

Strasbourg, 29 June 2012
pc-cp\docs 2011\pc-cp (2011) 5 e rev 9

PC-CP (2011) 5 rev 9

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT RECOMMENDATION
CONCERNING FOREIGN PRISONERS

Draft Recommendation CM/Rec (2012) ... of the Committee of Ministers to member States concerning foreign prisoners

(adopted by the Committee of Ministers on ... at the ... meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15. b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members, in particular through harmonising laws on matters of common interest;

Considering the large number of foreign prisoners detained in the prisons in its member States;

Recognising the difficulties which these prisoners may face on account of such factors as differences in language, culture, customs and religion, and lack of family ties and contact with the outside world;

Desirous of alleviating any possible isolation of foreign prisoners and of facilitating their treatment with a view to their social reintegration;

Considering that such treatment should take into account the special needs of foreign prisoners, arising from the fact that they are detained in a state of which they are neither a national nor a resident, in order to provide them with opportunities equal to those of other prisoners;

- the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
- the Convention on the Transfer of Sentenced Persons (ETS No. 112);
- the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167);
- Recommendation No. R (92) 16 on the European rules on community sanctions and measures;
- Recommendation No. R (92) 17 concerning consistency in sentencing;
- Recommendation No. R (93) 6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison;
- Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures;
- Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison;
- Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation;
- Recommendation Rec (2003) 22 on conditional release (parole);
- Recommendation Rec (2006) 2 on the European Prison Rules;
- Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse;
- Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures;
- Recommendation CM/Rec (2010) 1 on the Council of Europe Probation Rules.

Bearing in mind:

The United Nations Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners (1985);

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution 2010/16);

The European Union Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union;

The European Union Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;

The European Union Council Framework Decision 2009/829/JHA on the application, between member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;

Considering that Recommendation No. R (84) 12 of the Committee of Ministers to member States concerning foreign prisoners needs to be replaced by a new recommendation reflecting the developments since then in penal policy, sentencing practice and the overall management of prisons in Europe;

Taking into account the constitutional principles, legal traditions and the independence of the judiciary in its member States;

Recognising that a range of authorities and agencies deal with foreign persons who are subject to criminal proceedings, sanctions or measures, and that such bodies are in need of a coherent set of guiding principles in line with Council of Europe standards.

Recommends that governments of member States:

- be guided in their legislation, policies and practice by the rules contained in the appendix to this recommendation, which replaces Recommendation No. R (84) 12 of the Committee of Ministers to member States concerning foreign prisoners;
- ensure that this recommendation and the accompanying commentary to its text are translated and disseminated as widely as possible and more specifically to all relevant authorities, agencies, professionals and associations which deal with foreign prisoners, as well as to the prisoners themselves.

*Appendix to Recommendation CM/Rec (2012) XX***I. Definitions and scope***Definitions*

1. For the purpose of this Recommendation:
 - a. **foreign person** means any person who does not have the nationality of and is not considered to be a resident by the state where he or she is;
 - b. **foreign suspect** means any foreign person who is alleged to have committed but who has not been convicted of a criminal offence;
 - c. **foreign offender** means any foreign person who has been convicted of a criminal offence;
 - d. **prison** means an institution reserved primarily for the detention of suspects or offenders;
 - e. **foreign prisoner** means any foreign person held in prison and a foreign suspect or a foreign offender detained elsewhere;
 - f. **judicial authority** means a court, a judge or a prosecutor.

Scope

2. This Recommendation applies to foreign prisoners and to other foreign persons who are not in prison but who are subject to criminal proceedings, and criminal sanctions and measures, and who may be or have been deprived of their liberty.

