

EUROPEAN MIGRATION NETWORK BELGIAN NATIONAL CONTACT POINT



EU AND NON-EU HARMONISED PROTECTION STATUSES IN BELGIUM

Authors:
Marleen Maes (University of Leuven)
Professor dr Marie-Claire Foblets (University of Leuven)
Professor dr Dirk Vanheule (University of Antwerp)



With the support of the European Union

Belgian Immigration Department

Commissioner General for Refugees and Stateless Persons

Centre for Equal Opportunities and Opposition to Racism

Belgian Immigration Department

Commissioner General for Refugees and Stateless Persons

Centre for Equal Opportunities and Opposition to Racism



December 2009
(Summary update: May 2011)

The EMN has been established via a Council Decision and is financially supported by the European Union

This report was written on behalf of the Belgian National Contact Point for the European Migration Network. The Belgian National Contact Point is a mixed point composed of experts from the Immigration Department, the migration observatory of the Centre for Equal Opportunities and Opposition to Racism, the Office of the Commissioner General for Refugees and Stateless Persons.

The European Migration Network was set up with the purpose of providing up-to-date, objective, reliable and comparable information in the areas of asylum and migration for the European institutions, national authorities and other stakeholders.

Further information on the European Migration Network and its work can be obtained from:

www.emnbelgium.be

www.emn.europa.eu

The Belgian Contact Point can be contacted through the following channels:

info@emnbelgium.be - Tel. +32 (0)2/ 793 92 30

Or by ordinary mail at the following address:

EMN Belgisch Contactpunt
Dienst Vreemdelingenzaken, WTC II 24e verdieping,
Antwerpsesteenweg 59B,
1000 Brussel

The views expressed in this study are solely those of the authors.
They do not necessarily reflect any institutional or government position.



With the support of the European Union

EU AND NON-EU HARMONISED PROTECTION STATUSES IN BELGIUM

TABLE OF CONTENTS

1.	EXECUTIVE SUMMARY	5
2.	INTRODUCTION: PURPOSE AND METHODOLOGY FOLLOWED	15
	2.A. Purpose of the study	15
	2.B. Methodology	17
3.	PROTECTION STATUSES GRANTED IN BELGIUM	20
	3.A. Asylum policy – protection statuses granted	20
	3.A.1. EU Temporary protection	20
	3.A.2. “National” temporary protection	24
	3.A.3. Refugee status	26
	3.A.4. Subsidiary protection status	32
	3.A.5. Advice on possible removal orders and humanitarian clause	39
	3.A.6. Humanitarian visa	41
	3.A.7. Resettlement	41
	3.B. Migration policy – protection statuses granted	41
	3.B.1. Residence permits on medical grounds	42
	3.B.2. Residence permit on the basis of humanitarian grounds: pressing humanitarian situations	47
	3.B.3. Residence status for victims of human trafficking and aggravated forms of human smuggling	54
	3.B.4. Special protection status for non-EU unaccompanied minors	59
	3.B.5. Suspension of removal measures for families with school going children in a situation of illegal stay	66
	3.B.6. Delay of departure / prolongation of declaration of arrival or temporary residence title	68

3.C. Minimum protection in reception policy and social policy: factors in consolidating possible claims to a residence status	69
3.C.1. Urgent Medical Care as a minimum minimorum right	69
3.C.2. Right to material aid	70
3.C.3. Right to financial aid in case of a “medical force majeure”	73
3.C.4. Conclusions	73
4. PROCEDURES FOLLOWED AND RIGHTS PROVIDED	74
4.A. Asylum policy	74
4.A.1. Temporary protection	74
4.A.2. Refugee status and subsidiary protection	74
4.A.3. Rights	82
4.B. Migration policy	89
4.B.1. Residence permit on medical grounds	89
4.B.2. Residence permit on the basis of humanitarian grounds: pressing humanitarian situations	96
4.B.3. Protection for victims of human trafficking and of aggravated forms of human smuggling	100
4.B.4. Special protection status for non-EU unaccompanied minors	105
4.B.5. Suspension of removal order for illegally staying families with school going children	110
4.B.6. Delay of departure / exceptional prolongation of a declaration of arrival or a temporary residence title	112
5. CONCLUSIONS	113
6. ANNEX : SELECTED BIBLIOGRAPHY	119

- ALC:** Aliens Litigations Council (unofficial translation of: Raad voor Vreemdelingenbetwistingen)
(case law of the ALC is quoted as follows: RvV date, number)
- B.S.:** Belgisch Staatsblad (unofficial translation: Official Gazette)
- CGRS:** Office of the Commissioner-general for Refugees and Stateless Persons (unofficial translation of: Commissariaat-generaal voor de Vluchtelingen en de Staatlozen)
- ECtHR:** European Court of Human Rights
- GWH:** Grondwettelijk Hof (unofficial translation: Constitutional Court)
- ID:** Immigration Department (unofficial translation of: Dienst Vreemdelingenzaken)
- RvS:** Raad van State (unofficial translation: Council of State)
- RvV:** Raad voor Vreemdelingenbetwistingen (unofficial translation: Aliens Litigation Council –ALC)



Foreign nationals are offered protection in Belgium along a variety of needs, through different procedures or administrative practices, granting varying statuses and rights.

There are formal protection statuses which give a right to residence. They can be divided in EU harmonised and national statuses. Some of these statuses form part of the Belgian asylum policy and are granted by the competent asylum authority. Other statuses form part of the Belgian migration policy and are granted by the immigration authority.

The procedures that must be followed in order to obtain protection differ greatly from one to the other. The legislative basis is in some cases more solid than in other cases. Authorities are sometimes bound to decide on mandatory grounds, in other instances discretionary grounds give them a greater margin of appreciation. The rights that accompany protection statuses range from full blown rights to fewer rights, according to the permanent or temporary character of the protection statuses granted.

There are however also other forms of protection that do not give a right of residence and often find their origin in Belgian social policy or reception policy. The protection they offer is very basic and minimal.

A schematic overview of the protection statuses and practices according to each involved policy, gives following result:

• **ASYLUM POLICY**

- EU temporary protection
- National temporary protection
- Refugee status
- Subsidiary protection status

• **MIGRATION POLICY**

- Residence permit on medical grounds
- Residence permit for victims of human trafficking and aggravated forms of human smuggling
- Residence permit on humanitarian grounds, more in particular, in case of a pressing humanitarian situation
- Residence permit for unaccompanied non-EU minors
- The suspension of removal orders regarding illegally staying families with school going children
- Delay of departure/exceptional prolongation of a temporary residence permit in case of illness, pregnancy or intended marriage

• **SOCIAL POLICY AND RECEPTION POLICY**

- Urgent medical care
- The right to financial or material aid for some categories of illegally staying persons

The definition of protection in the UNHCR Master Glossary of Terms reads: *"A concept that encompasses all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law. Protection involves creating an environment conducive to respect for human beings, preventing and/or alleviating the immediate effects of a specific pattern of abuse, and restoring dignified conditions of life through reparation, restitution and rehabilitation."*

Taking this definition as a starting point and looking closer into the reasons for providing protection, one can notice that in Belgium on the one hand protection is provided to the foreign national against external factors (= "external protection"). On the other hand, protection is equally provided to the foreign national against internal factors (= "internal protection").

Use of these two notions, gives following overview of the reasons behind protection in Belgium:

I. External protection

- Sometimes protection is offered against external factors which can harm a foreign national in his country of origin, such as persecution, torture, civil war or lack of effective treatment for a serious ill person. The procedures for obtaining these protection statuses are well established, with necessary procedural guarantees and decisions being taken on a mandatory basis, with no discretion power left to the executive. This type of protection can generally be found in the asylum policy as well as in the migration policy of Belgium.

It includes:

- EU temporary protection;
- National temporary protection;
- Refugee status;
- Subsidiary protection status
- Residence permit granted on medical grounds.

Besides these formal statuses, there also exist practices that aim to provide certain be it very minimal level of protection, such as:

- freezing of asylum applications
 - advice on the conformity of the expulsion measure with the Geneva Convention and subsidiary protection as well article 3 ECHR
 - humanitarian clause
 - prolongation of removal measures towards failed asylum seekers
- Protection can also be offered to foreign nationals in a vulnerable situation and who can be abused or exploited by persons or factors. The rights that accompany these statuses are more conditional and more limited than some of the ones granted in the first category. The decision making is more discretionary than mandatory, depending on the status involved.

This type of protection is to be situated in the migration policy of Belgium.

It includes:

- victims of human trafficking and aggravated forms of human smuggling;
- non-accompanied minors (EU and non-EU).

II. Internal protection

This type of protection is aimed at preventing that internal actions or treatments (actions undertaken by the Belgian authorities or the lack thereof) harm foreign nationals and violate international obligations.

- Protection aimed at providing a right of residence to persons staying illegally in Belgium and finding themselves in a “pressing humanitarian situation”. More in particular, a pressing humanitarian situation exists where removal of a (vulnerable) person would constitute a direct violation of a fundamental right (like articles 3 or 8 ECHR or the UN Convention on the Rights of the Child) and the only viable option would be a right of residence. Such decisions take place on discretionary grounds. This type of protection is to be situated in the migration policy of Belgium.
 - Protection entailing solely the right of non-removal of certain persons. More in particular, the right to education will lead to the suspension of removal measures where families with school going children are involved. Articles 3 and 8 ECHR can lead to the delay of departure or prolongation of a residence title in cases of illness, pregnancy or intended marriage. This type of protection is to be situated in the migration policy of Belgium.
 - The basic and minimal right to urgent medical care for all illegally staying persons
 - The right to financial or material aid for some categories of illegally staying persons, more specifically non-removable persons.
- The latter two types of protection can be found in the social policy of Belgium.

Both of these schematic overviews make clear that protection in Belgium is awarded along a “cascade” of protection “statuses”, be they formal or informal.

The matrix below visualizes this:

Protection status	Refugee status	Subsidiary protection	EU temporary protection	Residence permit on medical grounds	
Legislative basis	Art. 48-56 Aliens Act	Art. 48-56 Aliens Act	Art. 57/29 to 57/36 Aliens Act	Art. 9ter Aliens Act	
Origin	1951 Geneva Convention (refugee law) + Qualification directive	Qualification Directive (articles 2 and 3 ECHR + international humanitarian law)	Temporary protection Directive	Article 3 ECHR, ECtHR and national case law	
Individual or collective protection?	Individual protection	Individual protection	Collective protection	Individual protection	
Evidence and burden of proof	Proof of a credible and well founded fear of persecution within the meaning of article 1 A Geneva Convention.	Proof of a credible and real risk of serious harm because of death penalty or execution or inhuman or degrading treatment or punishment. Proof of a real risk of a serious threat to a civilian's life or person by reasons of indiscriminate violence in situation of international or internal armed conflict.	Proof of belonging to specific group of persons specified in Council decision – no individual assessment of need to protection is made by the ID.	Assessment of the existence and seriousness of illness, as well as access to adequate treatment is done by the ID and medical officer.	

	Residence permit on humanitarian grounds	Victims of human trafficking/ smuggling	Non-accompanied minors - special protection	Suspension of removal order for families with school-going children	Right to financial or material aid for certain illegally staying persons
	Art. 9bis Aliens Act (procedural) + federal government agreement 2008 (substance)	Art. 61/2-61/5 Aliens Act	Circular letter of 2005	Circular letter of 2003	Law on Reception + ministerial circulars
	Articles 3 and 8 ECHR, UNCRC, ECtHR and ECJ case law, national case law	1994 ministerial circular and practice, formalised by 2 UN Palermo Protocols, Council decision 2001/87/EC, Council Directive 2002/90/EC, Council Framework Decision 2002/629/JHA, Council Directive 2004/81/EC	UNCRC – the best interest of the child + durable solution + Resolution of European Council of 26 June 1997 on unaccompanied minors from third countries	UNCRC – right to education	Jurisprudence from Constitutional Court and Court of Cassation
	Individual protection	Individual protection	Individual protection	Individual protection	Individual protection
	Burden of proof lies entirely with foreign national – all useful elements proving a “pressing humanitarian situation” must be handed over, as well as proof of identity.	The victim is not required to put forward proof of exploitation, but must cooperate with authorities by making truthful statements of a founded complaint.	The search for a durable solution is shared between the guardian of the minor and the ID, bureau Minteh.	The need for protection of the right of education will be assessed solely by the ID	Illegally staying minor child and parents must prove family relationship + child must be found needy because parents do not comply with duty of maintenance.

