



Poder Judiciário

*Conselho Nacional de Justiça*

**RESOLUTION No. 405, of JULY 6, 2021.**

Establishes procedures for the treatment of migrant people in custody, accused, defendants, convicted or deprived of liberty, including those under house arrest and other forms of open-ended sentencing, in compliance with alternative sentencing or electronic monitoring, and provides guidelines to ensure the rights of this population within the scope of the Judiciary.

**THE PRESIDENT OF THE NATIONAL COUNCIL OF JUSTICE**

(CNJ), in the use of its legal and regimental attributions,

**CONSIDERING** the Federative Republic of Brazil is governed by the prevalence of human rights in international relations (Article 4, II, of the FC), and the due legal process must be guaranteed to all persons subject to criminal jurisdiction, regardless of nationality;

**CONSIDERING** the United Nations Standard Minimum Rules for the Treatment of Prisoners - the Mandela Rules -, which provide that prisoners of foreign nationality must be granted reasonable facilities for communication with diplomatic and consular representatives of the State of which they are nationals (Rule No. 62) as well as the United Nations Rules that establish parameters and measures of humanitarian treatment for women deprived of their liberty and women released from prisons (the Bangkok Rules), which guarantee access to consular representatives when migrant women enter the penitentiary system (Rule No. 2);



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**CONSIDERING** the provision of Article 36 of the Vienna Convention on Consular Relations (1963), promulgated by Decree No. 61,078/1967, as well as the jurisprudence of the Supreme Court, which recognizes that the right to consular assistance integrates the clause of the due legal process, and that its non-compliance may result in international accountability, as condemned by the International Court of Justice, in the case of *Avena and others vs. United States* (2004), as well as *Lagrand and others vs. United States* (2001);

**CONSIDERING** the Inter-American Court of Human Rights issued Advisory Opinion No. 16/1999, concerning the "right to information and consular assistance within the framework of the guarantees of due legal process," on which occasion it clarified, in resolution point 06, that the individual right is enforceable against the State because it is a guarantee covered by Article 14 of the International Covenant on Civil and Political Rights, and Article 8 of the American Convention on Human Rights, interpreted in light of the Vienna Convention on Consular Relations (1963);

**CONSIDERING** the provisions of Law No. 7,210/1984 (Criminal Execution Law), which establishes that all rights not affected by the sentence or the law must be assured to the convicted person, without any distinction of racial, social, religious, or political nature;

**CONSIDERING** the provisions of Law No. 9,474/1997, which establishes mechanisms and guidelines for the implementation of the Convention Relating to the Status of Refugees (1951);

**CONSIDERING** the provisions of Law No. 13,344/2016, which provides for measures to repress and prevent international human trafficking and to protect victims;



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**CONSIDERING** the provisions of Law No. 13,445/2017 (Migration Law), which establishes the rights and duties of migrants and visitors, regulates their entry and stay in the country, and provides principles and guidelines for public policies for migrants;

**CONSIDERING** CNJ Resolution No. 369/2021, which establishes procedures and guidelines for replacing the deprivation of liberty of pregnant women, mothers, fathers and guardians of children and persons with disabilities, pursuant to Articles 318 and 318-A of the Code of Criminal Procedure, and in compliance with the collective *habeas corpus* orders granted by the 2nd Panel of the Supreme Court in HCs No. 143,641/SP and 165,704/DF;

**CONSIDERING** Resolution No. 4/2019, of the Inter-American Commission on Human Rights, which adopts the Inter-American Principles on Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Human Trafficking;

**CONSIDERING** the interpretative guidelines of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, through its General Comment No. 02;

**CONSIDERING** the deliberation of the Plenary of the CNJ, in Normative Act Procedure No. 0009272-52.2017.2.00.0000, at the 89<sup>th</sup> Virtual Session, held on June 25, 2021;

### **DECIDES**

Article 1. It establishes procedures for the treatment of migrants in custody, accused, defendants, convicted or deprived of liberty, including those under house arrest and other forms of open-ended sentencing, in compliance with alternative sentencing or electronic monitoring, and provides guidelines to ensure the rights of these population within the scope of the Judiciary.