II. Basic principles

3. Foreign prisoners shall be treated with respect for their human rights and with due regard for their particular situation and individual needs.
4. Foreign suspects and offenders shall be entitled to be considered for the same range of non-custodial sanctions and measures as other suspects and offenders; they shall not be excluded from consideration on the grounds of their status.
5. Foreign suspects and offenders shall not be remanded in custody or sentenced to custodial sanctions on the grounds of their status, but, as for other suspects and offenders, only when strictly necessary and as a measure of last resort.
6. Foreign offenders sentenced to imprisonment shall be entitled to full consideration for early release.
7. Positive steps shall be taken to avoid discrimination and to address specific problems that foreign persons may face while subject to community sanctions or measures, in prison, during transfer and after release.
8. Foreign prisoners who so require shall be given appropriate access to interpretation and translation facilities and the possibility to learn a language that will enable them to communicate more effectively.
9. The prison regime shall accommodate the special welfare needs of foreign prisoners and prepare them for release and social reintegration.
10. Decisions to transfer foreign prisoners to a state with which they have links shall be taken with respect for human rights, in the interests of justice and with regard to the need to socially reintegrate such prisoners.
11. Sufficient resources shall be allocated in order to deal effectively with the particular situation and specific needs of foreign prisoners.
12. Appropriate training in dealing with foreign suspects and offenders shall be provided for the relevant authorities, agencies, professionals and associations which have regular contact with such persons.

III. Use of remand in custody

13.1. In order to ensure that remand in custody is used for foreign suspects, as for other suspects, only when strictly necessary and as a measure of last resort, it shall be governed by Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

13.2 In particular:

- a. alternatives to remand in custody shall always be considered for a foreign suspect; and
- b. the fact that such a suspect is neither a national nor a resident of the state or has no other links with that state shall not, in itself, be sufficient to conclude that there is a risk of flight.

IV. Sentencing

14.1. In order to ensure that custodial sanctions are imposed on foreign offenders, as for other offenders, only when strictly necessary and as a measure of last resort, sentencing shall take into consideration Recommendation No. R (92) 17 concerning consistency in sentencing. In particular, foreign offenders shall be considered for the same range of non-custodial sanctions or measures as national offenders.

14.2. The judicial authorities shall be provided, where possible and appropriate, with pre-sentence reports about the personal circumstances of foreign offenders and their families, the likely impact of various sanctions on them and the possibility and desirability of their being transferred after sentencing.

14.3. To avoid disproportionate hardship and obstacles to social reintegration, account shall be taken when considering sentences of the possible impact that such sentences may have on individual offenders and their dependants, without prejudice to the independence of the judiciary.

V. Conditions of imprisonment

Admission

15.1. At admission and during detention, foreign prisoners shall be provided with information, in a language they understand, about:

- a. their rights and duties as prisoners including regarding contacts with their consular representatives;
- b. the main features of the prison regime and the internal regulations;
- c. rules and procedures for making requests and complaints; and
- d. their rights to legal advice and assistance.

15.2. Immediately after admission, prison authorities shall assist foreign prisoners, who wish to do so, to inform of their imprisonment their families, legal advisers, consular representatives and other persons or organisations competent to assist them.

15.3. As soon as possible after admission, foreign prisoners shall be provided with information, in a language they understand, orally or in writing, of international transfer possibilities.

Allocation

16.1. Decisions regarding the allocation of foreign prisoners shall take into account the need to alleviate their potential isolation and to facilitate their contact with the outside world.

16.2. Subject to the requirements of safety and security, and the individual needs of foreign prisoners, consideration shall be given to housing foreign prisoners in prisons close to transport facilities that would enable their families to visit them.

16.3. Where appropriate and subject to the requirements of safety and security, foreign prisoners shall be allocated to prisons where there are others of their nationality, culture, religion or who speak their language.

Accommodation

17. Decisions on whether to accommodate foreign prisoners together shall be based primarily on their individual needs and the facilitation of their social reintegration, while ensuring a safe and secure environment for prisoners and staff.

Hygiene

18.1. Facilities for sanitation and hygiene shall, as far as practicable, accommodate the cultural and religious preferences of foreign prisoners, while maintaining appropriate medical standards.

18.2. Rules that require prisoners to keep their appearance clean and tidy shall be interpreted in a manner that respects prisoners' cultural and religious preferences, while maintaining appropriate medical standards.