	Burden of proof is shared between foreign national and CGRS.	Burden of proof is shared between foreign national and CGRS.			
Exclusion clauses / public order – national security	Yes	Yes	Yes	Yes	
Granted on ...	Mandatory grounds	Mandatory grounds	Mandatory grounds (on the basis of Council decision)	Discretionary grounds	
Temporary or permanent residence?	Permanent residence	Temporary residence, with possibility to become permanent after 5 years	Temporary residence	Temporary residence, with possibility to become permanent after 5 years	
Unlimited or limited rights?	Unlimited rights	Limited rights during temporary residence	Limited rights during temporary residence	Limited rights during temporary residence	
Obtained in the context of ...	Asylum policy	Asylum policy	Asylum policy	Migration policy	

		Proof of identity.	The decision on what is the durable solution in the best interests the child will be taken by the ID on the basis of a maximum of objective information regarding the UM.		Non removable illegally staying persons must prove circumstances beyond their control due to which they cannot return to country of origin
	Yes	Yes	Yes	Yes	n/a
	Discretionary grounds	Discretionary grounds	Discretionary grounds	Discretionary grounds	Discretionary grounds
	Permanent residence status in the case of a pressing humanitarian situation	Temporary residence with possibility to become permanent when judicial proceeding have been finalised	Temporary residence until 18 years	No residence – tolerated status	No residence
	Unlimited rights	Limited rights during temporary residence	Limited rights during temporary residence	Basic and minimal rights	Basic and minimal rights
	Migration policy	Migration policy	Migration policy	Migration policy	Social and reception policy

Some of the procedures to obtain these “statuses” can succeed each other easily, while others are mutually exclusive.

In general, where protection is provided by a formal status, the rights of the foreign national will be better. Foreign nationals will tend to apply first for the best possible formal protection status.

If it appears that they do not qualify for any status, they will still benefit from a minimum protection that must be given to all persons which are staying illegally on the territory, namely the basic and minimal right to urgent medical care for all illegally staying persons. Sometimes they can benefit from a broader right to financial or material aid if they belong to a certain category of illegally staying persons, such as illegally staying families with children as well as some non-removable persons. This type of protection, the weakest and most minimal protection, originates in social security law and falls outside the scope of the asylum and migration policy in Belgium, as stated above, as it does not give a right to residence. However, this protection has been included in the study, because the very vulnerability of the persons involved and the minimum protection given, can, in some instances, give rise to a possible consolidation of an individual’s application to a residence permit, for example on the basis of humanitarian grounds. In other words, social protection can at a certain point contribute to the consolidation of a claim for a residence status.

On the concerns of the Commission with regard to the increasing trend of other protection forms at a national level, the findings of the report allow to take following conclusions:

1. The introduction of subsidiary protection in Belgium by the Law of 15 September 2006 has not lead to a decline in the granting of refugee status.¹ On the contrary, the Office of the Commissioner-general for refugees and stateless persons has maintained the pre-existing practice of a broad interpretation and application of the 1951 Geneva Convention which, in the current single procedure, takes priority over subsidiary protection. As the Qualification Directive only lays down minimum norms, the Belgian authorities have chosen to further apply the Geneva Convention in a broad manner as well as to interpret the definition of subsidiary protection in a broad manner. In general, a further harmonising of the Qualification Directive and the Procedures Directive is welcomed as long as it involves higher and common standards.
2. The trend of an increasing amount of practices and procedures of protection on a national level is very true for the Belgian situation. Besides refugee protection and subsidiary protection, another 10 protection statuses and administrative practices (former and current) have been identified. The motivation for these protection statuses is often to be found in international obligations, such as the ECHR, the UNCRC, international humanitarian law or the UN Palermo Protocols on victims of smuggling and trafficking. International and national case law have in most cases played a crucial role in the establishment of a national protection status or administrative practice, rather than a deliberate policy by the authorities.
3. In Belgium the number of positive decisions granting subsidiary protection and other forms of

¹ Before 10 October 2006, the status of “subsidiary protection” as such was not known in Belgium. There was however a practice of including a non-refoulement clause in a refusal decision for those foreign nationals who did not qualify as a refugee but could not be removed due to article 3 ECHR.

protection taken together is higher than the number of decisions recognizing refugee status. This is due to the number and diversity of protection statuses which are all tailored to respond to a specific need of protection without necessarily reducing or weakening in the granting of refugee status. In other words, there is no proof that subsidiary protection and national protection statuses or administrative practices have had a negative effect on the granting of refugee status in Belgium. There is certainly no watering down of the Geneva Convention.

4. Exclusion clauses and/or concerns of national security and public order can be applied in all EU and national protection statuses; no distinction is made.
5. National protection statuses are sometimes more easily accessible and obtainable than EU protection statuses but their legislative basis is less solid. In a number of cases even, the national protection statuses are solely based upon administrative practices.
6. It must be stressed that national protection statuses, in general, award fewer rights and are often limited in time. The possibilities to end or revoke a national protection status are more extensive and render the situation of a foreign national more precarious. When a protection status is to be awarded upon a discretionary basis, the burden of proof often lies entirely with the foreign national.
7. While the national protection statuses have their deficiencies, stakeholders prefer to ameliorate these statuses on a national level, rather than an EU harmonisation as this might lead to lower standards and rights. If an EU harmonisation of national protection statuses is to be expected, stakeholders prefer a "minimum harmonisation", not through imposing minimum standards or rules, but through identifying categories of foreign nationals who are in need of protection and must benefit from such a right. Additionally, the EU should encourage and allow MS to put in place a policy which is able to respond to needs of protection of persons who fall outside the general rules of protection. There are individual situations where only a case by case examination of the particular circumstances can lead, on the basis of international obligations, to offering the necessary protection. In short, this is a call for flexibility.
8. There was not much interest or support for creating new additional protection statuses, for example with regard to environmental migrants. The general feeling was that it was better to work on improving the existing protection statuses rather than working on additional legislation.
9. Unfortunately quite a number of the existing protection statuses are based on precarious administrative practices and policies, some of which are laid down in ministerial circulars. As stated above, it is national and international case law that has called into existence most of the national protection statuses, rather than a deliberate policy. This explains the ad hoc approach towards protection. In these cases, a coherent policy vision on protection for foreign nationals should be put in place and legal certainty would also be served here by consolidating these practices in statute law. European harmonisation could have an added value here by identifying in a coherent manner those categories of persons who are in need of protection.
10. Finally a lack of protection was identified by the authors with regard to some persons who are non-removable. More in particular, those persons who are not removable due to administrative (e.g. the diplomatic representation of the country of origin is not willing to issue the necessary travel document), practical (e.g. the airports in the country of origin are not accessible) or more substantial obstacles (e.g. recognized stateless persons) which are not

the consequence of their own doing (e.g. by not revealing their identity or destroying travel documents). Protection of these persons would certainly be served by EU harmonisation on the issue of protection of non-removable persons. Some stakeholders plead for better protection for instance through a strengthening of the human rights of such non-removable persons, which ideally should also include the possibility of obtaining legal residency. On the other hand, other stakeholders point out that non-removability in practice does not necessarily mean that the persons concerned can not return back to their country of origin on voluntarily or independent manner.



2. INTRODUCTION: PURPOSE AND METHODOLOGY FOLLOWED

2.A. Purpose of the study

This national report is the Belgian contribution to the research project carried out by the European Migration Network, which intends to analyse the different national practices concerning the granting of non-EU harmonised protection statuses in the Member States of the European Union.² These types of protection statuses are not refugee status or subsidiary protection status as defined in the Qualification Directive 2004/83/EC.³ On the basis of the MS' national reports, the European Migration Network will gain insight into the various types of protection statuses and practices which are not contained in EC Law and thus are not harmonized on the European Union level.

This national report does not only give an overview of the various national protection statuses and practices in Belgium, but also clarifies the implementation and the application of the Qualification Directive in the Belgian asylum procedure.

The European Commission *Policy Plan on Asylum Communication* (COM(2008) 360) states that on the EU level an ever-growing percentage of applicants are granted subsidiary protection or other kinds of protection status.⁴

The accompanying *Impact Assessment* document notes that “increasingly, people are seeking protection for reasons not foreseen in the traditional refugee regime, i.e. in the Geneva Convention and its Protocol, and are receiving protection statuses with lower guarantees”.⁵ The document identifies the reasons for the granting of other forms of protection: compassionate, humanitarian, medical reasons, results of environmental changes in the country of origin, *non refoulement*. The conclusion is that other forms and procedures of protection are increasing on a European level.

The introduction of subsidiary protection in Belgium, by the Act of 15 September 2006, appears not to have led to a decline in the granting of refugee status.⁶ On the contrary, the competent asylum authorities have maintained their pre-existing practice of a broad interpretation and application of the 1951 Geneva Convention which, in the current single procedure, takes priority

² See MIGRAPOL, European Migration Network, Doc 168.

³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004, 12.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum - An integrated approach to protection across the EU, COM/2008/0360 final, available on <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0360:EN:NOT>.

⁵ Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions – Policy plan on asylum: an integrated approach to protection across the EU - Impact Assessment (COM(2008) 360 final), available from <http://eur-ex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC2029:EN:NOT>.

⁶ Before 10 October 2006, the status of “subsidiary protection” as such was not known in Belgium. There was however a practice of including a non-refoulement clause in a refusal decision for those foreign nationals who did not qualify as a refugee but could not be removed due to article 3 ECHR.

over subsidiary protection.

However, the increasing trend of introducing new forms and procedures of protection on a national level is very true for the Belgian situation. Besides refugee protection and subsidiary protection, another 10 forms of protection (former and current) have been identified. The reasons for these other forms of protection are further clarified in the report.

In Belgium the number of positive decisions granting subsidiary protection and other forms of protection taken together is higher than the number of decisions recognizing refugee status.

The Commission offers two major explanations for the trend that Member States create other types of status.

On the one hand, the Commission identifies the criteria of Art. 1 A (2) Geneva Refugee Convention as not fully covering today's refugee situations while on the other hand the Commission notices that states are willing to protect persons not covered by the Convention.

The Commission draws the conclusion that these trends create the risk of weakening the general levels of protection and may amplify the substantial differences across the EU in terms of practices, procedures and decision making process for granting protection. Due to the fact that the alternative forms of protection have emerged without any coordination and are constantly evolving in all the Member States, there is no harmonization. The proliferation of such diversity in national practices may appear to be incompatible with the often stated objective of harmonising asylum policy in the EU.

The Belgian report also discusses the rights attached to the different forms of protection types. From this analysis follows that national protection statuses and practices are maybe more easily accessible and obtainable but also include fewer rights and are often limited in time.

Another aspect to consider, according to the Commission, is whether the national protection statuses could, if so how, fall under the scope of the Long Term Residence Directive, specifically its Arts. 3 (2b and c) and 12 (plus recitals (3) and (16)).⁷

The Belgian report indicates which protection statuses can fall under the Long Term Residence Directive.

In this context, the *Policy Plan on Asylum* states that it will, therefore, be important during the second phase of the Common European Asylum System (CEAS) to pay particular attention to subsidiary and other forms of protection and that a study will be launched on the possible alignment of national types of protection status which do not currently fall under the EU's regime of international protection.

The EMN study and the Belgian national report contribute to the evaluation of national practices and the research of whether such alignments of national practice are necessary and eligible.

⁷ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. OJ L 16, 23.1.2004, 44.

2.B. Methodology

The report is based on national statute laws and the explanatory memoranda to national laws, academic literature, IGO and NGO reports. A bibliography is included at the end of the report. There has been no comprehensive analysis of the different forms of protection (EU and national) in Belgium.

Interviews with relevant stakeholders from various government departments and NGOs were also an important source of information (ID, the Office of the Commissioner-general for Refugees and Stateless Persons, the Centre for Equal Opportunities and Opposition to Racism, Belgisch Comité voor Hulp aan de Vluchtelingen (Belgian Committee for support to refugees/Comité belge d'aide aux réfugiés) en het Vlaams Minderheden Centrum (Flemish centre for minorities)

In order to guarantee a good understanding of the report, we shortly explain the function of these government departments.

- The **Immigration Department (ID)** is responsible for the management of the entry of foreign nationals to the Belgian territory, their stay, their settlement and the removal of (a.o. undocumented) foreign nationals from the Belgian territory. The service employs approximately 1700 people, in its central administration in Brussels and in the detention centres for undocumented foreigners.

