial system (Schleswig-Holstein).

<sup>155</sup> Cf. Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules,

ed for, they must be sufficiently precise. Furthermore, they can only be an exceptional measure in justified individual cases. The opportunity to exercise outdoors may be denied only in extreme weather, and the persons concerned should, as far as possible, be given the option to exercise outdoors at a later time. Whether the persons concerned take advantage of the opportunity to exercise outdoors should be up to them, even in bad weather.

For juveniles, the ability to exercise outdoors should be guaranteed to an even greater extent. Outdoor exercise has unique health benefits that cannot be replicated by any other measure,<sup>156</sup> and it is crucial to the development of young people.

#### 2.4 – Optical-electronic monitoring

In line with the recommendations of the National Agency, the respective draft bills (prison system)<sup>157</sup> submitted to it provided for measures to protect the privacy of persons deprived of their liberty. For instance, particularly sensitive areas such as the toilet area are excluded from monitoring, or technical measures such as pixelation are used to ensure that these areas are not displayed on the monitor.

Unrestricted monitoring, which involves the toilet area being visible without pixelation, may only be used in specific exceptional cases where there is an acute danger of self-harm or suicide.

In the National Agency's view, such measure can only serve as a temporary solution until the emergency service arrives or until the person concerned is committed to a clinic or transferred to a prison hospital.

Care should also be taken to ensure that CCTV monitoring does not under any circumstances replace the presence of staff, who should provide constant personal supervision and care in situations where there is an acute danger of self-harm

or suicide.

In the National Agency's view, it is essential that these guarantees are ensured by law.

Furthermore, the National Agency considers the following guarantees to be necessary in order to ensure that the person concerned is detained under humane conditions even where the cell is under unrestricted monitoring due to an acute danger of self-harm or suicide:

The measure should be based on a carefully considered, substantiated and clearly documented decision taken on a case-by-case basis. CCTV monitoring should only be used in individual cases where it is imperative or absolutely necessary to protect the person concerned. In addition, it must be ensured that the person concerned is informed in a suitable manner (e.g. through pictograms) that CCTV monitoring is taking place.

#### 2.5 – Firearms in detention facilities

In several of its statements, the National Agency commented on the issue of carrying firearms in detention facilities.

Because of the risks involved, staff should refrain from carrying weapons on the facilities' premises. In order to minimise these risks as far as possible, it is recommended that firearms should be kept securely locked in a central location and that their use be confined to specially trained staff.

In addition, due to the significant health risks involved, the use of pepper spray in confined spaces is not a proportionate measure under any circumstances. It should therefore be avoided inside detention facilities.<sup>158</sup>

#### 2.6 – Forced medication and health care

In several of its statements, the National Agency commented on forced medication in the area of health care.<sup>159</sup>

Since forced medical treatment constitutes a serious interference with the fundamental right to physical integrity under Article 2 (2), 1st sentence, of the Basic Law and with the right to self-determination ensuing from this provision,

margin no. 27.1; CPT Standards (CPT/Inf/E (2002) 1 - Rev. 2010), margin no. 48.

<sup>156</sup> Cf. Arloth/Krä, "StVollzG-Kommentar" (Commentary on the Prison Act), 4th edition, section 64 of the Prison Act, margin no. 1.

<sup>157</sup> Ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts; draft of a revised *Land* prison data protection act (Rhine-land-Palatinate); draft bill on the implementation of Directive (EU) 2016/680 in the area of the prison system and on the constitutive revision of the Act on the Protection of Personal Data in the Prison System and in the Social Services of the Justice System of the *Land* of Berlin.

<sup>158</sup> ECHR, *Tali v. Estonia*, judgment of 13 February 2014, Application no. 66393/10, § 78; CPT/Inf (2008) 33, margin no. 86.

<sup>159</sup> Ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts; draft bill on secure psychiatric detention (Schleswig-Holstein).

strict requirements apply with regard to its permissibility. These requirements include substantive preconditions for interfering with such rights and protection by way of procedural safeguards.<sup>160</sup>

According to a judgment issued by the Federal Constitutional Court on 23 March 2011, they also include documentation requirements and the resulting “necessity to document any treatment measures taken against the will of the detainee, including their coercive nature, the way they are enforced, the main reasons for imposing them and how their effects are monitored”.<sup>161</sup>

In order to have a preventive effect in ensuring that forced treatment is always used only as a measure of last resort, the National Agency considers it essential for such documentation to include information on which less severe measures had been tried in advance and why these failed. Furthermore, such documentation should be evaluated on a regular basis.

Separate documentation and the evaluation thereof can help to reduce or avoid the use of coercive measures. In addition, such documentation provides transparency regarding measures which are often perceived as arbitrary by the persons concerned.

These guarantees should be ensured by law.

### 2.7 – Use of force to put a mask on prisoners

In the context of its statements on the draft of a second act amending Hessian prison acts, the National Agency came across the issue of force being used to put a mask on prisoners.

According to the explanatory memorandum to the act, the use of a mask is intended, above all, to prevent the spreading of diseases, but also to prevent aggressive spitting at other inmates, staff and other persons. In this respect, it seems appropriate to require detainees to wear a mask in specific situations, especially given the COVID-19 pandemic.