Clothing

19.1. Clothes provided by prison authorities shall not offend the cultural or religious sensibilities of foreign prisoners.

19.2. Where clothes are not provided by the prison authorities, prisoners shall be allowed, subject to the requirements of safety and security, to wear clothes that reflect their cultural and religious traditions.

Nutrition

20. In addition to providing a nutritious diet that takes account of the cultural and religious requirements of prisoners, prison authorities shall, where possible, provide prisoners with opportunities to purchase and cook food that makes their diet more culturally appropriate and to take their meals at times that meet their religious requirements.

Legal advice and assistance

21.1. Foreign prisoners shall be informed, in a language they understand, about their right to legal advice on matters affecting their detention and status.

21.2. Foreign prisoners shall be informed about possible legal aid and, where necessary, assisted in accessing such legal aid.

21.3. Foreign prisoners who need to communicate with their legal adviser shall be allowed access to interpretation where necessary.

21.4. Prison authorities shall facilitate the provision of administrative and legal assistance to foreign prisoners by approved outside agencies.

21.5. Foreign prisoners who are subject to disciplinary proceedings shall be assisted by an interpreter where necessary.

Contact with the outside world

22.1. To alleviate the potential isolation of foreign prisoners, special attention shall be paid to the maintenance and development of their relationships with the outside world, including contacts with family and friends, consular representatives, probation and community agencies and volunteers.

22.2. Unless there is a specific concern in individual cases related to safety and security, foreign prisoners shall be allowed to use a language of their choice during such contacts.

22.3. Rules for making and receiving telephone calls and other forms of communication shall be applied flexibly to ensure that foreign prisoners who are communicating with persons abroad have equivalent access to such forms of communication as other prisoners.

22.4. Indigent foreign prisoners shall be assisted with the costs of communicating with the outside world.

22.5. In order to optimise contact, visits to foreign prisoners from family members who live abroad shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements.

22.6. Support and information shall be provided to the extent possible to enable family members who live abroad to visit foreign prisoners.

22.7. Special measures shall be taken to encourage and enable foreign prisoners to maintain regular and meaningful contact with their children.

22.8. Arrangements shall be made to facilitate visits, correspondence and other forms of communication by children with their imprisoned parent, in particular when they live in a different state.

22.9. The authorities shall endeavour to ensure that foreign prisoners are able to inform family members about the prison or other facility in which they are held or to which they have been transferred.

22.10. In cases of emergency and where the foreign prisoner has given prior consent, the prison authorities shall endeavour to inform family members of the death, serious illness or serious injury of such a prisoner.

22.11. The authorities shall endeavour to keep up-to-date contact details of family members of foreign prisoners.

23.1. Foreign prisoners shall be allowed to keep themselves informed regularly of public affairs by subscribing to newspapers, periodicals or other publications in a language they understand.

23.2. To the extent possible, foreign prisoners shall be given access to radio or television broadcasts or other forms of communication in a language they understand.

23.3. Probation agencies, approved associations and volunteers providing support to foreign prisoners shall be given access to such prisoners who wish to have contact with them.

Contact with consular representatives

24.1. Foreign prisoners have the right to regular contact with their consular representatives.

24.2. Foreign prisoners shall be given reasonable facilities to communicate with their consular representatives.

24.3. Foreign prisoners who are without consular representation in the country in which they are detained have the right to regular contact and to facilities to communicate with representatives of the state which takes charge of their interests.

24.4. Foreign prisoners who are refugees, asylum seekers or stateless have the right to communicate with representatives of the national or international authorities whose task it is to serve the interests of such prisoners.

25.1. Prison authorities shall inform foreign prisoners about their right to request contact with their consular representatives or representatives of national or international authorities whose task it is to serve their interests.

25.2. Prison authorities shall, subject to the prisoner's request, inform consular representatives about their nationals held in prison.

25.3. Prison authorities shall co-operate fully with consular representatives and national or international authorities whose task is to serve the interests of foreign prisoners.

25.4. Prison authorities shall keep a record of instances where foreign prisoners waive their right to contact their consular representatives and of visits by consular representatives to foreign prisoners.