The main tasks of the ID, in relation to migration policy are:

- To manage migration flows and decide on the validity of applications (such as family reunification and short term stay);
- Adapt and implement national legislation to comply with European law;
- Enhance the struggle against human traffickers in collaboration with other services involved;
- Apply the Dublin-II Regulation; the registration of the asylum seekers' applications and the management of the applicants' residence requirements throughout the asylum procedure;
- Organize the return of foreigners who do no longer/not comply with the entry- and residence conditions.

- The **Office of the Commissioner General for Refugees and Stateless Persons (CGRS)** is an independent administrative instance and is the only instance with the competence to examine asylum cases. The CGRS is the competent instance to either grant or refuse the refugee status and to either grant or refuse subsidiary protection. The CGRS automatically examines all asylum applications, first within the framework of the Geneva Convention, then within the framework of subsidiary protection. An appeal against CGRS decisions on asylum claims can be lodged with the Aliens Litigation Council. In the case of an asylum application introduced by a subject of an EU member state or a candidate member state, the CGRS can decide not to take the application into consideration when the declaration of the asylum seeker does not clearly show a well-founded fear for persecution or a real risk of serious damage. In such cases a decision must be made within 5 working days.

- To manage the network of reception centres in an efficient and coordinated way, the federal government decided to set up a federal agency for the reception of asylum seekers in 2001. **Fedasil** falls under the competence of the PPS Social Integration. The agency is responsible for the humane reception of asylum seekers in Belgium. The reception of asylum seekers must be organized efficiently so as to respond in a flexible way to the arrival of newcomers. The agency also stands for the quality of the reception. The reception network includes 13,000 reception places. The organization and management of this number of places requires central co-ordination. The reception policy relies to a large extent on co-operation between government bodies, NGOs and non-public partners. The partners include the Red Cross, Vluchtelingenwerk Vlaanderen, Ciré and the Public Centres for Social Welfare (PCSW). Fedasil also has other competences: the coordination of the voluntary return programs, the observation and orientation of unaccompanied minors and the integration of reception facilities in the municipalities.

In the same vein, we here explain the function of two other authorities mentioned in the report:

- The **Aliens Litigation Council (ALC)** is an administrative court responsible for person-related decisions made in application of the 1980 Alien Act. (foreigners and asylum-seekers related decisions). On the one hand it has competences in the field of asylum (appeal against decisions of the Office of the Commissioner General on Refugees and Stateless Persons (CGRS)), on the other hand it also handles appeals against decisions of the ID. In the field of asylum the ALC is the competent instance to confirm or reform the decisions of the CGRS. Therefore, the Council can grant or refuse international protection. In addition to this, the Council can annul the decision of the Commissioner General because of substantial irregularities or because essential elements are missing so that the Council cannot come to a decision without carrying out additional inquiries. In this latter case, the claim will be re-examined by the CGRS, which will have to make a new decision. The Council does not have the competence to carry out its own examinations. The Aliens Litigation Council is also the competent instance to annul decisions from the CGRS pertaining to EU nationals or citizens of candidate member states. Lodging an appeal will suspend the execution of the contested decision. That is why the asylum seeker cannot be removed before the Aliens Litigation Council ruled. In the field of other (i.e. non-asylum) issues the ALC has more limited competences as it can only annul decisions due to the violation of the rules of procedure. Three types of appeals can be lodged: an action for annulment, a suspension application and an emergency procedure. These appeals can be lodged against following decisions of the ID: determination of the responsible state, refusal to consider the application, order to leave the territory, decisions of detention, refusal of family reunification, etc.
- **The Guardianship Service** belongs to the Justice Department and has the mission to ensure judicial protection of all UMs -asylum seeker or not- staying in Belgium, by systematically appointing a guardian. The provisions for guardianship of foreign UMs are laid down in the

so-called Guardianship Act of 24 December 2004.⁸ It was a deliberate choice of the policy makers to create this service within the FPS Justice, so that this service would have a more independent position vis-à-vis the instances competent in migration and asylum affairs. The Guardianship Service is more in charge of the general coordination and supervision of the guardians, while the guardians are the ones who have direct contact with the UM on a regular basis. Its competences include:

- taking charge of the UMs: the GS will take charge of the UM as soon as they are informed about their presence at the border or within the territory;
- identification of the UMs and age assessment;
- assignment of a guardian;
- coordination of the contacts between the different instances on asylum, migration, reception, housing, as well as with instances in the country of origin of the UM;
- supervision on the search for a 'durable solution' for the UM;
- coordination of the material activities of the guardians, their supervision and training;
- consultation of other stakeholders in the field.

8 BS 31 December 2002.

3. PROTECTION STATUSES GRANTED IN BELGIUM

3.A. Asylum policy – protection statuses granted

Belgian asylum legislation and administrative practice currently include following protection statuses:

- EU temporary protection
- national temporary protection (including humanitarian entry visa)
- refugee status (including resettled refugees)
- subsidiary protection.

Besides these formal protection statuses, there exist also situations where no fully fledged protection statuses are accorded but where nonetheless the foreign national is allowed to remain on the territory or is at least tolerated for protection reasons, more in particular through:

- advice on the conformity of an expulsion measure with the Geneva Convention and subsidiary protection or with article 3 ECHR;
- humanitarian clauses;
- stay of removals of failed asylum seekers.

It is important to note that the Belgian legislator has decided to treat applications of seriously ill foreign nationals whose removal to the country of origin would be in violation of article 3 ECHR in a separate procedure which does not fall under Belgian asylum policy, but under the Belgian migration policy.⁹

3.A.1. EU Temporary protection

a. Definition

Protection is provided to those persons in the event of mass influx or imminent mass influx of displaced persons from third countries who belong to a particular group or to particular groups which are described/specified in a Council decision that is adopted according to the procedure laid out in Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.¹⁰¹¹

⁹ See article 9ter and article 48/4, § 1, Aliens Act.

¹⁰ Council Directive 2001/55/EC was transposed through the law of the 18 February 2003, amending the Aliens Act, which inserted articles 57/29 to 57/36 in the Aliens Act (BS 11 April 2003). These provisions entered into force on 3 June 2003, as stipulated by the Royal Decree of 3 May 2003 (BS 3 June 2003).

¹¹ Article 57/29 Aliens Act.

According to this Council Directive this is a procedure of exceptional character that provides, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

“Displaced persons” are further defined in the Council directive as third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.

b. Legal framework, national policy and practical implementation

The legal framework regarding temporary protection is in the first place Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

The general provisions with regard to the admission and residence within the temporary protection framework were transposed by the articles 57/29 to 57/36 of the Aliens Act.

The Immigration Department (hereafter: ID) is the authority responsible for the treatment of the applications for temporary protection.¹²

Applications for temporary protection will thus not be examined in the regular asylum procedure by the CGRS.

Temporary protection will be given from the moment that a Council decision is adopted according to the procedure laid out in Council Directive 2001/55/EC of 20 July 2001.

However, a detailed national procedure for the granting and withdrawing of applications for temporary protection that must be followed from the moment that such a Council decision enters into force, has until now not yet been elaborated.

¹² Article 6 of the Ministerial Decree of 18 March 2009 with regard to the delegation of certain competence of the Minister responsible for the entry, stay, establishment and removal of foreigners, BS 26 March 2009.

c. Conditions

Temporary protection status will be granted to foreign nationals who fit the description given in the Council decision of the specific groups of persons to whom temporary protection shall apply.

d. The assessment of the need for protection

Given the fact that the assessment of the need for protection of a specific group has taken place at the level of the European Commission and has been confirmed by the Council of the European Union, an individual assessment of the need for protection will not take place at national level.

As the legislation is drafted now, it is assumed that the ID will screen the foreign national applying for temporary protection, on his membership to the specific groups of persons described in the Council decision as in need of protection through an individual examination of his origin, nationality and identity.

e. Evidence

The foreign national must establish in a credible manner that he belongs to the specific groups of persons described in the Council decision as in need of protection.

f. Public order issues, grounds for exclusion and revocation, ground for refusal of residence and the non-refoulement principle

- In accordance with article 28 of the Council Directive 2001/55/EC, Belgium has made use of the possibility to exclude. The ID can decide to exclude the foreign national on the following grounds:¹³
 - (a) there are serious reasons for considering that the foreign national has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes and which are binding upon Belgium;
 - (b) there are serious reasons for considering that the foreign national has committed a serious non-political crime outside Belgian territory prior to his admission as a person enjoying temporary protection. The severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;
 - (c) there are serious reasons for considering that the foreign national has been guilty of acts contrary to the purposes and principles of the United Nations;

¹³ Article 57/32 Aliens Act.

- (d) there are reasonable grounds for regarding him as a danger to the security of Belgium or, having been convicted by a final judgment of a particularly serious crime, he is a danger to the community of Belgium.

The grounds for exclusion shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality. Because of the weighty consequences, such a decision to exclude can only be taken by a high placed senior official of the ID.¹⁴

The foreign national will thus receive a removal measure. There is no explicit legal provision stipulating expressly that in cases where exclusion grounds are applied, the non-refoulement principle must be respected. There is no explicit statutory obligation to ask or give advice on the conformity of possible removal measures with article 3 ECHR. However the non-refoulement principle of article 3 ECHR remains directly binding upon the relevant Belgian authorities.¹⁵ Moreover, the provisions in the Aliens Act that deal with the removal measures indicate the authorities when executing these measures must take into account “derogations defined in an international treaty or in national law”¹⁶ or “more favourable provisions contained in an international treaty”¹⁷. The prohibition of non-refoulement is absolute and must be taken into account by the ID when deciding and executing a removal order. Although these persons cannot be returned, no alternative protection status is granted.

Noteworthy is also the possibility given to the ID to refuse residence to foreign nationals benefiting from temporary protection if they apply for residence from abroad and if the number of persons enjoying temporary protection exceeds the reception capacity of Belgium, as mentioned in the relevant Council decision.¹⁸

It was admitted that this motive of refusal was not explicitly mentioned in Council directive 2001/55/EC of 20 July 2001, but that it followed from the general philosophy of the directive which is based on a regime of solidarity between Member States. Each Member State must indicate its reception capacity which will be included in the Council decision to be adopted.¹⁹

Decisions to refuse can be taken between the moment that the reception capacity of Belgium is exceeded and the moment that the Council approves additional measures in accordance with article 25 (3) of the Council directive.

Such refusal decision will however not be applicable to foreign nationals in the framework of family reunification.

Furthermore, the ID must assure that foreign nationals benefiting from temporary protection but refused residence are received in another Member State as soon as possible, which implies active

14 Explanatory memorandum to the Act of 18 February 2003 amending the Aliens Act, Parl. St. Kamer 2001-2002, nr. 50-2044/001, 25.
Article 4 of the Ministerial Decree of 18 March 2009 with regard to the delegation of certain competence of the Minister responsible for the entry, stay, establishment and removal of foreigners, BS 26 March 2009.

15 J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM, I Algemene beginselen, Antwerpen, Intersentia, 2005, 12. O. DE SCHUTTER and S. VAN DROOGHENBROECK, Droit international des droits de l'homme devant le juge national, Brussel, Larclier, 1999, 434.*

16 Article 3 Aliens Act

17 Article 7 Aliens Act

18 Article 57/30, § 2, 1° Aliens Act

19 Explanatory memorandum to the law of 18 February 2003 amending the Aliens Act, Parl. St. Kamer 2001-2002, nr. 50-2044/001, 24-25.

contacts with other Member States and competent international organisations.

It is unclear what happens to these persons between the refusal of residence and their reception in another Member State.

g. Appeal possibilities

Against a refusal of residence or a decision to exclude, an appeal can be introduced at the Aliens Litigation Council (hereafter: ALC).

This is an appeal of annulment, which means that the ALC can only examine the decision on its legality.²⁰ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect. In order to stay the execution of the removal a separate appeal for stay must be lodged also within 30 days.

The introduction of an appeal for stay of the removal measures does not automatically suspend the removal measure either. Only when the ALC orders the stay of execution; the alien cannot be removed.

In case of extremely urgent necessity, an appeal for stay can be introduced separately from the appeal of annulment and will be heard in summary proceedings. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time (e.g. detention in a closed centre with the purpose of forced repatriation).

