



Your Excellency
Minister of Internal Administration
Praça do Comércio
1149-019 Lisbon

Your Ref.

Your Comm.

Our Ref.

Visit no. 12-2016

Visit no. 16-2016

Visit no. 17-2016

Visit no. 18-2016

Visit no. 19-2016

RECOMMENDATION NO. 17/2017/NPM

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I

Under the provision contained in the article 19, paragraph b), of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, I recommend the deemed convenient measures should be taken with a view to improving the conditions of the staying conditions of foreigners in temporary accommodation centres or similar facilities, so that:

- a) The maximum period of stay (60 days) is respected;
- b) The regulation of temporary accommodation centres or similar facilities is reviewed, with a view to their completeness and updating;
- c) Temporary accommodation or similar facilities meet the requirements for proper accommodation and treatment of persons deprived of their liberty;
- d) In case of accommodation of foreign children and young people, the mentioned places have the appropriate equipment;



e) Study the possibility of signing the protocol mentioned in the article no. 40, paragraph 3, of Law no. 23/2007, of July 4¹.

II

This position is taken in result of a series of visits carried out, by the National Preventive Mechanism (NPM) during the second half of the year, which portrayed the reality that foreign citizens find in temporary accommodation centres. In order for the information collection to take place in an even manner, the object of those visits was defined in a unitary and comprehensive way, consisting in the verification of the living conditions of the people who are installed in the said places of detention and by the measurement, through interviews, of their right to a fair treatment.

III

From the elements collected during the NPM visits to temporary accommodation centres or similar facilities — and of the complementary information requested and received in the meantime — it has been possible to conclude that the conditions of those places of detention can be improved in the name of a better defense of the rights of citizens who are in them. For this reason, I have taken this position, as well as another one addressed to the National Director of the Immigration and Borders Service (whose file is enclosed in the annex).

§ 1. *Maximum length of stay*

The guidelines for the promotion and protection of the fundamental rights of persons who are deprived or limited in their freedom determine that «to guard against arbitrariness, maximum periods of detention should be set in national legislation»². As

¹ And its amendments, operated by Law no. 29/2012, of August 9, Law no. 56/2015, of June 23, Law no. 63/2015, of June 30, and Law no. 59/2017, of July 31, which approved the legal regime for entry, stay, departure and removal of foreigners from the national territory. This legal diploma will henceforth be referred to as the Foreigners Law.

² Guideline no. 6, point 46, first part of the Detention Guidelines. *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* of the United Nations High Commissioner for Refugees, p. 26.



a rule, the deadline of 60 days³ according to the portuguese legislation is respected in temporary accommodation centres for foreigners in an irregular situation in our country or asylum seekers or similar facilities. However, an exception was made to the *Santo António* Housing Unit, where eight people lived there for more than 60 days in 2015, the same as in the following year with five foreign citizens⁴.

Therefore, 13 foreign citizens saw their fundamental right to freedom limited beyond the maximum period provided by law, not only opposing the legal provisions but also the regime of restriction of rights, freedoms and guarantees provided in the article no. 18 of the Portuguese Constitution.

Therefore, I consider appropriate that the necessary steps and guidelines be taken to comply with the legally established periods of maximum deprivation of liberty in those places of detention.

§ 2. Regulation of temporary installation centres or similar areas

The accommodation of foreign nationals in temporary accommodation centres or similar facilities is regulated by Law no. 34/94, of September 14⁵, which establishes in article no. 7 that «the system provided for in articles nos. 209 to 216-A of Decree-Law no. 265/79, of August 1, with the amendments and wording resulting from Decree-Law no. 49/80 of March 22 and Decree-Law no. 414/85 of October 18(...) is applied, subsidiary, to the foreigners». In other words: on issues such as visits, clothing and food, the articles nos. 212, 213 and 214 of the Law on the Reform of the Penal System were applied *mutatis mutandis* to foreign nationals deprived of

³ See the article no. 146, paragraph 3, of the Foreigners Law, as well as article no. 35-B, paragraph 1 of Law no. 26/2014, of May 5, later designated by the Asylum Law.

⁴ In this regard, it should be noted that «in the situation of detention for the expulsion of foreign citizens, the restriction on the freedom from the application of the coercive measure of placement in a temporary establishment may constitute grounds for habeas corpus [either for appraisal of the verification of its assumptions, or in the event of exceeding its maximum period]» (Supreme Court of Justice ruling of October 20 of 2010 concerning the Case no. 21223/10.9T2SNT-A, accessed on August 3 of 2017 by means of the following link: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/2ddb8dad0ebdd2d580257885003181e5?OpenDocument>).

⁵ This diploma was modified by the mentioned Foreigners Law that also contains some provisions related to this matter, the same happening with some norms of the Asylum Law.



their liberty in the places of detention previously identified. This means that the general regulations of temporary accommodation centres or similar facilities were governed by penitentiary legislation, as was seen by means of a legislative referral.

However, the Law on the Reform of the Penal System was repealed in 2009 by the Law no. 115/2009, of October 12, which approved the Code of Execution of Sentences and Privative Measures of Freedom. This law does not provide any references to the legislation that was repealed by it and, therefore, there is nothing that prohibits it, and with due interpretation of the supplementary rules of article no. 7 of Law no. 34/94 of September 14, are those that deal with the same matters of the Code of Execution of Sentences and Privative Measures of Freedom^{6/7}.

The time that has elapsed, combined with the benefit that could be achieved by concentrating rules in a single piece of legislation which generally manages the treatment of foreign nationals and the operation of temporary accommodation centres or similar facilities, may justify the weighting of a new, updated and complete regulation of these facilities⁸. In my belief, this would greatly contribute to the protection of the rights of those who are deprived of their freedom in those spaces⁹.