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Article 2. A migrant is defined as every person who is outside the territory of which he/she is a national, regardless of his/her migratory situation, intention, or duration of his/her stay or permanence.

Single paragraph. The concept of migrant includes the stateless person, understood as a person who is not considered a national by any State under its legislation, according to the 1954 Convention relating to the Status of Stateless Persons, promulgated by Decree No. 4,246/2002.

Article 3. The following principles rule the treatment of migrants referred to in this Resolution :

- I - universality, indivisibility and interdependence of human rights;
- II - repudiation and prevention of xenophobia, racism, human trafficking and any form of discrimination;
- III - non-criminalization of migration;
- IV - non-discrimination due to criteria or procedures by which the person was admitted into the national territory;
- V - guarantee of the right to consular assistance;
- VI - guarantee of due legal process and the right to non-discrimination in the trial process or at any stage of the execution of the sentence;
- VII - promotion of document regularization, with access to the necessary documentation for migratory regularization and the exercise of rights;
- VIII - guarantee of the right to family reunion and the exercise of maternity or paternity;
- IX - equal treatment and opportunities, considering the various social markers of difference, such as race, ethnic or national origin, gender and sexual orientation, social status and exposure to poverty, among others;
- X - social and labor inclusion, with equal access to services, programs and benefits;
- XI - right to full and free legal assistance;



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XII - promotion of the right of access to information about the rights and obligations of the migrant person, including those arising from his/her condition as in custody, accused, defendant, convicted, deprived of liberty or serving criminal alternatives;

XIII - international cooperation with States of origin, transit, and destination of migratory movements, in order to promote the effective protection of the migrant's human rights; and

XIV - diffusion and guarantee of the rights recognized in international treaties and in the jurisprudence of international human rights courts.

Article 4. The presence of an interpreter or translator of the migrant's spoken language will be guaranteed at all stages of criminal proceedings in which he/she is a party, including custody hearings.

Single paragraph. The organs of the Judiciary must make efforts to promote access to the main documents of the judicial process to the migrant, translated into his/her spoken language .

Article 5. If there are elements that the migrant is a direct or indirect victim of human trafficking, in the terms of Law No. 13,344/2016, the judge will forward the evidence to the responsible authorities, as well as taking the appropriate measures of protection and care, according to Article 6 of that law.

Single paragraph. The measures indicated in the *caput* must not lead to revictimization of the migrant.

Article 6. If there is evidence of specific vulnerability or at the request of the parties, the judge may ask the migrant person, during a custody hearing, about his/her interest in requesting refuge or other forms of complementary protection under the terms of Law No. 9,474/1997 and Law No. 1,345/2017, and forward the request by letter to the competent authority.

§1<sup>st</sup>. Irregular entry into national territory does not constitute an impediment for a migrant to seek refuge with the competent authorities, according to Article 8 of Law No. 9,474/1997.



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§2<sup>nd</sup>. In case of a refuge request by the migrant, the provisions of Article 10 of Law No. 9,474/1997 must be observed, suspending any administrative or criminal proceedings filed against the person and members of his/her family group, due to irregular entry into the national territory.

§3<sup>rd</sup>. The communication of the arrest of a refugee or asylum seeker to the consular or diplomatic representation will be made exclusively in cases where there is an express request, in the terms of Article 7, II, of this Resolution.

Article 7. It is responsibility of the organs of the Judiciary to guarantee the exercise of the migrant person's right to consular assistance during the administrative or judicial process, specially:

I - inform the migrant person about the possibility of exercising the right to consular assistance before giving any statement;

II - inform the consular representation of the arrest as soon as it has occurred, only in cases where the migrant requests it;

III - transmit without delay any communication addressed to the consular representation by the migrant person; and

IV - enable consular officials to visit establishments of deprivation of liberty and attend custody hearings, with the migrant's agreement.

Single paragraph. In cases where there is no consular representation or representative appointed by the person's country of origin, the diplomatic representation must be informed, and in its absence, the Ministry of Foreign Affairs.

