When the security measure meets bordered penality : release procedures for persons who are not criminally responsible without residence rights in Belgium

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Abstract

Offenders considered to be persons not criminally responsible (hereafter Persons NCR) in Belgium, are subjected to a security measure. This is executed by means of a forensic care trajectory, often beginning in high-security prison units or forensic psychiatric facilities, and moving through medium and lower security psychiatric facilities, with the intention to ultimately integrate them back into society. Within this group there are 145 persons without residence rights. This article is attentive to how the forensic care trajectories for people without residence rights are currently navigated. Six qualitative interviews were conducted with key decision-makers in the forensic care trajectories of Persons NCR. Moreover, we analyse the legislative framework regarding the security measure and illustrate how features of 'bordered penality' are clearly present. Our results indicate that when working towards a return to the country of origin fails, Persons NCR without residence rights become neglected, either in high-security prison units or forensic facilities. We explore avenues to improve this precarious situation, and consider possibilities to guarantee mental healthcare according to a persons' security needs rather than their residence rights.

Keywords: Early release, security measure, forensic psychiatry, mentally ill offenders, persons not criminally responsible, foreign national prisoners, undocumented migrants, bordered penality, stuckness, Belgium

1. Introduction

The Council of Europe's SPACE Statistics' overview for 2021-2022 shows that Belgium ranks over 25 % higher than the European median value for the number of foreign nationals in the prison population (Aebi et al., 2023). On 31 January 2022, 43,4 % of the Belgian prison population (4.752 out of 10.960 inmates) did not have Belgian nationality. Moreover, the majority of these (3.437 out of 4.752 foreign national inmates) had no residence rights in Belgium (Aebi et al., 2023: 63). They are therefore legally obliged to leave Belgium after their release. In recent decades, the 'forced removal' of this group became a political priority: specific early release procedures were consequently created for the forced removal of convicted persons without residence permits (De Ridder et al., 2012; Breuls & Vandennieuwenhuysen, 2022). The preparation for this increasingly takes place during the execution of the prison sentence and the policy preference is that the forced removal itself is carried out directly from prison (De Ridder, 2016; Breuls et al., 2017).

What emerged was the gradual development of a dual penal system in which the central goals of intervention for foreign nationals without residence rights shifted away from their reintegration into society, and toward their exclusion and removal from Belgian territory. Aas (2014) could be equally referring to the Belgian case when conceptualizing the Norwegian situation:

> The absence of formal membership is the essential factor contributing towards shifting the nature of penal intervention from reintegration into the society towards territorial exclusion, and towards the development of a particular form of penality, termed hereby 'bordered penality' (Aas, 2014: 521).

Within the Belgian prison population persons considered to be not criminally responsible (Persons NCR) constitute a specific group. Due to mental health issues, these persons are not criminally convicted, and

thus not considered as criminally responsible. They are, however, subject to a security measure of undefined duration to support their recovery and desistance from offending, locally called an 'internment' (De Pau et al., 2020; Van Roeyen et al., 2016). The Belgian Internment Act[1] defines this as a legal security measure ordered by a criminal court for persons who have committed an offence that affects or threatens the physical or psychological integrity of others, and who suffered, at the time of the decision, from a mental disorder which abolishes or seriously impairs their capacity for discernment or control over their actions.[2] Any mental disorder qualifies under the law. In practice, primary DSM diagnoses among persons with a security measure in the high security forensic psychiatric centers in Flanders, are psychotic disorders, personality disorders and paraphilic disorders. Substance abuse is a frequent comorbidity (Jeandarme et al., 2022: 4). The judge can only impose the security measure after a forensic mental health assessment has been carried out (article 9 of the Internment Act). A security measure can only be ordered when the person presents a danger to commit new offences that affect or threaten the physical or psychological integrity of others because of the mental disorder (article 9 of the Internment Act). The security measure not only has the legal objective 'to protect society', but also 'to ensure that the person receives care required for their mental health condition for the purpose of reintegration into society' (article 2 of the Internment Act).

The European Court of Human Rights (ECtHR) emphasised the need to provide such care in an appropriate setting – which, in principle, is not a prison.[3] Moreover, the ECtHR repeatedly condemned the absence of appropriate and qualitative care for Persons NCR in Belgium.[4] Over the last two decades, the Belgian federal government have developed multiple forensic psychiatric settings, ranging from high

[1] Act of 5 May 2014 on internment, *Belgian Official Gazette* 9 July 2014.

[2] The security measure can thus also be imposed in the exceptional event that the person could be seen as criminal responsible at the time of the commission of the criminal act given that the mental disorder must only be present at the moment of judgement. For the sake of comprehensibility for the international public, the term Person NCR is chosen in this paper.

[3] See e.g. ECtHR 28 May 1985, no. 8225/78, Ashingdane v. UK, §44; ECtHR 2 October 2012, no. 22831/08, L.B. v. Belgium, §93.