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

h. EU Temporary protection and applying for asylum

A foreign national who already enjoys temporary protection can at every moment introduce an asylum application.²¹ The examination of this application will however be suspended until the temporary protection regime has been ended accordingly.²²

3.A.2. “National” temporary protection

If a qualified majority is not found at Council level to adopt a decision triggering temporary protection at EU level, the Belgian government has stated that it can unilaterally grant national temporary protection to specific groups of persons.²³

Although this has not occurred since the implementation of Directive 2001/55/EC, this practice

²⁰ Article 39/2, § 2, Aliens Act.

²¹ Article 50bis Aliens Act.

²² Article 51/9 Aliens Act.

²³ Explanatory memorandum to the law of 18 February 2003 amending the Aliens Act, Parl. St. Kamer 2001-2002, nr. 50-2044/001, 23.

has been applied several times before the adoption of the Council directive. This type of protection has been granted in an ad hoc way through ministerial circulars, which are in essence not legislative instruments, but internal instruments of public administration. However, the content of these circulars went further than internal administration and laid down guidelines regarding the targeted group, the scope of the protection, the status and the rights attached, which varied according to the different situations envisaged.

The purpose of the circulars was in most cases to provide an effective answer to the mass influx of certain groups of persons as a consequence of internal turmoil. By granting temporary protection, the government aimed at relieving the pressure on the asylum procedure (through the suspension of pending applications), provided an alternative to persons who were not necessarily refugees but in need of protection all together and took a temporary measure in expectation of a solution in the nearby future.²⁴

Following situations were as such addressed in the past:

- Displaced persons of the former republic of Yugoslavia (1992)
According to the circular of 18 September 1992, temporary protection (then called: "displaced person status") was granted to:
 - a contingency of ex-prisoners, directly transferred to Belgium by mediation of UNHCR and the Red Cross
 - displaced persons from the former republic of Yugoslavia arriving individually in Belgium, fulfilling following conditions:
 - * coming from a dangerous zone (Bosnia-Herzegovina or Croatia)
 - * belonging to a threatened ethnic or religious minority
 - * deserters or conscientious objectors.

In exchange, pending asylum applications of these persons were suspended.

The circular of 1 March 1995 ended the granting of temporary protection to displaced persons from ex-Yugoslavia.²⁵ Additionally, the circular laid down guidelines for the revocation of temporary protection for certain categories, for instance displaced persons originating from Macedonia, Slovenia, Serbia (with exception of Kosovo), Montenegro and Croatia (except the regions occupied by the Serbs).²⁶

- Nationals of Rwanda (1994)
According to the circular of 13 June 1994, some categories of Rwandan nationals, who had not applied for asylum but who had entered Belgium regularly and were in possession of a visa²⁷, were granted a temporary stay²⁸. In first instance this involved a prolongation of their original short term stay of three months with another three months. If after expiration of this period, they wished to remain in Belgium their stay was prolonged again, this time with six months. After that their situation would be evaluated in light of the circumstances in Rwanda.

24 D. VANHEULE, "Bedenkingen bij de tijdelijke beschermingsmaatregelen in Europa", T.Vreemd. 1996, 273.

25 Circular of 1 March 1995 regarding the revision of the status of displaced person, BS 28 March 1995.

26 For more literature: M. BOSSUYT, "Het CGVS en de ontheemden uit ex-Joegoslavië", T.Vreemd. 1996, 252-259; and S. SAROLEA, "De omzendbrief van 1 maart 1995 tot herziening van de status van ontheemde", T.Vreemd. 1996, 277-280.

27 In some instances, humanitarian transit visa were delivered, for instance to certain persons who were evacuated from Rwanda in the framework of the so-called 'Silverback' operation.

28 Circular of 13 June 1994 regarding the entry and stay of Rwandan nationals, BS 22 June 1994.

- Displaced persons from Bosnia-Herzegovina (1997)

The circular of 27 October 1997 granted to displaced persons from Bosnia-Herzegovina, still enjoying temporary protection in Belgium and sufficiently integrated in Belgian society, a permit to stay for unlimited time.²⁹ Displaced persons from Bosnia-Herzegovina, also enjoying temporary protection but not yet sufficiently integrated, were granted a permit to stay for one year. If after one year, they were found to be sufficiently integrated, they were granted unlimited stay, if not, they were ordered to leave the country.

- Displaced persons from Kosovo (1999)

The circular of 19 April 1999 granted temporary protection to specific categories of displaced persons from Kosovo³⁰:

- 1200 persons selected through the evacuation programme of UNHCR
- Family members of Kosovo nationals residing already in Belgium, in so far these family members entered Belgian territory in a regular manner.

These targeted persons were granted a stay permit for six months. After evaluation of the situation in Kosovo, the permit could be prolonged with another six months.

The circular of 11 May 1999 extended the application of temporary protection to Kosovar Albanians with an asylum application pending. They were given the opportunity to receive temporary protection in exchange of the suspension of their asylum procedure.

The circular of 17 May 1999 laid down guidelines accelerating and simplifying the granting of entry visa or laissez-passer for family members of Kosovo nationals who had arrived earlier in Belgium through the UNHCR evacuation programme.³¹

From 3 September 1999 temporary protection was no longer granted to persons from Kosovo, since the situation no longer required it.³² Persons already enjoying the temporary protection could still benefit from the status until 2 March 2000, or if families with school going children were involved, until 30 June 2000.

These ad hoc temporary protection solutions have not been applied anymore since 2000. Unlike the treatment of "EU" temporary protection, which is statutory guaranteed now, no legal status or legislation regarding "national" temporary protection has until now been elaborated.

3.A.3. Refugee status

In order to obtain protection, the foreign national needs to introduce an asylum application with the competent asylum authorities. The notion of "asylum application" covers two forms of protection: protection as a refugee and subsidiary protection. During the asylum procedure, which is a single procedure, the Office of the Commissioner-general for refugees and stateless persons (hereafter:

²⁹ Circular of 27 October 1997 regarding the granting of a permit for unlimited stay to displaced persons from Bosnia-Herzegovina, BS 18 November 1997.

³⁰ Circular of 19 April 1999 regarding the special status of temporary protection for and the reception of refugees from Kosovo, BS 20 April 1999.

³¹ Circular of 17 May 1999 regarding Kosovo family members of persons residing in Belgium, BS 18 June 1999.

³² Circular of 2 September 1999 regarding the cessation of the special status of temporary protection for Kosovar persons, BS 11 September 1999 and circular of 15 February 2000 regarding the practical modalities of the cessation, BS 29 February 2000.

CGRS), being the determining asylum authority, will examine first and with priority whether the applicant is eligible for refugee protection and subsequently whether the applicant is eligible for subsidiary protection.

An asylum application can be introduced by EU nationals and non-EU nationals, which makes the scope of Belgian asylum legislation “*rationae personae*” broader than the EU Qualification Directive.³³

a. Definition and conditions

A foreign national is recognised as refugee if he fulfils the conditions which are laid down in international instruments that are binding upon Belgium.³⁴

More specifically, refugee status is granted to the foreign national who fulfils the conditions laid down in article 1 of the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967 (hereafter: the Geneva Convention).³⁵

The different constituent elements of the refugee definition (acts of persecution, grounds of persecution, actors of persecution, actors of protection and internal flight alternative) are further described and explained in the Aliens Act³⁶, in conformity with the relevant parallel provisions of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter: the Qualification Directive).

Generally, Belgium has taken over the interpretation given by the Qualification Directive to the different constituent elements of the refugee definition. However, as was consistently underlined in the explanatory memorandum³⁷, Belgium had already a practice and reputation of interpreting the Geneva Convention in a broad manner, for instance by recognising that persecution can take place by the hands of non-state actors. A practice which the government claimed would not be undermined by the transposition of the Qualification Directive, since article 3 of the Directive allows for more favourable standards.

This position is, for instance, reflected in the guidelines adopted to interpret the notion of “a particular social group” as a ground of persecution. By making use of the formulation “*a group must (instead of “shall”) be considered to form a particular social group where:*

- *members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*
- *that group has a distinct identity in the relevant country, because it is perceived as being different by*

33 As is stated in the explanatory memorandum, this is due to the Belgian reservation to the protocol on asylum for nationals of EU Member States, annexed to the Treaty of Amsterdam (Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 79).

34 Article 48 Aliens Act.

35 Article 48/3 Aliens Act.

36 Articles 48/3 and 48/5 Aliens Act.

37 Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 83-84.

the surrounding society”,

Belgium made clear that the interpretation that given by the directive to the notion of “a particular social group” is an absolute minimum. The definition given by the Qualification Directive combines cumulatively two schools of interpretation:

- one that defines “particular social group” through the sharing of an innate characteristic”, and
- another that defines the notion through the possession of a distinct identity.

Belgium however applies each of these theories independently of one another. According to the individual situation of the asylum applicant either one or the other of these theories will be applied. By using a formulation that deviates from what is stated in the Qualification Directive, Belgium has maintained a broad interpretation of the notion “social group”. Moreover, in an internal guideline the CGRS has decided to delete the word “and” and replace it by “or”.³⁸ Situations such as blood feud (vendetta), honour crimes or dedovchina, have in the past been categorised as falling under the persecution ground of “member of a particular social group”, as well as characteristics as gender or sexual orientation.³⁹ Protection against female genital mutilation is also offered under the notion of “social group”.

A broader application of the Qualification Directive is also reflected in the practice of granting refugee status in cases where the persecution is not linked to a Convention ground, but the lack of protection is.

Finally, in light of its international obligations, Belgium does not make use of the possibility in Article 8, 3 of the Qualification Directive to apply the internal flight alternative notwithstanding technical obstacles to return to the country of origin.⁴⁰

b. Legal framework, national policy and practical implementation

The legal framework regarding the granting of asylum is in the first place determined by the Convention relating to the status of refugees done at Geneva on 28 July 1951, and secondly, by the Qualification Directive.

The general provisions with regard to the asylum procedure are to be found in articles 48 to 56 of the Aliens Act.

The CGRS is the determining authority and thus responsible, in first instance, for the examination of the asylum applications in the framework of a single procedure.⁴¹ The CGRS is an independent administrative authority that has to decide impartially on asylum applications. Against decisions of the CGRS an appeal can be lodged at the Aliens Litigation Council (hereafter: ALC), a specialized administrative and independent tribunal based in Brussels.

³⁸ Interview with CGRS on 19 October 2009.

³⁹ See more in S. BODART, *La protection internationale des réfugiés en Belgique*, Brussel, Bruylant, 2008, 204-209 and in the Year report of the ALC, 2007-2008, 50 at www.rvv-cce.be

⁴⁰ Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 90.

⁴¹ Article 6 of the Ministerial Decree of 18 March 2009 with regard to the delegation of certain competence of the Minister responsible for the entry, stay, establishment and removal of foreigners, BS 26 March 2009.

c. The assessment of the need for protection

The asylum application is always examined on an individual basis and there is a full examination of the grounds of the application. There will be at least one asylum interview.

The CGRS will examine the credibility of the statements made and whether the application meets the requirements of the Geneva Convention. Although the CGRS must decide on the basis of the criteria for refugee status laid down in statute law, the CGRS does not rely solely on the minimum interpretation attributed to these requirements by the Qualification Directive. Rather, its practice of applying a broader interpretation – which is the result of internal policy decisions, has been maintained. The asylum appeal instance, the Aliens Litigation Council, works more or less along the same lines – its judges do not limit themselves to the minimum interpretation of the Qualification Directive.

d. Evidence⁴²

The applicant must establish a credible and well founded fear of persecution within the meaning of article 1 A of the Geneva Convention.

For this purpose, there is an obligation for the applicant to cooperate fully with the CGRS. This means that the applicant must tell the truth throughout the procedure. The applicant must disclose all relevant facts and provide all relevant documentation at his/her disposal. According to case law of the Council of State⁴³ the burden of proof is shared between the asylum applicant and the asylum authorities: *"It is not absolutely necessary for the applicant to put forward material evidence; however, it is recommended that the asylum applicant put forward as much evidence as possible. When the asylum applicant cannot put forward any material evidence (or very little), but provides for a plausible explanation as to why he cannot provide more evidence, he can still be recognized as a refugee. The statements of the applicant can be enough to prove that the applicant is a refugee. For this reason, the statements need to be possible, credible and honest. The statements also have to be plausible and in line with what is generally known. Not only contradictions can lead to the conclusion that the applicant is not credible, also vague, incoherent and incredible statements can lead to this decision. On the other hand, the CGRS does not have to prove with absolute certainty that the statements made by the applicant do not correspond with reality. The CGRS should only determine whether the statements made by the asylum applicant are contradictory with what is generally known of the country of origin and whether the statements can reasonably be true"*.⁴⁴

e. Public order issues, grounds for exclusion and revocation, and the non-refoulement principle

Public order and national security

- asylum seeker

⁴² Article 4 on assessment of facts and circumstances of the Qualification Directive has been transposed in article 27 of the Royal Decree of 11 July 2003 regarding the functioning of and the judicial procedure before the CGRS.