However, the draft bill allows for the use of force in order to put a mask on prisoners. The National Agency has only heard about such cases in connection with deportations, where a so-called

body cuff<sup>162</sup> or a spit guard was used. In the prison system, however, such a measure is disproportionate.

Furthermore, the draft bill did not contain any preconditions for ordering and carrying out the measure. The forcible fitting and compulsory wearing of masks constitutes a serious interference and should therefore be subject to mandatory regulation. If it is to be provided for by law, the measure would thus only be permissible in narrowly-defined exceptional circumstances, such as for the purpose of implementing security measures or for ensuring the attendance of detainees at essential appointments.

In terms of procedural safeguards, the wording of the legislation would have to include an obligation to maintain complete documentation of the implementation of the measure and the reasons for imposing it. Another aspect which would need to be regulated by law is the question of who is authorised to order the measure, e.g. the management of the facility or a doctor.

Finally, the detainees concerned would have to be supervised constantly in order to prevent health damage. The explanatory memorandum presumes that a mask can “generally consist of any object”<sup>163</sup> which prevents spitting at other persons. In this regard, it must be pointed out that only such means may be used which have been tested and which are of such a nature that any health risk for the detainees concerned can be ruled out. In addition, the officers applying them must be trained accordingly.

If the legislative amendment were also applied to youth detention, this would not take account of the fact that youth detention (“juveniles”) does not serve to enforce prison sentences (“prisoners”), but that its main purpose must be education. This means that different standards must apply.

In the area of youth detention, the forcible application of a mask is particularly problematic in view of the seriousness of the interference and must therefore not take place.

<sup>160</sup> Federal Constitutional Court, order of 23 March 2011, file no.: 2 BvR 882/09, margin no. 38.

<sup>161</sup> *Ibid.*, margin no. 67.

<sup>162</sup> Textile belt with devices for shackling wrists and ankles.

<sup>163</sup> Hesse *Land* Parliament, printed matter no. 20/2967, p. 23.

# VII APPENDIX



## 1 – LIST OF VISITS

Date	Visit
4 March 2020	Schwalmstadt Prison, Hesse
23 June 2020	Schleswig Youth Detention Centre (follow-up visit by telephone), Schleswig-Holstein
16 July 2020	Bremervörde Prison, Lower Saxony
20 August 2020	Karlsruhe Prison (follow-up visit), Baden Württemberg
21 August 2020	Brandenburg an der Havel Prison (follow-up visit), Brandenburg
25 August 2020	Wilhelmsburg Barracks, Ulm, Baden-Württemberg:
26 August 2020	Camp Heubeck, Stetten am kalten Markt, Baden Württemberg
26 August 2020	Nibelungen Barracks, Walldürn, Baden-Württemberg:
8 September 2020	Eichstätt facility for custody awaiting deportation (follow-up visit), Bavaria
10 September 2020	Essen Customs Investigation Office, Düsseldorf Airport office, North Rhine-Westphalia
10 September 2020	Observation of a deportation procedure, charter operation from Düsseldorf Airport to Tbilisi (Georgia), North Rhine-Westphalia
22 September 2020	Würzburg Prison, Bavaria
24 September 2020	Forensic psychiatric clinic in Mühlhausen, Thuringia

## 2 – STATEMENTS ON DRAFT LEGISLATION

Date	Legislation
8 January 2020	Ministerial draft of a prison data protection act for Mecklenburg-Western Pomerania and on amending other prison acts
14 February 2020	Draft bill on secure psychiatric detention, Schleswig-Holstein
18 March 2020	Draft bill to amend Berlin prison acts
26 March 2020	Draft of a revised <i>Land</i> prison data protection act, Rhineland-Palatinate
15 April 2020	Draft of a second act amending Hessian prison acts (Hesse Ministry of Justice)
15 April 2020	Draft bill to modernise the judicial system, Schleswig-Holstein, (Ministry of Justice, Europe, Consumer Protection and Equality)
8 May 2020	Draft bill on assistance and placement of persons requiring assistance as a result of mental disorders, Schleswig-Holstein
31 August 2020	Draft of a second act amending Hessian prison acts ( <i>Land</i> Parliament of Hesse)
2 November 2020	Draft bill to modernise the judicial system, Schleswig-Holstein (Committee on Internal and Legal Affairs of the <i>Land</i> Parliament of Schleswig-Holstein)
4 November 2020	Draft bill on criminal law-related committal to a psychiatric hospital or an institution for withdrawal treatment, North Rhine-Westphalia
27 November 2020	Draft bill on implementing Directive (EU) 2016/680 in the area of the prison system and on the constitutive revision of the Act on the Protection of Personal Data in the Prison System and in the Social Services of the Justice System of the <i>Land</i> of Berlin

### 3 – MEMBERS OF THE FEDERAL AGENCY

Name	Official title	Since	Position
Ralph-Günther Adam	Senior civil servant and prison director (retd)	06/2013	Director
NN	NN		Deputy Director