[4] ECtHR 30 July 1998, no. 61/1997/845/1051, Aerts v. Belgium; ECtHR 6 December 2011, no. 8595/06, De Donder and De Clippel v. Belgium; ECtHR 2 October 2012, no. 22831/08, L.B. v. Belgium; ECtHR 10 January 2013, no. 43653/09, Dufoort v. Belgium; no. 43418/09, Claes v. Belgium; no. 53448/10, Swennen v. Belgium; ECtHR 9 January 2014, no. 22283/10, Lankester v. Belgium; no. 330/09, Van Meroye v. Belgium; no. 43663/09, Oukili v. Belgium; no. 43687/09, Caryn v. Belgium; no. 43717/09, Moreels v. Belgium; no. 43733/09, Gelaude v. Belgium; no. 50658/09, Saadoun v. Belgium; no. 28785/11, Plaisier v. Belgium; ECtHR 3 February 2015, no. 49484/11 et al., Smits and others v. Belgium; no. 49861/12 and 49870/12, Vander Velde and Soussi v. Belgium and the Netherlands; ECtHR 6 September 2016, no. 73548/13, W.D. v. Belgium; ECtHR (GC) 31 January 2019, no. 18052/11, Rooman v. Belgium; ECtHR 6 April 2021, no. 46130/14 et al., Venken and others v. Belgium.

to low security (De Pau et al., 2021). The result was a notable decline in the number of Persons NCR in prison, dropping from 1.088 persons in 2014 to 529 persons in 2018. Yet, despite these efforts, hundreds of Persons NCR remain detained extensively in the overcrowded and understaffed psychiatric wards of Belgian prisons, where the required level of care is absent (Wittouck et al., 2022). Indeed, the Belgian prison context falls short of meeting the minimum requirements established by the ECtHR, which entail regular and systematic monitoring alongside a comprehensive therapeutic strategy to adequately address mental health issues and prevent their exacerbation.[5] Moreover, the numbers of Persons NCR in prison is again on the rise (717 persons in 2021[6]). Some of them sleep on mattresses on the floor, and health care arrangements are far from optimal where frequent turnover of prison and health care staff results in interruptions to their treatment (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2022).

Of 4.036 Persons NCR in Belgium, 145 have no residence rights. With the exception of one, who is detained in a medium-security psychiatric unit, most reside in either a prison ward (*n*=48) or are compulsory placed in high-security forensic facilities (*n*=96) (K. Seynnaeve, Coordinator External Care for Persons NCR at the Justice Department, personal communication, January 10, 2022).

Despite this, little is known about this group or their future prospects within their forensic care trajectory. We address this gap by focussing on their *de jure* and *de facto* opportunities for release: the (im)possibility to be released in view of expulsion and of progressing to lower security (forensic) psychiatric facilities or outpatient services. We interviewed the judges/magistrates in the social protection chambers of the Belgian sentence implementation courts, with competence to decide the forensic care trajectory of Persons NCR without residence rights, to unpick the obstacles within their trajectories to release. In this way, we show how questionable practices of bordered penality collide with the heavily criticised Belgian system of security measures. We argue that this creates a system of

[5] Cf. the previous footnote. See on the requirements regarding the therapy: Rooman v. Belgium; ECtHR 6 April 2021, no. 46130/14 et al, § 208-210.
[6] See: https://www.nieuwsblad.be/cnt/dmf20211116_97651048.

indefinite *stuckness* (cf. Russell & Rae, 2020) with disastrous effects for those subjected to it, and for the system of security measures as a whole.

2. *De jure* analysis

First, a *de jure* analysis is made. We briefly describe the general system of implementing security measures, after which we focus on the legal options for Persons NCR without residence rights. We show that, as far as the latter group is concerned, the logics of migration control clearly dominate the actions of legislators and policymakers (cf. bordered penality).

2.1 The execution of a Belgian security measure

The decision to apply a security measure may be taken by a sentencing court or an investigating court with regard to a person who is still at liberty, or who has already been arrested and resides in prison. If necessary, the person can remain or be temporarily detained in prison at the time of the decision (articles 10 and 11 of the Internment Act). After the imposition of the security measure, the person shall appear before a specialized chamber no more than three months later, i.e. a chamber of social protection (CSP), of a Belgian sentence implementation court (article 29 of the Internment Act). The CSP can make the compulsory decision to place this person in an appropriate institution, which can be a designated institution for the protection of society or a high-security forensic psychiatric facility (article 19 of the Internment Act; see also Jeandarme et al., 2020; Pesout & Pham, 2019). The CSP can also grant other modalities at the first court hearing, such as electronic monitoring or probationary release in lower security mental healthcare services, if the Person NCR meets the legal conditions (e.g. the prospect of social reintegration; no risk of further offending; no risk to the victims).

The admission to lower security institutions is thus not compulsory, and in principle requires access to social security in order to pay for it. These modalities can also be granted at a later phase of a forensic care trajectory, and are designed to prepare for reintegration into society (article 23-27 of the Internment

Act). Until a decision by the Belgian Court of Cassation in 2019[7], definitive release could only be granted after a probation period of at least three years,

> 'provided that the mental disorder is sufficiently stabilized so that there is no reasonable fear that the interned person [Person NCR] whether or not as a result of the mental disorder, possibly in conjunction with other risk factors, will again commit offences that affect or threaten the physical or psychological integrity of others' (article 66 of the Internment Act).