⁴³ The supreme administrative court that can hear final appeals against refugee status determination.

⁴⁴ RvS 19 April 2006 nr. 157.749, RvV 4 December 2007 nr. 4460. ALC case law follows these line, see Year Report of the Aliens Litigation Council, 2007-2008, 50 at <http://www.rvv-ccce.be>

The Minister responsible for immigration can decide that a foreign national, who has introduced an asylum application, can not enter the territory or no longer stay in the territory, if there exist serious reasons to consider him a danger to the public order or national security.⁴⁵ The applicant consequently will be refused access to the asylum procedure.

In such a case, the Minister is obliged to seek the advice of the CGRS with regard to the asylum application and with regard to the question as to whether the removal measures taken are in conformity with the Geneva Convention or the subsidiary protection.

- recognized refugee

Although article 33, § 2, of the Geneva Convention allows for the removal of refugees under certain circumstances, the Aliens Act stipulates expressly that no recognized refugee can be expelled for reasons of public order or national security.⁴⁶

Recognized refugees, posing a threat to the public or national security, continue to benefit from the non-refoulement principle.

Exclusion

A foreign national can be excluded from refugee status if he falls under the application of Article 1 D, E or F of the Geneva Convention.⁴⁷

Exclusion will also be applied to persons who knowingly instigate or otherwise participate in the commission of the crimes or acts mentioned therein. These exclusion grounds can be applied during the examination of the applications.⁴⁸

However, the CGRS is also competent to revoke refugee status already granted when evidence becomes available later that shows that the foreign national should have been excluded in the first place.⁴⁹ No time limitation is put to the possibility of revocation on exclusion grounds.

However, revocation of the status does not necessarily lead to a loss of residence rights.

Only if it is also established, within the first 10 years of residence, that the refugee status was granted on misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of refugee status, or the personal behaviour indicates that the foreign national does not fear persecution, will the foreign national be given an order to leave the territory.⁵⁰

There is no explicit legal provision in the Aliens Act stipulating expressly that in cases where exclusion grounds are applied, the non-refoulement principle must be respected. Nor has the CGRS to include in its revocation decision an advice on the conformity of possible removal measures with article 3 ECHR.

However, in practice, the CGRS will when taking an exclusion decision, also give its opinion on the conformity of an eventual removal measure with article 3 ECHR. This opinion will be part of the

45 Article 52/4 Aliens Act.

46 Article 21, § 1, 2°, Aliens Act.

47 Article 55/2 Aliens Act

48 Article 57/6, 5° Aliens Act

49 Article 57/6, 6° Aliens Act

50 Article 49, § 2, and article 57/6, 7°, Aliens Act.

motivation of the decision.⁵¹ As such, it may be of use to the ID when deciding on a possible removal.

Finally, given its direct effect in Belgian internal law, the non-refoulement principle of article 3 ECHR remains directly binding upon the Belgian authorities.⁵² Moreover, the provisions in the Aliens Act dealing with removal indicate that the authorities, when executing these measures, must take into account “derogations defined in an international treaty or in national law”⁵³ or “more favourable provisions contained in an international treaty”⁵⁴. The prohibition of non-refoulement is absolute and it is the responsibility of the ID, as the deciding and executing authority, to take this provision into account. However, in such case the foreign national who cannot be removed, will not be granted any alternative protection status and will only be tolerated.

Revocation

Within the first 10 years of residence, starting from the date of the introduction of the asylum application, the Minister can ask the CGRS to revoke the refugee status of the foreign national if the status was granted on his misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of refugee status, as well as when his personal behaviour indicate that the foreign national does not fear persecution.⁵⁵ The CGRS must then take a motivated decision within 60 days. Moreover, the CGRS can, on the same motives and without a time limitation, revoke the refugee status on its own initiative.⁵⁶

If the status is revoked, the Minister can, within the same period of 10 years, expel the foreign national with a simple order to leave the territory.⁵⁷

If the refugee has in the meantime obtained Belgian nationality⁵⁸, his newly acquired nationality will be declared defunct if the nationality was obtained on the basis of misrepresentation or omission of facts, or on the basis of false declarations or false or falsified documents, which were decisive in the decision to grant the Belgian nationality.⁵⁹

51 More so, since ‘exclusion’ does not necessarily mean automatic ‘inclusion’ – according to the CGRS sometimes the reasons for exclusion are so evident that no thorough examination of the application takes place. (interview with the CGRS on 19 October 2009)

52 See also article 21 of the Qualification Directive:

Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him as a danger to the security of the Member State in which he or she is present; or
(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State

J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM, I Algemene beginselen*, Antwerpen, Intersentia, 2005, 12. O. DE SCHUTTER and S. VAN DROOGHENBROECK, *Droit international des droits de l’homme devant le juge national*, Brussel, Larcier, 1999, 434.

53 Article 3 Aliens Act

54 Article 7 Aliens Act

55 Article 49, § 2, and article 57/6, 7°, Aliens Act.

56 Article 57/6, 7° Aliens Act.

57 Article 49, § 3, Aliens Act.

58 A refugee can obtain the Belgian nationality through naturalisation after two years of legal and permanent residence (article 19, Belgian nationality code)

59 Article 23, § 1, 1°, Belgian nationality code.

f. Appeal possibilities

As it has been explained, appeals against refusal, exclusion or revocation decisions taken by the CGRS lie with the Aliens Litigation Council. The ALC has full jurisdiction over such appeals which have a suspensive effect on removal orders. The appeal must be introduced within 30 days after the notification of the contested decision.

A further appeal lies with the Council of State, the supreme administrative court, upon leave by that court. The Council of State will refuse leave to appeal in cases that do not raise important issues of law. These appeals do not have suspensive effect.

The rejection of an asylum application on the basis of a refusal of recognition of refugee status, will be followed by a refusal of residence measure and removal measures will be taken by the ID, if the claimant does not hold any other residence title in Belgium.

Against such refusal of entry or residence taken by the ID, an appeal can be introduced with the ALC. This is an appeal of annulment, which means that the ALC can only examine the decision on its legality.⁶⁰ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect – a separate appeal for suspension of the removal measures must be lodged.

The appeals for annulment and stay of execution of the removal measures must be lodged in one and the same petition within 30 days after the notification of the contested decision.

The introduction of an appeal for stay of execution of the removal measures does not automatically suspend the removal measure. Only when the suspension is granted by the ALC, will the execution of the measure be suspended.

Only in case of extremely urgent necessity, can the appeal for stay of execution be introduced separately for the appeal of annulment. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time (e.g. detention in a closed centre because of forced repatriation).

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

3.A.4. Subsidiary protection status

a. Definition and conditions

Subsidiary protection status is granted to the foreign national⁶¹:

- who is not eligible for refugee status;
- who cannot benefit from a residence permit for medical reasons;
- for whom there exists serious grounds to assume that if he would return to the country origin (or in the case of a stateless person, the country of habitual residence) he would run a real risk of suffering serious harm and cannot or will not avail him/herself to the protection of that

⁶⁰ Article 39/2, § 2, Aliens Act.

⁶¹ Article 48/4 Aliens Act.

- country, because of that risk; and
- who does not fall under the exclusion grounds.

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

b. Legal framework, national policy and practical implementation

The subsidiary protection status was introduced in the Aliens Act on 10 October 2006 as a result of the transposition of the Qualification Directive.⁶²

Before this date, no statutory complementary protection status was available in Belgium. In practice, the CGRS however sometimes included in its refusal decisions a "non refoulement clause" stating: "I esteem however, that given the situation in your country of origin, the return to (country of origin) would not be appropriate in the current circumstances".⁶³

With this clause, inserted in the refusal decision, the CGRS would advise the Minister and the immigration authorities not to repatriate the failed asylum applicant to his country of origin because of the serious situation there. Such an evaluation was in essence made case by case, although it could happen that such a clause was systematically applied to a certain group of persons or a certain nationality. Persons receiving such a clause were in essence non-removable. Although they received an order to leave the territory, this order was not executed. They were thus tolerated on the territory, but remained there illegally and without many rights. They could apply for a regularisation of their situation on humanitarian grounds but depended for this on discretionary decision making by the Minister. Countries to which such a clause applied in the past were: Iraq, Ivory Coast, Sudan (Darfur), Eritrea, Kosovo (Roma), Liberia, Angola, Sierra Leone, ...

When subsidiary protection became part of the asylum procedure, the legislative basis for giving such advice was deleted in the Aliens Act.

The current general provisions with regard to the subsidiary protection are to be found in articles 48 to 56 of the Aliens Act.

The CGRS is the determining authority and thus responsible for the examination of the asylum applications in the framework of a single procedure.⁶⁴

c. The assessment of the need for protection

The need for subsidiary protection is assessed by the CGRS. There will be at least one asylum interview.

⁶² Law of 15 September 2006 amending the Aliens Act, BS, 6 October 2006.

⁶³ This was based on the old article 63/5 of the Aliens Act.

⁶⁴ Article 6 of the Ministerial Decree of 18 March 2009 with regard to the delegation of certain competence of the Minister responsible for the entry, stay, establishment and removal of foreigners, BS 26 March 2009.

Within the single procedure, the CGRS will, after a credibility assessment, examine with priority whether the application meets the requirements of the Geneva Convention and, subsequently, whether the application meets the conditions for subsidiary protection. However, if the applicant's claim raises issues that can give cause to an examination of the application under the procedure for a residence permit on medical grounds, in particular the applicant suffers from a very serious illness and return to the country of origin could be in violation of article 3 ECHR, then the claim will be examined by the ID under the procedure of Article 9ter Aliens Act.⁶⁵

The different constituent elements of the definition on subsidiary protection ('real risk of serious harm') have not been clarified more profoundly in the Qualification directive. Clarification has been brought to these concepts through legislative proceedings, internal guidelines and practice and case law.⁶⁶

"*Real risk*" is used in analogy with the threshold applied by the European Court of Human Rights⁶⁷. With regard to establishing a real risk of serious harm because of death penalty or execution, following criteria with regard to the specific notion "death penalty" have, in principle, to be fulfilled:

- judgment by a court
- based on positive law making the act punishable with death penalty
- actual investigation against the claimant based upon the aforementioned grounds.

The notion "execution" also includes arbitrary or extra-judicial execution.

With regard to establishing a real risk of serious harm because of torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, the CGRS and the ALC take inspiration from the jurisprudence of the European Court of Human Rights as well as of the UN Committee against Torture.

The ALC has also recognised a real risk of serious harm because of execution to persons who feared revenge where no link with the criteria of the Geneva Convention was possible.⁶⁸

Torture is understood as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁶⁹ It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (article 1 CAT).

Inhuman or degrading treatment or punishment is understood as:

⁶⁵ See infra part 3.B.1.

⁶⁶ Following information was obtained on the basis of the report "Complementary protection – compilation of answer" discussed by the Working Group on Asylum and Refugees, Inter-governmental consultations on asylum, refugee and migration policies, 29-30 March 2007, Geneva and represent an official position of the Belgian authorities.

⁶⁷ ECtHR 20 March 1991, Cruz Varas / Sweden; see also ECtHR 30 October 1991, Vilvaradjah / United Kingdom.

⁶⁸ RvV 19 July 2007, nr. 867; RvV 14 March 2008, nr.8.758.

⁶⁹ RvV 26 October 2007, nr. 3.215

- (i) such treatment as deliberately causing severe suffering, mental or physical, which, in the particular situation, is unjustifiable (inhuman treatment)
- (ii) acts that arouse in their victims feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or drive them to act against their will or conscience (degrading treatment)

In particular, the CGRS requires a certain act of inflicted harm aimed at the individual applicant, directly or indirectly, before subsidiary protection enters into cause.