Prison regime

26.1. In order to ensure equal access to a balanced programme of activities, prison authorities shall, where necessary, take specific measures to counter the difficulties foreign prisoners may face.

26.2. Access to activities shall not be restricted because the prisoners concerned may be transferred, extradited or expelled.

Work

27.1. Foreign prisoners shall have access, where appropriate, to suitable work and vocational training, including programmes outside prison.

27.2. Where necessary, specific measures shall be taken to ensure that foreign prisoners have access to income-producing work.

27.3. Foreign prisoners may transfer at least a part of their earnings to family members who are resident abroad.

27.4. Foreign prisoners who work and contribute to the social security system of the state in which they are imprisoned shall be allowed, where possible, to transfer the benefits of such contributions to their state of nationality or another state.

Exercise and recreation

28.1. Exercise and recreational activities shall be arranged flexibly to enable foreign prisoners to participate in a manner that respects their culture.

28.2. Prison authorities shall encourage activities that promote positive relations amongst prisoners from the same culture and between prisoners from different backgrounds.

Education and training

29.1. To enable foreign prisoners to relate effectively to other prisoners and staff, they shall be given the opportunity and be encouraged to learn a language that allows them to communicate, and to study local culture and traditions.

29.2. To ensure that educational and vocational training is as effective as possible for foreign prisoners, prison authorities shall take account of their individual needs and aspirations, which may include working towards qualifications that are recognised and can be continued in the country in which they are likely to reside after release.

29.3. The prison shall be stocked as far as possible with reading materials and other resources that reflect the linguistic needs and cultural preferences of the foreign prisoners in that prison and are easily accessible.

Freedom of religion or belief

30.1. Prisoners shall have the right to exercise or change their religion or belief and shall be protected from any compulsion in this respect.

30.2. Prison authorities shall, as far as practicable, grant foreign prisoners access to approved representatives of their religion or belief.

Health

31.1. Foreign prisoners shall have access to the same health care and treatment programmes that are available to other prisoners.

31.2. Sufficient resources shall be provided to deal with specific health problems which may be faced by foreign prisoners.

31.3. Medical and health care staff working in prisons shall be enabled to deal with specific problems and diseases which may be encountered by foreign prisoners.

31.4. To facilitate the health care of foreign prisoners, attention shall be paid to all aspects of communication. Such communication may require the use of an interpreter who is acceptable to the prisoner concerned and who shall respect medical confidentiality.

31.5. Health care shall be provided in a way that is not offensive to cultural sensitivities and requests by foreign prisoners to be examined by a medical practitioner of the same gender shall be granted as far as possible.

31.6. Where possible, psychiatric and mental health care shall be provided by specialists who have expertise in dealing with persons from different religious, cultural and linguistic backgrounds.

31.7. Attention shall be paid to preventing self harm and suicide among foreign prisoners.

31.8. Consideration shall be given to the transfer of foreign prisoners, who are diagnosed with terminal illnesses and who wish to be transferred, to a country with which they have close social links.

31.9. Steps shall be taken to facilitate the continuation of medical treatment of foreign prisoners who are to be transferred, extradited or expelled, which may include the provision of medication for use during transportation to that state and, with the prisoners' consent, the transfer of medical records to the medical services of another state.

Good order, safety and security

32.1. Prison staff shall ensure that good order, safety and security are maintained through a process of dynamic security and interaction with foreign prisoners.

32.2. Prison staff shall be alert to potential or actual conflicts between groups within the prison population that may arise due to cultural or religious differences and inter-ethnic tensions.

32.3. To ensure safety in prison, every effort shall be made to enhance mutual respect and tolerance and prevent conflict between prisoners, prison staff or other persons working or visiting the prison, who come from different backgrounds.

32.4. The nationality, culture or religion of a prisoner shall not be the determinative factors in the assessment of the risk to safety and security posed by such prisoner.

Women

33.1. Special measures shall be taken to combat the isolation of foreign women prisoners.

33.2. Attention shall be paid to meeting the psychological and healthcare needs of foreign women prisoners, especially those who have children.