The mandatory probation period was, however, abolished by the Court of Cassation in the 2019 decision: if the mental disorder is sufficiently stabilized, definite release can be granted immediately.

2.2 Bordered penality in the Belgian Internment Act

With regard to Persons NCR without residence rights, the logics of migration control dominate the actions of legislators and policymakers. The idea that Persons NCR without residence rights must leave the country is evident in the creation of a specific release modality to that end. Furthermore, the legislator attempted to deny Persons NCR without residence rights, access to the 'regular' forensic care pathway/modalities, designed to prepare Persons NCR for reintegration into society.

2.2.1 A modality of the execution of a security measure aimed at expulsion

Article 28 of the Internment Act provides for the possibility of a release decision in view of expulsion. The law states that this modality is intended for Persons NCR for whom a final decision to deny them residence rights in Belgium has been taken. It may also be granted for those placed at the disposal of a foreign court or those that have expressed a wish to leave Belgium. Removal can be to their country of origin or any other country where residence rights are held (Colette-Basecqz & Jaspis, 2021).

[7] Court of Cassation 9 April 2019, P.19.0273.N and Court of Cassation 11 June 2019, P.19.0524.N.

The modality may be granted at any time during the security measure (which, if recalled, is a measure of undefined duration), provided that there are no contra-indications on the part of the Person NCR. These contra-indications relate to the risk of further offending, risks to the victims, and the efforts made by the Person NCR to compensate the civil party. Furthermore, the Person NCR must agree to the conditions the CSP imposes for six years, including standard conditions such as refraining from committing offences and leaving Belgium (article 36 and 42 of the Internment Act).

Prior to 2019, examination of potential housing/accommodation in the country to which the person would return was required before granting the modality: a lack of housing/accommodation was a first contra-indication. This contra-indication was, however, abolished in May 2019.[8] The preparatory work asserted that 'practice shows that this contra-indication is very difficult for the CSP to assess. It follows that this contra-indication constitutes in practice a significant obstacle to the granting of a release in view of expulsion.'[9] Legally speaking, this means that no reintegration perspectives are required to grant the modality, showing how the logics of migration control undercut the logics of care and reintegration for Persons NCR without residence rights.

2.2.2 Exclusion from other modalities of the execution of a security measure

Leaving aside the modality in view of forced removal, all Persons NCR are in principle able to access other execution modalities during the security measure. For example, they may be granted permission for temporary leave (article 20 of the Internment Act) or a prison furlough (article 21 of the Internment Act), allowing them to leave the institution for up to 16 hours respectively for a maximum of 14 days per month, provided that there are no risks of contra-indications relating to evasion, committing offences, and disturbing the victims (article 22 of the Internment Act).

[8] Act of 5 May 2019 containing various provisions on criminal matters and religion, which amends the Act of 28 May 2002 on euthanasia and the Social Penal Code, *Belgian Official Gazette* 24 May 2019.
[9] Act of 6 February 2019 containing various provisions on criminal matters and religion, *Doc. Parl.* Ch. repr., n° 54-3515/001, p. 259.

Persons NCR may be granted semi-detention, allowing them to regularly leave the institution during the day for maximum 16 hours a day (article 23 of the Internment Act). Moreover, the execution of the security measure outside the institution according to a pre-determined plan, where compliance is monitored by electronic means, is possible (article 24 of the Internment Act). Subject to compliance with the conditions imposed during the probation period, Persons NCR can also benefit from probationary release (article 25 of the Internment Act), which permits the execution of the security measure within the framework of a lower security inpatient or outpatient service. These modalities are granted, providing there are no contra-indications of low prospects for social reintegration (taking into account the mental disorder), a risk of committing new offences, a risk of disturbing the victims, a negative attitude towards the victims, as well as insufficient efforts made by the person to compensate the civil party (article 26 of the Internment Act).

Again, logics of bordered penality are clearly apparent in the decision-making of the Belgian legislator, who had clear intent to exclude Persons NCR without residence rights from the aforementioned modalities: in 2016, the provision that Persons NCR without a right to reside could no longer benefit from the majority of the release modalities[10] was inscribed in the Internment Act.[11] The legislator assumed that people without residence rights would be necessarily removed from the territory, rendering it entirely futile to grant them access to modalities designed for reintegration trajectories in Belgium.

However, the Belgian Constitutional Court annulled these specific provisions of law, judging them disproportionate. The Court criticized the legislator for depriving all Persons NCR without residence rights of access to these modalities, 'regardless of their behavior since their security measure, the history of their administrative residence situation, their family ties in Belgium and the possibility of their removal.'[12] The Court stated that these provisions were discriminatory 'because of their absolute and automatic nature' to prevent 'the CSP from examining Persons NCR request to benefit from a measure

[10] Only permission for temporary leave was allowed in order to pursue affective, social, moral, legal, family, therapeutic, educational or professional interests requiring the presence outside the establishment, and to undergo medical examination or treatment outside the establishment. Permission for temporary leave in order to prepare the social reintegration, and the other modalities where no longer permitted.