### 4 – MEMBERS OF THE JOINT COMMISSION

Name	Official title	Since	Position
Rainer Dopp	State Secretary (retd)	09/2012	Chair
Petra Heß	Employee of Thuringia State Chancellery	09/2012	Member
Dr Helmut Roos	Senior civil servant (retd)	07/2013	Member
Michael Thewalt	Senior civil servant and prison director (retd)	07/2013	Member
Dr Monika Deuerlein	Certified psychologist (Dipl.-Psy.)	01/2015	Member
Margret Osterfeld	Psychiatrist, psychotherapist (retd)	01/2015	Member
Petra Bertelsmeier	Senior public prosecutor (retd)	01/2019	Member
Dr Werner Päckert	Senior civil servant and prison director (retd)	01/2019	Member

### 5 – SECRETARIAT STAFF

Name	Official title	Position
Christian Illgner	Lawyer (Mag. iur.)	Head of Secretariat
Dr Sarah Teweleit	Lawyer (LL.M.)	Deputy Head
Dr Jennifer Trunk	Fully-qualified lawyer ( <i>Rechtsassessorin</i> ), specialist in European law	Deputy Head (until 10/2020)
Elisabeth Eckrich	Nursing educator (B.A)	Academic Assistant
David Achtstein	Certified geriatric nurse	Staff member (until 09/2020)
Katja Simon	Public administration specialist ( <i>Verwaltungsfachwirtin</i> )	Administrative Department
Désirée Eichler	Management assistant in marketing communication	Secretariat

## 6 – ACTIVITIES IN THE PERIOD UNDER REVIEW

Date	Location	Visit
9 January 2020	Berlin	Event: “Reforming the system of UN treaty bodies” (“ <i>Die Reform des Systems der UN-Vertragsorgane</i> ”), German Institute for Human Rights ( <i>Deutsches Institut für Menschenrechte</i> )
18 February 2020	Essen	Schengen evaluation regarding returns (EU)
5 March 2020	Berlin	Preliminary meeting in preparation for the event marking the delivery of the 2019 Annual Report, Representation of <i>Land</i> Bremen to the Federation
23 April 2020	Virtual	Expert webinar: “Do no harm principle”, APT
6 May 2020	Virtual	Workshop: Reform of psychiatry: focussing on human rights and patient autonomy” (“ <i>Psychiatrie-Reform: Schwerpunkt Menschenrechte und Patientenautonomie</i> ”), DGPPN
20 May 2020, 27 May 2020, 3 June 2020	Virtual	Expert meeting in connection with the project “Working towards harmonized detention standards in the EU – the role of NPMs: Monitoring Prison Violence”
17 June 2020	Virtual	Participation in the SPT regional team for Europe meeting: “Covid-19, lessons learned and future challenges”
22 June 2020	Virtual	Hearing: Options to strengthen the National Agency for the Prevention of Torture in Germany, parliamentary group Alliance 90/The Greens ( <i>Bündnis 90/Die Grünen</i> )
22 - 23 June 2020	Virtual	“Symposium: Europe, Coronavirus and Human Rights - The Significance of the European Convention on Human Rights (ECHR) for the Protection of Refugees” (“ <i>Symposium: Europa, Corona und die Menschenrechte - Die Bedeutung der Europäischen Menschenrechtskonvention für den Flüchtlingsschutz</i> ”), Protestant Academy of Berlin ( <i>Evangelische Akademie zu Berlin</i> )
10 July 2020	Berlin	Information meeting with Division B 2 of the Federal Ministry of the Interior, Building and Community
14 July 2020	Virtual	Online Consultation “Systemic approach to NPM work”
17 August 2020	Berlin	Exchange with the Federal Ministry of Justice
2 September 2020	Kiel	Coordination meeting with the Ministry for the Interior, Rural Areas, Integration and Equality of the <i>Land</i> Schleswig-Holstein: planned facility for custody awaiting deportation in Glückstadt
17 September 2020	Wiesbaden	Oral hearing in the Legal Policy Committee and in the Sub-committee on the Prison System of the <i>Land</i> Parliament of Hesse on the legislative initiative to amend Hessian prison acts
21 October 2020	Alzey	Workshop: Introduction to “easy-to-read language”

Date	Location	Visit
3 – 4 November 2020	Virtual	Concluding expert meeting in connection with the project “Working towards harmonized detention standards in the EU – the role of NPMs”
25 November 2020	Virtual	Oral hearing in the Committee on Internal and Legal Affairs of the <i>Land</i> Parliament of Schleswig-Holstein on the draft bill to modernise the judicial system
26 November 2020	Virtual	Online meeting with CPT as part of the periodic visit to Germany
26 November 2020	Virtual	Conference: “The police and the discussion on racial discrimination” (“ <i>Die Polizei und die Diskussion über rassistische Diskriminierung</i> ”), University of Applied Sciences for Police and Public Administration ( <i>Hochschule für Polizei und öffentliche Verwaltung</i> , HSPV)
4 December 2020	Virtual	Expert discussion on legislative project to streamline the Prison Act, Federal Ministry of Justice and Consumer Protection
18 – 19 December 2020	Virtual	Monitoring places of deprivation of liberty in the context of COVID-19, Tunisian NPM