Article 8. In the custody hearing involving a migrant person, which must be conducted under the terms of CNJ Resolution No. 213/2015, the judicial authority must:

I - inquire about the nationality of the migrant, the language spoken, as well as fluency in the Portuguese language;

II - certify whether the exercise of the right to consular assistance has been guaranteed, pursuant to Article 7 of the present Resolution;

III - adopt the measures mentioned in Articles 5 and 6 of this Resolution, once the evidence is verified or at the request of the parties;



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IV - facilitate contact with family members or persons he/she trusts in the country of origin or in his/her country of residence for information about the arrest, and may use equipment for virtual visits and allowing the migrant access to telephone contacts;

V - investigate the hypothesis of pregnancy, existence of children or dependents under the care of the migrant person in custody, health history and use of continuous medication, including mental disorders and problematic use of alcohol and other drugs, housing, work and study status, for possible referral within the scope of social protection;

VI - promote care by a psychosocial team, whenever necessary, with the participation of an interpreter;

VII - provide for the referral of the migrant person to the existing social protection or inclusion policies, according to the identified demands, clarifying their voluntary nature; and

VIII - communicate the consular and diplomatic representation in case of a pre-trial detention, if the person requests it.

§1<sup>st</sup>. In the case of a migrant person who does not reside in the country, special attention will be given to referral to reception and housing programs, with the assistance from the criminal alternative monitoring service, diplomatic and consular representations, municipal social assistance offices and civil society organizations, considering the situation of vulnerability.

§2<sup>nd</sup>. In the cases referred to in the previous paragraph, the judicial authority will request that the entity responsible for the referral informs the court of the address where the migrant is hosted.

§3<sup>rd</sup>. In case of relaxation from arrest in flagrante delicto or the granting of provisional liberty, the migrant must be informed of the nature of the measure and its implications, be given a copy of the minutes of the hearing, and be informed of the need to report any change of address.

§4<sup>th</sup>. The application of precautionary measures other than imprisonment must include the analysis of the adequacy of the migrant's situation and the need for measures, stipulating deadlines for their fulfillment and the reassessment of their maintenance, according to Article 316 of the Code of Criminal Procedure and Article 9 of CNJ Resolution No. 213/2015.



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Article 9. The judicial authority will decide on the person's passport, which must:

I - be handed over to the person, in case of release with or without application of a precautionary measure other than imprisonment;

II - be held in the administration of the prison to which it is sent, for return upon release, in case of pre-trial detention, according to Article 7, §1<sup>st</sup> of CNJ Resolution No. 306/2019; and

III - be returned to the person at the registry office of the police unit or the court of trial process in case of seizure, when it is no longer of interest to the process.

§1<sup>st</sup>. The Federal Police will be notified in cases where the migrant is prohibited from leaving the national territory.

§2<sup>nd</sup>. Until the passport has not been returned, according to item III of this article, a complete copy of the passport must be made available to the migrant, and may be certified as a true copy by the relevant notary's office.

Article 10. The criminal treatment of migrant women will consider, especially:

I - the exceptionality of provisional arrest, especially for pregnant women, nursing mothers, mothers and guardians of children under 12 (twelve) years of age or people with disabilities, in terms of Articles 318 and 318-A of the Code of Criminal Procedure and the decision uttered by the 2<sup>nd</sup> Panel of the Supreme Court in the HC judgement No. 143,641/SP;

II - the progression of regime under the terms of Article 112, §3<sup>rd</sup>, of the Criminal Execution Law

III - that the woman's migration status cannot be an obstacle to the determination of house arrest, the granting of regime progression, and the exercise of other rights of criminal process and execution;

IV - that the monitoring of the execution of migrant women to whom refer to Articles 72 and 112 of the Criminal Execution Law will occur on a case-by-case basis, if possible, with the support of the local social protection network or, when applicable, the consular and diplomatic representations; and





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V - that, in case of application of house arrest to a migrant woman whose family does not have residence or support network, the social protection network, the consular and diplomatic representations, as well as civil society organizations must be mobilized to ensure the maintenance of ties and family life, under the terms of Article 23 of the Statute of the Child and Adolescent.