33.3. Arrangements and facilities for pre-natal and post-natal care shall respect cultural and religious diversity.

Infant children

34.1. When deciding whether it would be in the best interests of an infant child of a foreign prisoner to be kept in prison, particular consideration shall be given to:

- a. the conditions in which the child would be held in prison;
- b. the conditions that would apply if the child is kept outside prison; and
- c. the views of the legal guardians of the child.

34.2. Arrangements and facilities for the care of infant children who are in prison with their parent shall respect cultural and religious diversity.

34.3. The legal status of any infant children in prison with their foreign parent shall be determined as early as possible during the sentence of that parent, with special care being taken to resolve cases where children born in prison have a different nationality to that of their parent.

VI. Release

Preparation for release

35.1. Preparation for release of foreign prisoners shall start in good time and in a manner that facilitates their reintegration into society.

35.2. In order to facilitate the reintegration of foreign prisoners into society:

- a. their legal status and their situation after release shall be determined as early as possible during their sentence;
- b. where appropriate, prison leave and other forms of temporary release shall be granted to them; and
- c. they shall be assisted in making or re-establishing contact with family, friends and relevant support agencies.

35.3. Where foreign prisoners are to remain in the state in which they were held after release, they shall be provided with support and care by prison, probation or other agencies which specialise in assisting prisoners.

35.4. Where foreign prisoners are to be expelled from the state in which they are being held, efforts shall be made, if the prisoners consent, to contact the authorities in the state to which they are to be sent with a view to ensuring support both immediately upon their return and to facilitate their reintegration into society.

35.5. In order to facilitate continuity of treatment and care where foreign prisoners are to be transferred to another state to serve the remainder of their sentence, the competent authorities shall, if the prisoner consents provide the following information to the state to which the prisoners shall be sent:

- a. the treatment the prisoners have received;
- b. the programmes and activities in which they have participated;
- c. medical records; and
- d. any other information that will facilitate continuity of treatment and care.

35.6. Where foreign prisoners may be transferred to another state, they shall be assisted in seeking independent advice about the consequences of such a transfer.

35.7. Where foreign prisoners are to be transferred to another state to serve the remainder of their sentence, the authorities of the receiving state shall provide the prisoners with information on conditions of imprisonment, prison regimes and possibilities for release.

Consideration for early release

36.1. Foreign prisoners, like other prisoners, shall be considered for early release as soon as they are eligible and shall not be discriminated against in this respect.

36.2. In particular, steps shall be taken to ensure that detention is not unduly prolonged by delays relating to the finalisation of the immigration status of the foreign prisoner.

Release from prison

37.1. In order to assist foreign prisoners to return to society after release, practical measures shall be taken to provide appropriate documents and identification papers and assistance with travel.

37.2. Where foreign prisoners will return to a country with which they have links and, if the prisoner consents, the consular representatives shall assist them where possible in this regard.

VII. Persons who work with foreign prisoners

Selection

38. Persons who work with foreign prisoners shall be selected on criteria that include cultural sensitivity, interaction skills and linguistic abilities.

Training

39.1. Staff involved in the admission of foreign prisoners shall be appropriately trained to deal with them.

39.2. Persons who work with foreign prisoners shall be trained to respect cultural diversity and to understand the particular problems faced by such prisoners.

39.3. Such training may include learning languages spoken most often by foreign prisoners.

39.4. Training programmes shall be evaluated and revised regularly to ensure they reflect changing populations and social circumstances.

39.5. Persons who deal with foreign suspects and offenders shall be kept informed of current national law and practices and international and regional human rights law and standards relating to their treatment, including this Recommendation.

Specialisation

40. Appropriately trained persons shall be appointed to engage in specialised work with foreign prisoners and to liaise with the relevant agencies, professionals and associations on matters related to such prisoners.

VIII. Policy evaluation

41. The authorities shall regularly evaluate their policies for dealing with foreign suspects and offenders on the basis of scientifically validated research and revise them where appropriate.