[11] Article 167 of the Act of 4 May 2016 on internment and various provisions relating to justice, *Belgian Official Gazette* 13 May 2016.

[12] Constitutional Court 28 June 2018, nr. 80/2018, B.49.2.

enabling them to prepare for their social reintegration or treatment, or to maintain family or social ties.'[13] As a consequence, Persons NCR who are not authorized to stay in Belgium have, in theory, renewed access to these various modalities for the execution of their security measure. How this translates in everyday decision-making by the CSP, will be discussed in the results section.

3. Method

3.1 Interviews

In Belgium, six CSPs are active: three Dutch speaking chambers (Antwerp, Brussels, Ghent) and three French speaking (Brussels, Liège, Mons).[14] We conducted qualitative semi-structured interviews with the presiding judge of each court (sometimes accompanied by the court assessors) in order to examine the decision-making process of the CSP regarding Persons NCR without residence rights. We asked whether challenges exist in their care pathways, and if so, which challenges. Qualitative interviews allowed us not only to unpick how decisions are made, but also the logics behind these decisions. One CSP was unable to participate in the study due to their personal circumstances. Therefore, we interviewed the public prosecutor of this court instead. In total, six interviews were conducted, lasting between 60 and 100 minutes. The location of the interview was chosen by the participant. With the exception of one interview conducted during a lunch meeting, and one online, the remainder were conducted in the magistrates' offices by the authors of this article, either separately or in two's. The topics discussed involved, among others, (factors influencing) the decision-making process, interactions with other professional actors in the procedure, and challenges regarding the release of foreign national Persons NCR. We used open questions to understand the decision-making practices and encountered challenges, such as: 'Suppose you receive a request for release in view of expulsion / probationary release / electronic monitoring/ … How would you proceed? Which elements would you consider? How

[13] *Ibid.*

[14] One reviewer requested explicit mentioning that two CSPs, namely a Dutch-speaking chamber and a French-speaking chamber, are operating in Brussels.

would you assess the contra-indications?' Deeper questions were then asked, based on the respondents' answers. The full topic list is available upon request from the first author.

All research activities were carried out in accordance with the European Code of Conduct for Research Integrity. All participants gave their informed consent for participation, and all but one interview were audio recorded (after obtaining permission). The interviews were transcribed *verbatim*, except for the non-recorded interview. In this case, the extensive notes made by the second interviewer were used for analysis. The data was thematically coded abductively (Layder, 1998), using structured analytical categories in the coding process (a coding list outlining anticipated topics, such as the assessment of contra-indications, barriers to release, etc.), but remaining sensitive to additional themes that emerged from the data (Braun & Clarke, 2006). NVivo was employed to facilitate efficient and systematic coding of the collected data. To improve the validity and reliability of the analysis, all transcripts were coded by at least two researchers (Morse, 2015). Any ambiguities in the coding system were discussed within the interdisciplinary research team (two researchers have a background in law, two researchers have a background in social sciences, namely criminology and psychology). We are confident that we achieved data saturation as recurring themes consistently emerged throughout the data analysis (Glaser & Strauss 1967). Furthermore, we were able to uncover different views and decision-making practices, such as the different views between CSPs regarding (not) granting a final release without a prior probationary period. These differences are presented in the results section.

3.2 Limitations

The interviews primarily focused on examining the decision-making processes of the CSPs and possible challenges encountered in managing the care trajectories of persons NCR without residence rights. It was therefore a logical choice to interview the presiding judges of the CSPs since they possess expert knowledge into their chamber's decision-making. Unfortunately, one presiding judge was unavailable for an interview due to personal reasons. We addressed this issue by conducting an interview with the public prosecutor of that court, who is well-versed in the court's jurisprudence, but may have placed

different emphases in the interview than the presiding judge would have done. Still, this approach ensured the inclusion of the entire research population, as all CSPs in Belgium were represented, although it should be acknowledged that the number of interviewees was small (n = 6). In future research, it would be beneficial to include other stakeholders within the care trajectory, such as staff members in forensic facilities. Systematically studying all judgments of CSPs involving Persons NCR could also be an interesting avenue for follow-up research.

4. Results

All interviews revealed that the situation of Persons NCR without residence rights is worrisome. Often, neither a return to the country of origin nor a release in Belgium are possible. All interviewees spoke of 'blockages'; 'obstacles', 'stuckness' and 'inhumane situations'. Below, we discuss the pertinent themes which emerged.

4.1 Administrative ambiguity

As residence procedures are dynamic, so too is the residence status of a person. There are many types of administrative procedure, each dependent on what residence status a person has or is applying for. In the case of appeals against adverse decisions, these can be suspensive, but not always (cf. Macq, 2018; De Ridder, 2013; Triandafyllidou, 2010). For instance, the documents that may be issued in the course of a residence procedure are multiple, and not all imply an authorization to stay in Belgium.