§1<sup>st</sup>. The granting of provisional release or placement in house arrest will take into account the experience of transnational maternity, which can be exercised even when the sons or daughters reside abroad, considering the facilitation of contact through virtual means and the possibility of providing alimony by sending funds abroad.

§2<sup>nd</sup>. In the exceptional case of maintaining a migrant mother in pre-trial detention or to serve her sentence under a closed regime, the judge must consider, especially when there are bilateral or multilateral treaties in effect, or even a promise of reciprocity on the part of the foreign state:

I - the transfer of imprisoned migrant women to their country of origin, especially if they have children there, after prior request or the informed consent of the woman; and

II - sending the child to their family members in the country of origin, if removed from the prison unit where the child is staying with his/her migrant mother, considering his/her best interests and after informed consent of the woman.

§3<sup>rd</sup>. The provisions of this article apply, as applicable, to parents and guardians of children and people with disabilities, under the terms of CNJ Resolution No. 369/2021 and the ruling uttered by the 2<sup>nd</sup> Panel of the Supreme Court in HC No. 165,704/DF.

Article 11. The judge will consider, observing the peculiar condition of the migrant person, the possibility of:

I - transfer of the convicted person to serve his/her sentence in the country of origin, in the country where he/she has residence or personal ties, when he/expresses interest in this regard, through international legal cooperation measures, when there is a treaty or promise of reciprocity;



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II - voluntary return, especially in the hypotheses of serving a non-custodial sentence or during the compliance with open regime and conditional release, through international travel authorization before the extinction of punishability by the full completion of the sentence; and

III - possibility of complying with the Migration Law's compulsory withdrawal measures after the conviction is *res judicata* and before the sentence is extinguished, especially in the hypotheses of serving a non-custodial sentence or granting the benefits from criminal execution.

Article 12. In penal establishments where there are migrants deprived of their liberty, the criminal execution court, in the exercise of its powers of supervision, must ensure that consular, material, health, legal, educational, social, and religious assistance is guaranteed, considering, especially:

§1<sup>st</sup>. Regarding the right to visits:

I - analysis for the inclusion of friends and acquaintances in the list of declared socio-affective relationships, not limited to those officially recognized, ensuring the right to intimate visits;

II - guarantee of access to the establishment of deprivation of liberty by representatives of the diplomatic and consular representations of the country of origin; and

III - the virtual visit and the availability of other means of contact with the outside world, including with people in other countries, in an unbureaucratic way.

§2<sup>nd</sup>. Regarding the right to material assistance:

I - the receipt of supplementary material assistance provided by consular and diplomatic representations; and

II - the articulation with organizations, consulates, and embassies to make it possible to receive and send financial resources to family members abroad.

§3<sup>rd</sup>. Regarding work, education, and other policies offered in prison establishments:



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I - guarantee of non-discrimination and the provision of equal opportunities in all initiatives implemented within the prison establishment;

II - encouragement and authorization to work as an interpreter of other languages during deprivation of liberty and consideration for remission purposes;

III - respect for religious practices, including those involving dietary restrictions, access to religious items, and dress codes; and

IV - availability of an interpreter or translator, including virtually, in institutional interactions within the unit, when necessary, for the exercise of rights.

Article 13. Migrants deprived of liberty in the prison system must be provided with basic civil documentation, preferably free of charge, and the documents, including passports, must be given to the person at the moment of release, pursuant to Articles 6 and 7 of CNJ Resolution No. 306/2019.

Single paragraph. The judge may expressly indicate, in the sentencing decision or at another procedural moment, since the custody hearing, the referral to the competent authority for the request the issuance of a Work and Social Security Card (CTPS), either physical or digital.

Article 14. The judge hearing the case must forward to the Ministry of Justice and Public Security a copy of the criminal conviction handed down against the migrant and the certificate of res judicata, as provided in Article 54, §1<sup>st</sup>, of the Migration Law, in the following cases:

I - crime of genocide, crime against humanity, war crime or crime of aggression, as defined by the Rome Statute of the International Criminal Court, 1988, promulgated by Decree No. 4,388/2002; and

II - common felony crime punishable by deprivation of liberty, considering the gravity and the possibilities of re-socialization in national territory.