It could be that a certain measure in itself is not directly inhuman or degrading but it can become so if it is accompanied by an unacceptable coercion or if the person, to whom this measure applies, is placed in physical or psychological intolerable situation.⁷⁰

For medical cases where refoulement to the country of origin would be in violation of article 3 ECHR, a separate procedure has been elaborated which does not fall under the Belgian asylum policy. Such applications are excluded from subsidiary protection.⁷¹

A serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict has been interpreted on the basis of international humanitarian law⁷² and relevant jurisprudence.⁷³

1) *real risk*

The applicant must not individually prove that article 15, c of the Qualification Directive applies to the situation he is fleeing from. Per country or per region, the CGRS takes a principled decision whether or not such a scenario is applicable. This is based upon the analysis of the different criteria in the definition and a weighing of the different elements in the country or regions at stake.

For instance, CGRS internal guidelines acknowledge that a real risk is present in Somalia, Iraq (south and central), Sudan (Darfur) or that a real risk is present in some parts of Afghanistan but that in other parts of Afghanistan the level of the real risk is too low to qualify as an article 15, c -situation.

2) *serious threat:*

Belgium has opted to dispense with the requirement of an "individual" threat, as stated in article 15, c of the Qualification Directive.

An applicant must show that he, irrespective of personal circumstances, is confronted with a situation where the serious threat to life or person is demonstrable.

- Therefore, an individual examination of the claim still takes place in order to verify whether or not: the applicant really comes from the region/country in question (identity and origin) (credibility assessment: demonstration of a minimum of credibility);
- the applicant is a civilian (non combatant);
- the applicant does not belong to the oppressors;
- there is no internal flight alternative;

⁷⁰ RvW 20 December 2007, nr. 5.277.

⁷¹ Article 48/4, § 1, Aliens Act.

⁷² The four Geneva Conventions and protocols.

⁷³ For instance see ICTY, 2 October 1995, Tadic

- the applicant does not fall under an exclusion clause.

In this context, the Elgafaji-ruling of the Court of Justice has no significant consequences on the policy and decision making of the CGRS.⁷⁴

- 3) “*Indiscriminate violence*” is understood as:

Collective violence that affects a whole region/country or at least a substantial part of it, where civilians and the military are targeted in an indiscriminate manner, whether this is intentional or not.

- 4) “*Civilian*”:

Is not a civilian, every person who belongs to a structured military organization and who voluntarily and actively engages in combat activity for this organization.⁷⁵

- 5) “*Armed conflict*”:

In principle the CGRS does not differentiate between international or internal armed conflicts. The following criteria are essential in determining whether or not there is an armed conflict:

- the armed conflict must be ongoing (military operations, actual combat, attacks);
- there must be an armed conflict between a state and a structured military organization or between several military organizations;
- the violence must be persistent and be of a severe intensity.⁷⁶

d. Evidence

The evidence to be presented by the applicant depends on the type of serious harm that is claimed. If the serious harm regards the death penalty, torture or an inhuman or degrading treatment, the risk has to be real, personal and actual. The applicant must be personally at risk and he must make the existence of a real risk sufficiently concrete. The applicant must establish a credible “real risk of suffering serious harm”.

The standard of proof is equal to that of the Geneva Convention.

If the serious harm regards a serious threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict, then the perspective is slightly different. In this case, a certain degree of lack of individual credibility can be accepted as this is not necessarily an impediment for the recognition that the applicant is in need of protection if it is established that the applicant originates from a certain country or region where the situation is indeed one of indiscriminate violence because of an international or internal armed conflict.⁷⁷

However, minimal credibility about the provenance of the claimant remains required.

Furthermore, the CGRS and the ALC apply the principle contained in article 4 of the Qualification Directive which states that “the fact that an applicant has already been subject to persecution or

⁷⁴ Court of Justice, case C-465/07, 17 February 2009.

⁷⁵ The ALC applies the benefit of the doubt - RV 17 August 2007, nr. 1.244

⁷⁶ There exists ALC case law that grants subsidiary protection to Burundian nationals because of a “latent” armed conflict. This case law also broadens the notion of “indiscriminate violence” to endemic violence or situations of systematic or generalized violations of human rights. The motivation for this case law is that de Belgian legislative preparatory documents leave open the possibility of interpreting the notion “indiscriminate violence” in light of the temporary protection directive. See RV 23 October 2008, nr. 17.522.

⁷⁷ RV 29 October 2007, nr. 3.294; RV 27 September 2007, nr. 2.010

serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm."

e. Public order issues, grounds for exclusion and revocation, and the non-refoulement principle

Public order and national security

- asylum seeker

The Minister can decide that a foreign national, who has introduced an asylum application, can not enter the territory or no longer stay in the territory, if there exist serious reasons to consider him a danger to the public order or national security.⁷⁸

In such a case, the Minister is obliged to seek the advice of the CGRS with regard to the asylum application and with regard to the question as to whether the removal measures taken are in conformity with the Geneva Convention or the subsidiary protection.

- granted subsidiary protection status

Once a foreign national has been granted subsidiary protection status and if there are serious reasons to consider him a danger to the public order or national security, the Minister can decide to expel him.⁷⁹ However, this removal can only take place after an advice has been received from the Commission of advice for foreigners⁸⁰. In any case, the foreign national may not be expelled to the country he fled because his life or freedom was threatened there.⁸¹

Exclusion

A foreign national is excluded from being eligible for subsidiary protection where there are serious reasons for considering that⁸²:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious crime;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) he constitutes a danger to the community or to the security of the Member State in which he is present.

These exclusion grounds also apply to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

These exclusion grounds can be applied during the examination of the applications as well as after granting the protection status, without any time limitation.⁸³

Moreover, the Minister can ask the CGRS to revoke the subsidiary protection status already granted

⁷⁸ Article 52/4 Aliens Act.

⁷⁹ Article 49/2, § 6, Aliens Act.

⁸⁰ Commission of advice for foreigners: the function of this Commission is to advise the competent Minister in those cases where legislation provides this opportunity. The Minister can also ask the advice of the Commission prior to taking any decision regarding a foreign national. The Commission exists of 2 magistrates, 2 lawyers and persons who defend the interests of foreign nationals. See articles 32 and 33 Aliens Act.

⁸¹ Article 56 Aliens Act.

⁸² Article 55/4 Aliens Act.

⁸³ Article 57/6, 5° and 6° Aliens Act

when facts appear later that show that the foreign national should have been excluded in the first place.⁸⁴ Once the status is revoked, the Minister can issue an order to leave the territory, however only during the first five years after the status has been granted but during the first ten years when the status was obtained through fraud or when the behaviour of the applicant indicates that he never feared persecution.

Nonetheless, the CGRS must include in its decision to revoke an advice on the conformity of possible removal measures with article 3 ECHR, which lays down an absolute prohibition of refoulement in the event of a risk of violation of article 3 ECHR in the country of destination.⁸⁵ In principle, national security concerns will not affect the state's interpretation of article 3 ECHR. No alternative protection status will be granted.

Curiously, such an advice must, according to the Aliens Act, not be given when exclusion clauses are applied during the asylum procedure. However, also in this case, the CGRS will touch upon this issue in the motivation of its decision.

Revocation

Within the first 10 years of residence, starting from the date of the introduction of the asylum application, the competent Minister can ask the CGRS to revoke the subsidiary protection status of the foreign national if the status was granted on his misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of refugee status, as well as when his personal behaviour indicate that the foreign national does not fear persecution.⁸⁶

The CGRS must take a motivated decision within 60 days.

If the status is revoked, the Minister can, within the same period of 10 years, expel the foreign national with an order to leave the territory.⁸⁷

f. Appeal possibilities

It is also possible to appeal the decision to grant subsidiary protection status with a view of obtaining refugee status. Since the ALC has full jurisdiction, it can confirm, annul and/or change the decision taken by the CGRS. However, given the ALCs full jurisdiction, the claimant runs the risk of losing even his subsidiary protection status.

A further appeal lies with the Council of State, upon leave of appeal by this court. This allows the Council of State to filter out appeals that do not raise important issues of law. These appeals do not have suspensive effect.

g. Data

Number of positive decisions taken by the CGRS during the last decade⁸⁸

⁸⁴ Article 49/2, § 4, Aliens Act

⁸⁵ Article 49/2, § 5, Aliens Act.

⁸⁶ Article 49/2, § 4, and article 57/6, 7°, Aliens Act.

⁸⁷ Article 49/2, § 5, Aliens Act.

⁸⁸ Accompanying children not included.

Year	N° of refugee recognitions (first instance)	N° of subsidiary protection granted (first instance)
2000	1.198	Not applicable
2001	897	NA
2002	1.166	NA
2003	1.201	NA
2004	2.275	NA
2005	3.059	NA
2006	1.914	8
2007	1.843	279
2008	2.143	394
2009	1.887	416
2010	2.107	711

In 2010 21,4% of all the decisions taken by the CGRS was positive (refugee recognitions or subsidiary protection status).

The majority of the recognitions were taken for people originating from Guinee⁽²⁶⁹⁾, Iraq⁽²⁶⁴⁾, followed by Afghanistan⁽²⁵²⁾, China (mainly Tibet), Russia (mainly people from the Northern Caucasus), Rwanda, Kosovo, Syria, Serbia and DR Congo.

Beneficiaries of the subsidiary protection status came mainly from Iraq as well⁽³⁷⁸⁾, followed by Afghanistan⁽²⁵²⁾, Somalia⁽³¹⁾ and Guinee⁽¹²⁾.

3.A.5. Advice on possible removal orders and humanitarian clause

a. Advice on possible removal orders

As stated above, prior to the introduction of subsidiary protection, the CGRS was competent to insert a non-refoulement clause, on the basis of old article 63/5 Aliens Act, if the (voluntary or forced) return of the failed asylum seeker would be in violation of article 3 ECHR.

This competence has been replaced by the CGRS' new responsibility to examine, on a complementary basis, whether asylum applications meet the criteria for subsidiary protection.

As stated above, there are only two cases where the Aliens Act still explicitly grants the CGRS the competence to give advice on the conformity of removal orders with article 3 ECHR:

- when the Minister decides that a foreign national, who has introduced an asylum application,

cannot enter the territory or no longer stay in the territory, because there exist serious reasons to consider him a danger to the public order or national security.⁸⁹ In such a case, as the applicant has no access to the asylum procedure, the Minister is obliged to seek the advice of the CGRS with regard to the asylum application and with regard to the question as to whether the removal measures taken are in conformity with the Geneva Convention or the subsidiary protection.

- when the CGRS revokes the subsidiary protection status on the basis of exclusion grounds (during the first five years of residence), the CGRS must include in its decision to revoke an advice on the conformity of possible removal measures with article 3 ECHR, which lays down an absolute prohibition of refoulement.⁹⁰

Whether or not such an advice is followed up, is decided by the Minister and the ID. The advice is not binding, but article 3 ECHR is and can be invoked in national court proceedings.

Receiving a non-refoulement clause does not lead to an alternative protection status. It only means that the foreign national is tolerated on the territory and will not be removed forcibly.

Humanitarian clause

The CGRS can also include a humanitarian clause in its refusal decisions, where the attention of the Minister and the ID is drawn to certain humanitarian aspects of the case file. There is no legislative basis underpinning this practice.

Such a clause is mainly inserted in refusal decisions taken against heavily pregnant women, ill persons, or other vulnerable persons.

If asylum is refused to a non-accompanied minor, the CGRS will draw the attention of the Minister to the UN Convention on the Rights of the Child.

In yet other cases, the CGRS may draw attention to the principle of unity of family.

Whether or not such an advice is followed up, is decided by the Minister and the ID. The advice is not binding and its value is limited as the ALC is not obliged to uphold such a humanitarian clause in its appeal decision.

Receiving a humanitarian clause does not lead to an alternative protection status. It can be a ground for introducing an application for regularisation of stay on humanitarian grounds, if there are no indications of a danger to the public order or national security. Decisions on such applications are however taken on a discretionary basis by the ID.⁹¹

⁸⁹ Article 52/4 Aliens Act.

⁹⁰ Article 49/2, § 5, Aliens Act.

⁹¹ Article 9bis or article 9ter, Aliens Act.

3.A.6. Humanitarian visa

There are no legislative rules governing the issuance of humanitarian visa, which is rather decided upon on a discretionary basis.

Currently such visa are delivered to very specific persons (e.g. high profiles, such as foreign politicians, opposition leaders, ...) or clear cut cases of protection needed, sometimes after Belgian authorities have been contacted by UNHCR.