As a consequence, some CSPs reported that, in some cases, decision-making is prevented or delayed by the difficulties in obtaining and understanding the information on the person's residence status. All judges admitted having limited knowledge of immigration law and having great difficulty assessing potential prospects for legal residence, or the implications of introducing immigration proceedings or appeals against adverse decisions. The legal jousting between the Migration Office and the person

appealing was described by one interviewed judge as ‘a game of ping-pong’ (interview CSP 1). This game can take months, sometimes even years, ensuring that decisions on release are delayed.

According to the CSPs, lawyers too do not always understand the administrative situation of their clients. Sometimes, a Person NCR is represented by two lawyers: one specialized in immigration law, the other in criminal law (with little knowledge of immigration law). The latter is often present at the hearing of the CSP, but does not always communicate with the former.

With only one exception, all CSPs reported having summoned a representative of the Migration Office to a hearing, because the information they were given was unintelligible, or insufficient to properly understand the residence situation of the Person NCR. This results in lost time if hearings are postponed, while more information is sought to resolve the administrative ambiguity. This can constitute the first obstacle on the road to freedom.

4.2 Working towards a return to the country of origin

For Persons NCR without residence rights, CSPs aim for the release procedure in view of expulsion as the only way to get them out of the security measure. Indeed, four magistrates explicitly stated that the possibilities for probation for Persons NCR without residence rights in Belgium are non-existent. However, in the case of the other two CSPs, a very limited number of Persons NCR without residence rights were released in Belgium earlier (see *infra*). Nevertheless, all CSPs agreed that the main focus in cases of Persons NCR without residence rights is release in view of expulsion.

The latter requires that a return is possible on a practical level. In this respect, the person must be officially identified as the national of a particular country so that travel documents can be issued (Ellermann, 2010). This immediately creates problems in several cases, often beyond the Person NCR’s control. Three judges also pointed to the impact of the COVID-19 health crisis, where for an extended period of time, there were no flights to certain countries and/or certain embassies were unreachable:

> So yes, Algeria never issues permits. And recently Morocco, with the pandemic, no longer issues permits. Even if people agree to return, it is impossible to let them go (interview CSP 1).

Such diplomatic issues mean that persons with certain nationalities (e.g., Algerian) remain subject to an indefinite security measure, especially when a release in view of expulsion is considered the only way forward by the CSPs.

Even when travel documents are present, problems can arise. To grant a release in view of expulsion, all CSPs expect Persons NCR to have some form of support (e.g., a social network) and/or treatment for their mental illness in the country of origin. As explained earlier, the withdrawal of the legal requirement to examine the possibilities of housing/accommodation abroad, suggests that the legislator clearly intended to increase the expulsions of Persons NCR without residence rights, which once again reveals the dominant logics of migration control. However, the interviews reflect how CSPs do not abandon the logics of care and reintegration altogether. All interviewed magistrates stressed that they still need to assess the risk of committing offences (a contra-indication, see *supra*). Prospects of reintegration in the country of origin (including treatment) are considered essential by all CSPs to reduce this risk to an acceptable level:

> That is actually the most important thing, that they have a reception in that country adapted to their medical needs. And often, yes, a social network is important too. We have to assess the chances… Actually, the law says that there should be no indication that they are still going to commit criminal acts. We have to assess that (interview CSP 2).

> In the cases in which we granted the modality, we were assured. We knew that he was going to go to his family, that he was going to have an ambulatory follow-up at the hospital, which had a psychiatrist who agreed to take care of him (interview CSP 3).

In this respect, one CSP recalled that under international law, a person cannot be forcibly removed without adequate care in the country of origin. The ECtHR confirmed this in *Savran v. Denmark*.[15] Deporting a person with mental health issues to a country where there is insufficient care may violate rights protected by the European Convention on Human Rights such as the right to respect for private and family life (Article 8) or the prohibition of torture and inhuman and degrading treatment (Article 3).

All CSPs emphasised that release in view of forced removal is not possible when appropriate care in the country of origin is absent and when there is no established reception or social network there. Indeed, CSPs expect arrangements to have already been made with a psychiatrist in the country of origin or that official permission exists for admittance to a psychiatric institution. One CSP indicated to always require admission to a residential institution, as they consider outpatient treatment insufficient. When only outpatient treatment is found, most CSPs also require a place in the country of origin where the Person NCR will stay, despite the deletion of that contra-indication by the legislator (see *supra*). Every CSP expects a network that can take care of the person in the country to which the person will return.

The expectations are thus far-reaching. It is clear from the interviews that such arrangements are already challenging within the European context, let alone in countries outside Europe, where (mental) health care is often at a lower level. Moreover, mental health issues often prevent Persons NCR from working out an adequate care trajectory abroad on their own, as one CSP mentioned. They sometimes receive help from their family, their lawyer and/or the Special Needs Program (i.e. a service of the Migration Office that investigates the possibilities of care abroad and helps financing the care once expelled), but only occasionally are challenges such as the scarcity of adequate mental health care facilities in the country of origin overcome. Consequently, all interviewed magistrates indicated that the release in view of expulsion is only granted exceptionally, and mainly to European citizens.