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§ 3. *Conditions of the temporary accommodation centres or similar facilities*

Temporary accommodation centres and, in particular, their similar from the airports of *Faro*, Lisbon and *Porto*, are aimed at receiving people for a relatively short

⁶ Interpretation which, as governed by article no. 9, paragraph 1, of the Civil Code, «should not be limited to the letter of the law, but rather to reconstruct legislative thinking from the texts, taking into account the unity of the legal system, the circumstances in which the law was drawn up and the specific conditions of the time in which it is applied.»

⁷ This interpretative reasoning, along with the principle that the legislation confers on it, is already being carried out in the application of international legal principles and norms that deal with the treatment of people in situations of imprisonment, although it is not ignored that it is being drafted, in the context a specific normative instrument for the conditions of deprivation of liberty of foreign nationals in temporary accommodation centres.

⁸ As was the case with the General Regulation on Prison Facilities, which, as stated in the decree approving it (Decree-Law no. 51/2011, of April 11), aimed at two main objectives: a) «uniformity and equality in the application of prison regulations throughout the prison system»; and b) «to bring together and systematize in a single document matters which are currently very widely dispersed ... [which] presents important advantages for both prisoners and their addressees by making the applicable law easier to grasp.»

⁹ A contribution that consisted in the concretization of the right to information about the rights and duties of the people who are in that circumstance.



period of time, for structural and organizational reasons. But even with a short-term perspective, it is important to ensure that spaces where people are deprived of their liberty meet the necessary and adequate conditions, in order to provide a dignified and therefore human-friendly treatment.

From the visits made by the NPM to the places of detention, it was noted that in some cases the conditions could be improved. I'm referring, by way of example, to the absence of areas for the installation of families, particularly in similar areas near airports; to the rooms in the same space near the Lisbon airport and to the discomfort that the emergency lights provoke to those who, being inside, want to rest; the scarcity of resources to occupy the leisure time of foreign citizens; lack of adequate facilities for the accommodation of children; and the lack of variety or sufficiency of the food supplied, as well as the lack of a proper procedure to ensure the satisfaction of specific nutritional needs (*v.g.*, children, pregnant women and lactating).

These and other aspects demand the improvement of the living and accommodation conditions of these centres and similar facilities. However, in order to achieve such a goal, those responsible for the management of those spaces need to be given the means at their disposal, and it is important, therefore, to promote the steps taken to be pertinent in order firstly to examine which existing shortcomings and, secondly, provide the necessary resources.

§ 4. Accommodation for children and young people

It is a general principle that detention — detention in its broadest sense and therefore as a synonym of deprivation of liberty — of children and young people should only occur when no other measure proves to be suitable. This means that, as a rule, children and young people should not be deprived of liberty, but if they do, they should be accommodated in spaces that have a number of characteristics that contribute to their healthy development. In other words, detention places that house children and young people must have, among other things, secure beds or cribs,



leisure materials and patios, allowing, in the same way, the joint installation of all the elements of a family¹⁰. What, as seen, does not happen in temporary accommodation centres for foreigners in an irregular situation in Portugal or asylum seekers and, in particular, in similar facilities located near *Faro*, Lisbon and *Porto* airports¹¹.

I believe that one should strive for the creation, in the detention areas, of zones intended for the installation of families so that, in case it the reception of unaccompanied children is necessary, they can be properly fitted to their accommodation.

§ 5. *Protocol — legal assistance*

The NPM found — particularly during the second visit to the Lisbon airport space used as a temporary accommodation centre — that foreign citizens were insufficiently informed about their rights and duties, including legal aid. In fact, the occupants of the place of detention stated that they were unaware of this possibility, and some of them turned to lawyers at their own expense¹².

This circumstance, substantiating the violation of the right to information, may jeopardize the exercise of the right to legal protection, which, according to the article no. 7, paragraph 2, of Law no. 34/2004, of July 29 (and its amendment, operated by Law no. 47/2007 of August 28), must also be guaranteed to «foreigners without a valid residence permit in a Member State of the European Union (...), to the extent that it is attributed to the laws of the respective States». Moreover, the lack of access to legal protection can — combined with the lack of economic resources of foreign citizens — lead to the ignorance of their rights and their effective defense. This is especially adverse to those who are in another country, where another language is spoken, and are simultaneously deprived of their freedom.

¹⁰ See paragraphs 6 and 7 of article no. 146-A of the Foreigners Law.

¹¹ See annex report «Treatment of undocumented foreign nationals or asylum seekers in temporary accommodation centres or similar facilities — Visits of the NPM», pp. 24-26.

¹² See annex report «Treatment of undocumented foreign nationals or asylum seekers in temporary accommodation centres or similar facilities — Visits of the NPM», pp. 36-40.



Therefore, in order to ensure that foreign citizens can avail themselves of legal assistance, I consider it urgent that the measures taken to achieve this objective be adopted in the shortest possible time, along with the conclusion of the protocol referred to in article 40, paragraph 3 of the Foreigners Law.

I conclude, being convinced of the personal commitment and co-operation with which your Excellency will receive this recommendation, thus contributing to the improvement of temporary accommodation centers for foreigners in an irregular situation in Portugal or asylum seekers, or similar, for the strengthening of security and honorable treatment of the people deprived of their liberty.

The Portuguese Ombudsman
National Preventive Mechanism

José de Faria Costa

Annex: Relatório Tratamento dos cidadãos estrangeiros em situação irregular ou requerentes de asilo nos centros de instalação temporária ou espaços equiparados – Visitas do Mecanismo Nacional de Prevenção and a copy of the Recommendation no.18/2017/NPM.