A humanitarian visa does not give an automatic right to a protection status (refugee or subsidiary protection) but only aims at facilitating the access of a certain person to the Belgian territory and the asylum procedure.

To be correct, humanitarian visa are also granted in cases which are not necessarily asylum-related. In the past humanitarian visa have been granted to, for example:

- Rwandan nationals fleeing the genocide in 1994 (see circular mentioned above);
- Palestinian children in need of specialized medical care.

3.A.7. Resettlement

Belgium does not have a formalised resettlement procedure. However, Belgium undertook a pilot project, in the framework of the JHA Council decision of 13 February 2009, to resettle Iraqi refugees, mainly women-at-risk and their children, located in refugee camps in Syria and Jordan, as well as Palestinian refugees from the al-Tanf camp at the Syrian-Iraq border.

These refugees were referred by UNHCR that made a first selection.

CGRS case managers went on site to make a final selection. For this selection the same criteria for refugee status were applied as in the national asylum procedure. This selection was approved by the competent Minister. The Ministry of Foreign Affairs delivered the necessary identity and travel documents. Once the refugees arrived in Belgium, they still needed to introduce a formal asylum application, which received a pro forma positive decision from the CGRS.

In 2011 Belgium responded to a request made by UNHCR to resettle a group of 25 refugees originating from the Shousha camp in Tunisia. This group mainly consisted of families with children and some single persons. They came from Eritrea or DR Congo and lived in Libya for a long time, which they had to flee because of the insurrections started in February 2011.

3.B. Migration policy – protection statuses granted

Belgian migration legislation and administrative practice currently include following protection statuses:

- Residence status on medical grounds:
- Residence status on humanitarian grounds, more in particular, in case of a pressing humanitar-

- ian situation;
- Residence status for victims of human trafficking and aggravated forms of human smuggling;
 - Residence status for unaccompanied non-EU minors (and the specific case of unaccompanied EU-minors);
 - The stay of execution of removal orders regarding illegally families with school going children;
 - Delay of departure / prolongation of residence title in cases of illness or intended marriage.

3.B.1. Residence permits on medical grounds

a. Definition

Foreign nationals, already present in Belgium, who suffer from a very serious illness and who cannot be adequately treated in their country of origin, can, under certain conditions, also obtain a more durable right of residence which can become a permanent right of residence after five years.

b. Legal framework, national policy and practical implementation

Article 9ter of the Aliens Act constitutes the legal provision for the granting of residence permits on medical grounds.

This article was introduced by the Law of 15 September 2006 modifying the Aliens Act and entered into force on 1 of June 2007.⁹²

Details of the procedure to be followed are laid down in the Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006⁹³ and a Ministerial circular of 21 June 2007 regarding modifications in the legislation on the residence of foreign nationals as a consequence of the entry into force of the law of 15 September 2006.⁹⁴

The establishment of this special procedure aims at providing legal certainty to a pre-existing practice of granting residence on discretionary grounds.

According to the Belgian government foreign nationals suffering from a serious illness cannot be removed from the territory if their situation fulfils the conditions which have been elaborated through the jurisprudence of the European Court of Human Rights, more particular on article 3 ECHR. Moreover, in conjunction with article 15 (b) of the Qualification Directive, these foreign nationals should also be granted a protection status.

Nevertheless, the Belgian government found it not opportune to treat such applications for protection through the regular asylum procedure. More in particular:

- the asylum instances do not dispose of the required competences to assess the medical

⁹² BS 6 October 2006.

⁹³ BS 31 May 2007.

⁹⁴ BS, 4 June 2007.

situation of a foreign national or to assess the medical facilities in the country of origin or habitual residence;

- the asylum procedure is not suitable to intervene when urgent medical cases arise;
- on a budgetary level, such a special procedure necessitates quite a number of additional investments (medical experts, research on the medical facilities in the relevant countries, ...).⁹⁵

Due to these reasons, the Belgian government chose to establish a special procedure for this particular group of foreign nationals requiring protection, completely outside the regular asylum procedure. As such, this procedure is to be located within the migration policy.

c. Conditions

- 1) The foreign national must already be staying in Belgium

A request for a residence permit on medical grounds, valid for more than three months, cannot be introduced abroad.

Such an application must be introduced in Belgium, either during a legal stay or during an illegal stay.

The foreign national does not have to proof exceptional circumstances which justify why the application was introduced in Belgium.

In particular cases, foreign nationals, living abroad, can obtain a so-called "medical visa" to enter Belgium.

- 2) The foreign national must suffer from a serious illness

To obtain a residence permit on medical grounds, the medical situation of the foreign national must be of certain seriousness.

More in particular, there must be a real risk, upon return to the country of origin or habitual residence that:

- the life or physical integrity of the foreign national is in danger, or
- the foreign national will be at risk of inhuman or degrading treatment.

- 3) There does not exist an adequate treatment for this illness in his or country of origin

A seriously ill foreign national only has a right to a residence permit if in his country of origin or habitual residence, there is no or only an uncertain or limited availability of medical care for his illness.

d. Assessment of the need for protection and evidence

Originally, legislation stipulated that the foreign national must prove identity and nationality by presenting an identity document, although an exception was made for:

- the foreign national who can validly prove the impossibility to obtain the required identity

⁹⁵ Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 9-12.

document in Belgium;

- the asylum seeker who has not yet received a final decision on his application or who has introduced an administrative appeal of annulment with the Council of State which has been declared admissible.

However, a referral for a preliminary ruling was made to the Constitutional Court regarding the fact that applicants under article 9ter Aliens Act are obliged to prove their identity and nationality. The question was whether this condition does not violate the non-discrimination principle and article 3 ECHR as this condition is not imposed on applicants for subsidiary protection.

In its judgment of 26 November 2009 the Constitutional Court decided that the current requirement regarding proof of identity and nationality is applied too strictly.

Legislation may require that applicants establish their identity and nationality but it must be made possible to prove this in another manner than solely by presenting an identity document or by proving that it is impossible to obtain such a document in Belgium.

The Court listed other kinds of proof that the ID must accept regarding identity and nationality:

- identity and nationality can be proved sufficiently and satisfyingly by another way than the presentation of an identity document;
- each document of which the authenticity cannot be discussed, must suffice as proof of identity;
- it is possible, as is the case with asylum applicants, to establish his identity without requiring that the applicant possesses an identity document.⁹⁶

The legislation was consequently modified and now includes an exhaustive lists of elements which on their own or in combination with other elements are accepted as sufficient proof of identity and nationality (art. 9ter § 2 Aliens Act).

The foreign national must furthermore bring forward all useful information.⁹⁷

In the first instance, a model medical certificate must be handed over which includes information on the illness, the seriousness of the illness and the necessary treatment.⁹⁸

The existence and seriousness of the foreign national's illness will be assessed by a medical officer. The medical officer is a staff member of the ID but will remain free in his appreciation of the medical elements, whilst observing his Hippocratic Oath. This medical officer can, if he deems it necessary, ask additional advice from experts. The medical officer will forward his final advice to the competent case manager of the ID.

Secondly, the foreign national must prove that adequate treatment is not available or accessible in his country of origin or habitual residence.

The examination of the issue of adequate and available or accessible treatment takes place on an individual basis. The ID will thus take into account the effective and individual accessibility of the necessary medical treatment, for example through financial, ethnical, political, geographic and

⁹⁶ GWH 26 November 2009, nr. 193/2009, B.5.3.

⁹⁷ Article 7, § 1, Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006

⁹⁸ Royal Decree of 24 January 2011 modifying the Royal decree of 17 May 2007.

security elements. When assessing the financial situation, the ID will take into account the possible existence of a social security system in the country of origin.

When assessing the risk of a violation of article 3 ECHR, the case manager will in principle decide on the application within the limits of the jurisprudence of the European Court of Human Rights.⁹⁹ However, the criteria which have been developed by the ECHR in these cases are quite strict and limited.¹⁰⁰ National case law, on the other hand, on this particular issue is more extensive. Belgian courts and tribunals have been eager and willing to use ECHR criteria in a broader manner in order to annul a removal order in medical cases as well as to oblige the ID to grant a residence permit for medical reasons.¹⁰¹ The ID applies this broader and more generous national case law in practice.

e. Exclusion grounds and non-refoulement

The foreign national will not benefit from article 9ter Aliens Act, when the ID is of the opinion that there are serious reasons to assume that the foreign national¹⁰²:

- (a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) has committed a serious crime;
- (c) has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) constitutes a danger to the community or to the security of the Member State in which he is present.

The Belgian government has stated that it is evident that a foreign national who is excluded from the benefit of a residence permit on medical grounds, will not be expelled when the foreign national is so ill that his removal would constitute a violation of article 3 ECHR.¹⁰³ However, no alternative protection status is provided.

f. Appeal possibilities

Against a negative decision an appeal can be filed at the Aliens Litigation Council.

This is an appeal of annulment, which means that the ALC can only examine the decision on its legality.¹⁰⁴ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect. Thereto a separate appeal for stay of execution of removal measures must be lodged.

The appeals for annulment and stay of execution of the removal measures must be lodged in one and the same petition within 30 days after the notification of the contested decision.

⁹⁹ Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 34-35.

¹⁰⁰ See ECtHR, *D v. United Kingdom*, 2 May 1997 and compare with Commission of human rights, *Karara v. Finland*; ECtHR 6 February 2001, *Bensaid v. France* and ECtHR, 27 May 2008, *N v. United Kingdom*.

¹⁰¹ See for an overview of jurisprudence: S. BOUCKAERT, *Documentloze vreemdelingen*, Antwerpen, Maklu, 2007, 114- 141.

¹⁰² Article 9ter, § 4, Aliens Act. The ALC has judged that the Aliens Act does not impede the ID to apply the exclusion grounds without having to pronounce on the medical circumstances of the case. RvV 20 August 2008, nr.15.078

¹⁰³ Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 36. Moreover, the ALC has confirmed that a refusal to grant a medical permit because of exclusion grounds does not constitute an inhuman or degrading treatment in the sense of article 3 ECHR. RvV 20 August 2008, nr.15.078

¹⁰⁴ Article 39/2, § 2, Aliens Act.

The introduction of an appeal for stay of execution of the removal measures does not automatically suspend the removal measure. Only when the removal is stayed by the ALC, will the execution of the measure be suspended.

In case of extremely urgent necessity, the appeal for stay can be introduced separately from and prior to the appeal for annulment. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time.

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

g. The relation with refugee status and subsidiary protection status

As stated above, although the Belgian legislator found that serious ill foreigners who upon return to their country of origin face a real risk to life or physical integrity or a real risk of inhuman or degrading treatment when no adequate treatment is available, should be able to benefit from subsidiary protection, the Belgian legislator decided to exclude applications of seriously ill foreign nationals from the asylum procedure.

For these cases, a separate procedure has been elaborated which does not fall under the Belgian asylum policy but under the Belgian migration policy.¹⁰⁵

As such, medical elements which are invoked during an asylum procedure but which do not form grounds for the recognition of refugee status (e.g. because there is no link with one of the five persecution grounds), will not be examined in the scope of subsidiary protection, but must be introduced in an application for a residence permit on medical grounds on the basis of article 9ter Aliens Act.

This exclusion of applications for protection on medical grounds from the asylum procedure was challenged before the Constitutional Court. It was claimed that the separate procedure of article 9ter Aliens Act did not foresee in the same procedural rights as the asylum procedure, for instance regarding a right to a hearing. Moreover, during the admissibility phase of the article 9ter procedure, the applicant does not benefit from a temporary residence status and remains in a precarious situation, while an asylum applicant will benefit from temporary residence from the moment of the introduction of his application. Additionally, the appeal for annulment against a negative decision taken on the basis of article 9ter only allows for a very limited examination on the legality of the decision, whereas the appeal against a negative decision in the framework of the asylum procedure takes place in full jurisdiction and thus allows an examination on facts and law.