For the latter group, there is also the possibility of an interstate transfer to another EU Member State under the EU framework decisions 2008/909/JHA or 2008/947/JHA. However, according to the CSPs, this raises similar issues and in addition, the other country must recognise the internment decision or the

[15] ECtHR (GC) 7 December 2021, no. 5767/15, Savran v. Denmark (in a mental health case). See on other health issues ECtHR (GC) 13 December 2016, Paposhvili v. Belgium.

release decision. This is only possible insofar as they have a similar security measure in their own legal system, which is often not the case.

4.3 Indefinitely stranded?

The poor mental health care provision in a country of origin and/or the lack of a social network result in a significant number of Persons NCR with no residence rights not being granted a release in view of expulsion. It became clear from the interviews that CSPs do not operate solely from the logics of migration control, trying to 'get them the hell out of here' (Bosworth et al., 2018), but that they exercise care and take the prospects of reintegration into account. Nonetheless, the logics of bordered penality are woven into the law, and are clearly having effects: instead of being expelled, most undocumented Persons NCR are stuck in overcrowded prison wards with inadequate health care provision, or in high-security forensic psychiatric facilities. These institutions are required to carry out any placement decision taken by a CSP. Other institutions (cf. regular health care institutions and medium security facilities), however, can formulate exclusion criteria, such as language conditions and/or the requirement of access to social security in order to pay for it, which is absent when not possessing a residence permit. This generally prevents Persons NCR without residence rights from being placed there, as several CSPs explained.

When placed in a prison ward or high-security forensic facility with no release in view of expulsion granted, there are, in theory at least, other options to obtain release: Persons NCR without residence rights can legally ask to be granted other modalities, such as semi-detention, electronic monitoring and probationary release. However, most interviewed magistrates indicated that this is only a theoretical possibility:

> 'They cannot take any steps [in their trajectory] if they are not allowed to stay in Belgium' (interview CSP 4).

Semi-detention is generally granted to allow work during the day, which is not applicable for undocumented Persons NCR because they cannot work legally, two CSPs mentioned. Electronic

monitoring, one magistrate explained, is only granted in exceptional cases, because it is considered difficult for Persons NCR (regardless of their residence status) to understand and manage. Moreover, inpatient mental healthcare services often refuse Persons NCR under electronic monitoring, as the time requirements can conflict with the institutional regime. In any event, Persons NCR without residence rights often have no official address to link to electronic monitoring.

In these circumstances, all that remains is the possibility of probationary release. To grant this modality, the CSPs require a secure probation with either an in or out-patient mental healthcare plan. The major problem undermining this option, is that Persons NCR without residence rights, due to their status of being undocumented, do not possess health insurance beyond access to emergency assistance, meaning that the funds needed for access to these healthcare services do not apply in their case. As one interviewee put it:

> People with an illegal status don't get in anywhere, that's very clear. They have no health insurance; they may get emergency medical care, but they cannot get into any [regular] psychiatric hospital (interview CSP 2).

In addition, they usually do not have family members who are willing and/or able to finance or to support them, five CSPs stated:

> When they have family in Belgium, the family can pay for all the medical care, the medication. But this is very, very expensive. We tried once… We released a person who was not yet in legal residence, because his family here in Belgium could take care of him [and of the financial costs of the treatment]. It did not last very long. Well, the reasons were not medical, but… Well… Financial. But it was related (interview CSP 3).

Another difficulty mentioned mainly by the Dutch-speaking magistrates is that the treatment of Persons NCR without residence rights is often particularly difficult given the language barriers they face. Language issues can already play a role in the expert reports of psychiatrists, on the basis of which decisions on security measures and for compulsory placement are made. Two interviewees said that

language barriers can render standardized psycho-diagnostic assessment tools unreliable, and psychiatrists often have to rely on less in-depth interviews. This creates the risk of choosing an unsuitable care setting/inadequate care trajectory by the CSPs. Furthermore, medium-security inpatient mental healthcare services often have language admission conditions. Two magistrates mentioned that the experience of trauma can also prevent effective treatment. One added that cultural differences can complicate treatment too.

With some very limited exceptions (see *infra*), Persons NCR without residence rights will remain in prison until they are (if at all) transferred to a high-security forensic psychiatric facility. These facilities do not necessarily match their security needs, but are the only facilities with an obligation to admit Persons NCR without residence rights (versus exclusion criteria in medium security facilities and regular health care institutions, see *supra*). From forensic psychiatric facilities, there is rarely, if ever, the possibility to move on to regular health care services:

> We have to choose between prison and the forensic psychiatric center. They can maybe go to the forensic psychiatric center and that's where it stops (interview CSP 2).

As places in high-security forensic psychiatric facilities are limited and rarely meet the security needs of those involved, CSPs may doubt the appropriateness of transferring Persons NCR without residence rights from prison to such facilities, knowing that they will be stuck in a high-security place without any possibility for a transfer to a lower-security service for a long time:

> There are people [without residence rights] who have been there from the beginning, right after the opening of the forensic psychiatric centers [in 2014 and in 2017], and who are still there now. And of course, they are taking the place of people who might be able to go through a treatment program, so that is very difficult. I think ethically it is not an obvious decision for the court to make (interview CSP 5).