Single paragraph. The processing of deportation in case of a common crime will not affect the progression of the regime, the completion of the sentence, the conditional suspension of the process, the commutation of sentence or the granting of alternative sentence, of collective or individual pardon, of amnesty or any benefits granted under equal conditions to the Brazilian national.



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Article 15. The bodies of the Judiciary must ensure that the migrant has legal conditions to exercise all rights not restricted by a motivated decision during the trial or the conviction, including the regularization of his/her stay in the country, throughout the trial and the execution of the sentence.

§1<sup>st</sup>. At any stage of the administrative or judicial process, attention will be given to the possibility of migratory regularization, under the terms of Article 30, II, "h", of Law No. 13,445/2017, until the effectuation of eventual expulsion.

§2<sup>nd</sup>. The Judiciary will control the legality and reasonability of the requirement for a criminal record certificate and other documents for the exercise of rights without discrimination, considering the objective of social integration and the rights to migratory regularization and work, in the course of the criminal process or the serving of a sentence.

§3<sup>rd</sup>. The courts are responsible for mapping and mobilizing the local social protection network and civil society organizations, providing the reception and referral of the released migrant person and his/her family members, through the Social Office, for inclusion in available public policies, especially those provided in Article 8 of CNJ Resolution No. 307/2019, or equivalent referral to other equipments intended for people released from the prison system and migrants.

Article 16. In addition to the provisions of this Resolution, the provisions set forth, respectively, in CNJ Resolution No. 287/2019 and CNJ Resolution No. 348/2020, apply to migrant persons self-declared as indigenous or self-declared as part of the lesbian, gay, bisexual, transgender, transvestite or intersex population.

Article 17. This Resolution will also be applied to apprehended migrant adolescents, processed for committing an infraction or in compliance with a socio-educational measure, as far as applicable and while no proper normative rule is elaborated, considering the condition of the developing person and the principle of absolute priority, making the due adaptations as foreseen in the Child and Adolescent Statute and the applicable legislation.



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Article 18. The National Council of Justice and the courts must indicate in their computerized systems, in a mandatory manner, information on the person's nationality.

Single paragraph. The registrations and systems must ensure the protection of personal data and the respect for individual rights and guarantees, especially intimacy, privacy, honor, image, and possible refugee status.

Article 19. The courts must prepare and maintain a register of interpreters with forensic experience at the disposal of the court, as well as a list of consular authorities, embassies and diplomatic missions, and institutions and services in the field of social protection, as well as civil society organizations, to enforce this Resolution.

Single paragraph. To fulfill the provisions in the *caput*, the courts may promote partnerships with local public and private agencies and entities that work with the migrant population, as well as public and private universities.

Article 20. In order to comply with the provisions of this Resolution, the courts, in collaboration with the schools of magistrates, may promote courses aimed at the permanent qualification and functional updating of the judges and employees who work in the judicial units that hold custody hearings, in criminal courts, special criminal courts, courts for domestic and family violence against women, and courts for criminal execution, as well as in those with competence to investigate infractions and enforce social and educational measures, especially in the districts and judicial sections with a large migrant population.

§1<sup>st</sup>. For the purposes of the *caput* of this article, collaboration with higher education institutions, public agencies, and other organizations specialized in working with the migrant population is encouraged.

§2<sup>nd</sup>. The courts may promote training actions for judges and civil servants acting in the criminal area with the purpose of spreading the forecast of international norms and jurisprudence of international mechanisms on human rights and the rights of the migrant population, in order to enable the discussion on the rules of interpretation to be adopted, with regard to the harmonization and compatibility of the international human rights treaties signed by Brazil.



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Article 21. The Department for Monitoring and Inspection of Prison and Socio-Educational Systems of the National Council of Justice will elaborate, within 180 (one hundred and eighty) days, a manual aimed at guiding the courts and magistrates on the implementation of the measures provided for in this Resolution.

Article 22. CNJ Resolution No. 162/2012 is hereby revoked.

Article 23. This Resolution goes into effect on the date of its publication.

**Justice LUIZ FUX**