It is clear that many Persons NCR without residence rights face the critical situation of being stranded for an indefinite time, in prisons or high-security forensic facilities, with little prospect of further traction in their forensic care trajectory towards lower-security care or reintegration in society.

4.4 A seldom way out?

All interviewed magistrates expressed feelings of powerlessness when faced with the hopeless situations of Persons NCR without residence rights. Four interviewees indicated that the only way out is a release in view of expulsion, but CSPs have negligible resources to facilitate, or help develop, a care plan in the country of origin. One described the consequence, thus:

> You just have to wait on something that often does not come. That's very difficult. Because, yes… You deprive those people of their freedom, in a high-security setting, unnecessarily. But there is no alternative… (interview CSP 2).

However, CSPs can, and said they do, grant temporary leaves. In such circumstances leave can be granted, for example, for family or medical reasons, to give the person involved a moment of respite. This can be for several hours and often takes place under supervision.

Two French-speaking CSPs went a step further in exceptional cases, and found a way to force a 'breakthrough' in the appalling situation. They decided to grant a limited number of Persons NCR without residence rights a final release (without a prior probationary period). These two magistrates referred to the hopelessness of the situation, in which the treatment for the Persons NCR was no longer evolving, and their medication and consultations with psychiatrists had become ineffectual. On the contrary, the treatment and the deprivation of liberty were perceived to be counterproductive. This was considered to be inhumane; more so because the mental state of the persons involved had stabilised. These CSPs considered their continued detention contrary to the case law of the ECtHR, which states that the mental health issues should persist during the detention period and appropriate care must be provided in order to lawfully detain a person of unsound mind.

To illustrate this further, in February 2022, the French-speaking Brussels CSP definitively released a Person NCR without residence permit who had been placed at a high-security forensic facility since 2011. Obtaining a probationary release failed, but the CSP ruled that this failure was entirely due to the persons administrative status (no income, no health insurance), which led the institutions where he

would perform these modalities to refuse him. In a judgment of 22 February 2022, the CSP ordered the definitive release of this Person NCR.[16] In its judgment, the CSP emphasized the fact that the management of the institution, and the psychosocial team, considered that 'the absence of any prospects for the Person NCR' made the security measure 'particularly inhumane' within a high-security forensic facility. The CSP considered that the deprivation of liberty of the person concerned, despite the stabilization of his mental state, must be considered irregular and contrary to Article 5 of the European Convention on Human Rights, which requires the release of a Person NCR whose mental health issues are sufficiently stabilized.[17] This decision is illustrative of the extreme situations that CSPs are confronted with when there are insufficient prospects for Persons NCR without residence rights.

Four of the interviewed magistrates stated, however, that although they also experience the powerlessness of their colleagues, they regarded such options as unsuitable to address the situation. In the first instance, it was argued that a sudden release without probation would create stress for the persons involved. After all, they are likely to have been 'institutionalized' for a long time, and sudden release while still in a situation of being undocumented, would make them very vulnerable:

> I don't see how someone could reintegrate without a right of residence in Belgium. It's not possible. He will be blocked at one point or another. He will be blocked in his journey, whether it is financially, medically, to find a job … (interview CSP 3).

Consequently, there is a high risk of periods of mental instability, more so because mental stabilisation is often due to medication. Medicated treatment, in their opinion, ought to be continued, but once again this raised the question of who will pay for it when they are released. One interviewee explicitly asserted that granting a definitive release in such a context would be 'irresponsible'. Although the CSPs who granted the definitive releases were aware of these risks, they took the view that to grant definitive

[16] CSP Brussels, 22 February 2022, RG no. 21/0871/LE.

[17] The CSP referred to ECtHR (GC) 1 June 2021, no. 62819/17 and 63921/17, Denis and Irvine v. Belgium, § 168. In this judgment, the Court concluded that there had been no violation of Article 5 but specified that Article 5 § 1 (e) of the Convention requires that 'it has reliably been established that the individual is of unsound mind, that the disorder is of a kind or degree warranting compulsory confinement and that the disorder persists throughout the entire period of the confinement'.

releases to Persons NCR without residence rights in these hopeless situations was the justifiable decision to take.

5. Discussion

We have illustrated what happens when the Belgian system of security measures meets bordered penality: many Persons NCR without residence rights are ultimately confronted with being indefinitely stranded, and the system of security measures becomes one of indefinite stuckness (cf. Russell & Rae, 2020). First, decision-makers are confronted with situations of administrative ambiguity. When the administrative situation of the Person NCR is finally clarified, the 'logical' option is to seek a return to the country of origin. However, if the conditions for release in view of expulsion are not met, their only possible options are to stay in prison or be compulsorily placed in high-security forensic facilities, regardless of their security needs. Paradoxically, such situations of being stranded, arise because the decision-making of CSPs is not only guided by logics of migration control, but also logics of mental health care. Indeed, the prospect of a forced removal is not sufficient for CSPs to release a Person NCR without residence rights, unless the necessary support and treatment is available in the country of origin. Such requirements are extremely hard to meet.

The mental health-oriented attitude of CSPs can be explained by the fact that they judge a specific population, namely people with mental health issues. The attitudes and decision-making practices of judicial actors who decide on the release of convicted persons without residence rights both in Belgium (De Pelecijn et al., 2017) and in other countries (see e.g. Brouwer, 2020) indeed differ markedly. If the forced removal of a convicted person without residence rights who is criminally responsible is possible, a release will be granted rather swiftly with little attention to the reintegration prospects in the country of origin (cf. logics of migration control).

Nevertheless, our findings show how the influence of bordered penality (Aas, 2014) is tangible in the system of security measures, albeit in a different way, where the situation of Persons NCR without residence rights can be completely obstructed. In this respect, a 'care paradox' (cf. Beyens et al., 2022)

arises. On the one hand, adequate care is required by the CSPs to grant release modalities; but on the other, their administrative status (e.g. no health insurance in Belgium) makes it virtually impossible for them to receive an appropriate forensic care trajectory.

The situation is of greatest concern for those Persons NCR who are incarcerated in Belgian prison units, where conditions have been repeatedly evinced by case law of the ECtHR as degrading and inhumane. Given the well documented lack of adequate health care in the prison context, the question of how the mental state of these persons can be expected to improve during their prison stay, is the most pertinent. The only possibility of overcoming the obstruction is securing a transfer to a high-security forensic psychiatric facility if places are available. They then are still stuck, albeit in a slightly more suitable (assuming the receipt of mental healthcare, and that language barriers can be overcome), although certainly not optimal situation, due to the highly restrictive environment which might not meet their security needs (De Pau et al., 2021). In addition to this, decision-making in forensic care trajectories should always be guided by the principle of least restrictiveness, especially given that a security measure and its mandatory forensic psychiatric treatment are intrinsically invasive and significantly restrict liberties (Kennedy, 2022; Tomlin et al., 2018). Unfortunately, our results strongly suggest that the prospects of Persons NCR without residence rights securing access to mental healthcare in lower-security services are strictly limited. This not only causes personal tragedies, but also puts undue pressure on the system of security measures as well. Indeed, all interviewed magistrates indicated that high-security facilities are congested with Persons NCR without residence rights. In this way, a cycle emerges of places occupied for lengthy periods that cannot be used for other Persons NCR – who, in turn, remain in prison.

This lamentable situation begs for solutions, but these do not seem evident. Whilst the main focus of CSPs remains fixed on the potential return to the country of origin, resources could be fruitfully directed to identifying care options in different countries, and disseminating this information to all relevant actors. The Special Needs Program, a service of the Migration Office that investigates the possibilities of care abroad and helps to finance care once expelled, could have a greater role to play in this. The

service, which at the moment consists of only two persons, would benefit significantly from an increase in staff and resources.

In cases where a return is impossible, credible solutions should be sought for those Persons NCR who remain indefinitely confined in high-security settings. One possibility would be to allow placement in low and medium security settings. However, as residence rights constitute the gateway to social care and resettlement perspectives, we would suggest, especially when a return to the country of origin is not possible for diplomatic, medical or practical reasons, that granting medical regularization is a logical and humane option/way out. The associated residence rights could open the door to a complete forensic care trajectory that can be adapted to the relevant security needs of the Persons NCR. Granting regularization, however, is a discretionary power of the Belgian Secretary of State for Asylum and Migration, and is currently generally refused on the grounds that the person poses a threat to the public order (i.e. committed a criminal act), even when the medical situation (in this case, the persons' mental issues) might justify a regularization.[18]

6. Conclusion

According to the current legal framework, Persons NCR without residence rights could benefit from the same execution modalities as every other Person NCR, but in practice, this is absolutely not the case. Because of several reasons related to their residence status, Persons NCR without residence rights are stuck in FPCs or prison institutions with little prospect of being released. Our findings suggest that the situation ought to be thoroughly reconsidered at the level of political engagement to find urgent solutions to the problems we have outlined. More diplomatic efforts should be made to establish collaborations with countries of origin in order to explore the potential for developing care plans there and/or to increase the possibilities of interstate transfers, especially to other EU Member States under the EU framework decisions 2008/909/JHA or 2008/947/JHA. When a release in view of expulsion is unfeasible, serious

[18] One reviewer noted that ethical questions may arise when people without residence rights who have committed criminal offences (albeit without criminal responsibility) receive preferential treatment compared to those without residence rights who did not commit such offences. We concur with this comment: we advocate for a broader use of regularization for medical reasons, which should be granted to all persons when their medical condition justifies it.

consideration needs to be given to the granting of medical regularization in these cases, so that a transfer to regular mental healthcare facilities and/or outpatient care becomes a possibility. Such a step is primarily necessary for humanitarian reasons, but also makes sense from organizational, cost-efficiency considerations. Likewise, from the beginning of the security measure, lawyers, and CSPs, must become familiar with the details of immigration/regularization procedures, so that better understanding and collaboration across the penal and the administrative domains can be facilitated. This needs to be taken as a minimal step towards addressing the concerns that we have explored.

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