The Constitutional Court judged that there was no discrimination between applicants under article 9ter and applicants under subsidiary protection, since objective criteria justified the existence of and distinction between the two separate procedures:

“The difference in treatment is justified by the objective criteria of the substance of the case, on the one

¹⁰⁵ See article 9ter and article 48/4, § 1, Aliens Act.

hand the fact that the application is based on a serious illness, on the other hand the fact that the application is based on another form of serious harm. As such the elements of the applications are fundamentally different:

- *an application based on another form of serious harm, in the framework of subsidiary protection, requires that the declarations of the applicant are judged on their credibility (subjective element)*
- *while the application based on a serious illness required a medical examination (objective element).*

*Such an objective diagnosis can not be made by the Belgian authorities and requires medical advice.*¹⁰⁶

However the Constitutional Court added that when assessing applications for protection on medical grounds, account is not only taken of the health situation of the application but also with the adequate character of the medical treatment in the country of origin. Moreover, it must also be assessed whether the applicant has effective access to the medical treatment in his country.

If this assessment cannot take place under the article 9ter procedure, the applicant still can make use of the procedure with regard to subsidiary protection in order to examine the existence of an effective access, in respect of article 3 ECHR.¹⁰⁷

3.B.2. Residence permit on the basis of humanitarian grounds: pressing humanitarian situations

a. Definition

Certain persons who are present in Belgium but do not possess a right of residence, can apply for something often referred to as humanitarian regularisation of their stay on the basis of article 9bis of the Aliens Act, although this article in reality does not state that a residence permit can be obtained because of humanitarian reasons. In general, this article allows an exception on the rule that a foreign national must request an authorisation of residence at the diplomatic representations of Belgium abroad. More in particular, it states that in exceptional circumstances and on the condition that the applicant is in possession of an identity document, a foreign national can apply for an authorisation of residence in Belgium itself. The foreign national must in principle prove that he is not able to return to the country in order to introduce a request for authorization of residence. In practice a double evaluation is made: on the one hand an assessment of the circumstances that would justify an application in Belgium, on the other hand an assessment of the reasons invoked to stay in Belgium.

An exact definition of the categories of persons who can qualify for a residence permit on the basis of humanitarian grounds has not been laid down in the Aliens Act, which means that in essence decision making on such applications is discretionary (in the past based on various ministerial circulars). In fact, article 9bis is a mainly procedural article, but is invoked as legal basis for many residence applications based on humanitarian reasons.

¹⁰⁶ GWH 26 June 2008, nr. 95/2008, B.10.

¹⁰⁷ GWH 26 June 2008, nr. 95/2008, B.13

In March 2008, a federal government agreement stipulated that “exceptional circumstances” would be clarified further in a ministerial instruction. The federal government agreement indicated that a protracted asylum procedure, durable local integration and pressing humanitarian situations were situations that would allow a residence permit on humanitarian grounds to be granted.¹⁰⁸

The federal government agreement was approved by the Belgian parliament.

Indeed, a ministerial instruction of 19 July 2009 did establish certain criteria for the qualification of humanitarian regularisation.¹⁰⁹ The instruction specifically mentioned “pressing humanitarian situations” as situations that can give rise to regularisation.

However, the ministerial instruction of 19 July 2009 has been annulled by the Council of State, because the instruction lacked legal basis, contradicted art. 9bis and should have been established by statutory law, to be approved by the Parliament, rather than by a ministerial instruction of the executive power, amongst other reasons.¹¹⁰

The competent Minister has stated however that he will still examine the applications for a residence permit on the basis of the criteria elaborated in the annulled instruction, but using his discretionary power, not the annulled instruction.¹¹¹

The ID has answered that it will loyally follow the directive given by the competent Minister.¹¹²

In practice, this suggests that the criteria and notions of the annulled instruction will still be applied by the ID and the competent Minister.

This report therefore will still discuss the notion of “pressing humanitarian situations”.

Very importantly, the annulled instruction included a definition of such situations, namely: “As primary principle it can be established that there is a pressing humanitarian situation involved if the removal of the applicant would be in violation of international human rights treaties, more in particular the UN convention on the rights of children and the ECHR.”

In a manual on the application of this instruction, the authorities have clarified that the general criteria defining a “pressing humanitarian situation” are the following¹¹³:

- it must be a situation of such a pressing nature that the person cannot free himself of it;
- removal of the person would constitute a violation of a fundamental right with direct applicability in Belgium;
- further residence in Belgium would be the only solution.

As such, one can conclude that the main objective of granting residence in these cases is to offer protection to certain foreign nationals who fall outside all the possibilities of protection in the

108 http://www.fedweb.belgium.be/nl/binaries/regeerakkoord180308_tcm120-14855.pdf

109 Ministerial instruction of 19 July 2009 regarding the application of old article 9,3 and article 9bis of the Aliens Act, <http://www.vmc.be/uploadedFiles/Vreemdelingenrecht/Wegwijs/verblijfsstatuten/Humanitair/instructie%20regularisatie%2020090718.pdf>

110 RvS 9 December 2009, nr. 198.769

111 <http://www.degezinnen.be/portail/public/pages/?lang=2&rub=rubActu#277>

112 <http://www.dof.fgov.be/nl/1024/frame.htm>

113 Vademecum: Clarifications on the execution of the Ministerial instruction of 19 July 2009: <http://www.vmc.be/uploadedFiles/Vreemdelingenrecht/Vademecum21september.pdf>

asylum or migration policy but whose situation is so complex or precarious that removal from the territory might violate their human rights. In this case, humanitarian regularisation can be seen as the residual or remaining category of protection – an instrument which allows authorities to grant protection in situations where they recognize that regularisation is the only possible solution. For foreign nationals, this type of humanitarian regularisation is often the last available straw.

The instruction listed six concrete situations as examples of a pressing humanitarian situation that can give cause to granting of a residence permit on humanitarian grounds:

- the foreign national who is the parent of a Belgian minor child and who forms a real and effective family with this child¹¹⁴;
- the foreign national who is the parent of a EU minor child, if this child disposes of sufficient means of existence, possibly acquired through this parent or when this parent effectively takes care of the child¹¹⁵;
- the family member of an EU citizen (or Belgian national) who does not benefit from a right of family reunification but whose residence must be “facilitated” on the basis of EU Directive

114 This provision is in essence aimed at parents whose children have obtained the Belgian nationality because they would otherwise risk becoming stateless (article 10 of the Belgian nationality code). However the ID will examine if this Belgian nationality was not obtained through abuse of the nationality procedure by the parents in order to obtain a residence right. See also more in G. MAES, “Vreemdelingen zonder legaal verblijf met Belgische kinderen: uitzetting van onderdanen of beschermd gezinsleven als hefboom voor regelmatig verblijf”, T. Vreemd. 2005, 332-339. A number of ten (!) referrals for a preliminary ruling were made to the Constitutional Court. The prejudicial question regarded the fact that ascendants (more in particular parents originating from a third country) of Belgian nationals must be dependent on the Belgian national, meaning that a Belgian minor child must possess sufficient resources in order to support his parents from a third country, whereas this condition is not imposed on the Belgian parents of a Belgian minor child. The Court ruled that imposing this condition on Belgian minor children with parents from a third country, would lead to a situation where this minor child is obliged to live in an uncertain administrative situation in Belgium or to follow his parents to a third country where he would not have the same social benefits as in Belgium. This would constitute a disproportional difference in treatment with regard to Belgian children with Belgian parents. However the Court referred to a ministerial instruction of 26 March 2009 where it was explicitly stated that parents from a third country of Belgian minor children who form an effective and real family with these children, are found to be in a pressing humanitarian situation and can thus obtain a right of residence. This instruction was confirmed by the ministerial instruction of 19 July 2009. Because of the existence of this possibility to obtain a right of residence, the Court judged that there was at the end no disproportional difference in treatment. However, since the ministerial instruction of 19 July 2009 has been annulled, the question remains whether the difference in treatment between Belgian children with Belgian parents and Belgian children with parents from a third country would still constitute a disproportionate treatment in difference. GwH 3 November 2009, nr. 174/2009. See also ECJ, 8 March 2011, C-34/09, Ruiz Zambrano.

Note also that according to the amended article 7 of the Law of 12 January 2007 regarding the reception of asylum seekers and certain categories of foreign nationals, failed asylum seekers who are the parents of a Belgian child and who have applied for an authorization of residence, can benefit from an extended right to material aid (e.g. housing in a community centre, etc.). (This right to material aid does not give a right to residence) See BS 31 December 2009, 82956.

115 Influenced by the cases of Zhu and Chen, ECJ 19 October 2004, C-200/02 (§§ 42-45: “Article 1(2)(b) of Directive 90/364, which guarantees ‘dependent’ relatives in the ascending line of the holder of the right of residence the right to install themselves with the holder of the right of residence, regardless of their nationality, cannot confer a right of residence on a national of a non-member country in Mrs Chen’s situation either by reason of the emotional bonds between mother and child or on the ground that the mother’s right to enter and reside in the United Kingdom is dependent on her child’s right of residence. According to the case-law of the Court, the status of ‘dependent’ member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence. In circumstances such as those of the main proceedings, the position is exactly the opposite in that the holder of the right of residence is dependent on the national of a non-member country who is her carer and wishes to accompany her. In those circumstances, Mrs Chen cannot claim to be a ‘dependent’ relative of Catherine in the ascending line within the meaning of Directive 90/364 with a view to having the benefit of a right of residence in the United Kingdom. On the other hand, a refusal to allow the parent, whether a national of a Member State or a national of a non-member country, who is the carer of a child to whom Article 18 EC and Directive 90/364 grant a right of residence, to reside with that child in the host Member State would deprive the child’s right of residence of any useful effect. It is clear that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.”) and Baumbast, ECJ 17 September 2002, C-413/99.

2004/38, more in particular family members who in the country of origin were dependent on or members of the household of the EU citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the EU citizen¹¹⁶;

- the foreign national who, as a minor, was admitted or authorized to a permanent residence in Belgium and who afterwards returned to his country of origin (possibly under pressure of his parents) but who cannot claim a right of return as foreseen in the Belgian legislation¹¹⁷;
- the spouses of different nationalities who originate from countries who do not permit their family reunification, with the consequence that upon removal to their respective countries of origin, their family unit would be shattered, in particular, when they have a common child¹¹⁸;
- foreign nationals who benefit from a Belgian pension or invalidity benefits but who have lost their right of residence to Belgium as a consequence of their return to their country of origin.

This is a non-exhaustive list – the ID is competent to consider also other cases as pressing humanitarian situations. Particular attention will be paid to foreign nationals who can be considered to be vulnerable, for instance:

- women and children who have been abused or exploited;
- persons who find themselves in such a personal or family situation that their only rescue would be the regularization of their stay.

With regard to this last case, it could be argued that stateless persons and some other categories of non-removable persons can be included.

Since stateless persons do not have a nationality, they cannot easily be removed to another country. However, the recognition of statelessness does not have an automatic consequence on the residence status of the stateless person.¹¹⁹ No particular or privileged residence status is attached

¹¹⁶ It is important to note that Belgium has failed until now to correctly transpose article 3 § 2 of the Directive 2004/38, as was stated by the European Commission in its Report to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840/3.4. Article 3 § 2 lists a number of persons for which Member States, in accordance with their national legislation, must facilitate the entry and residence.

¹¹⁷ For example: the foreign national whose residence permit has been taken away after return or the young woman who has been married off against her will, in as far as these persons can prove their situation.

¹¹⁸ But persons in such a situation could very well be recognised refugees, according to the CGRS (interview on 19 October 2009)

¹¹⁹ Procedure relating to the recognition of statelessness:

First of all, it is important to note, that the procedure to be recognised as a stateless person is not a procedure that takes place within the 'asylum' or 'migration' policy of Belgium.

The UN Convention relating to the status of stateless persons defines a stateless person as "a person who is not considered as a national by any State under the operation of its law". (UN Convention relating to the status of stateless persons, signed on 28 September 1954, approved by law on 12 May 1960, BS 10 August 1960.)

It is thus up to the foreign person to prove his or statelessness, either by proving that he or she has lost the nationality which he or she had obtained by birth or that he or she never had a nationality. The burden of proof lies entirely with the foreign person. If it is a very clear case of statelessness, the conclusion of statelessness can, in the first place, be taken by the Bureau of Civil State of the local town or municipality. The Bureau of Civil State makes enquiries with the Department of Nationality at the Ministry of Justice. If there are doubts, the foreign person will have to prove his statelessness through a judicial procedure. A petition must be introduced at the competent tribunal of first instance.

The competent judge will consequently request the Office of the Public Prosecutor to examine the claim and give his advice. If the person is not found to be stateless by the judge, an appeal can be introduced at the Court of Appeal and later at the Court of Cassation. If statelessness is recognized by the judge, this recognition has a declaratory nature. The CGRS is competent to deliver documents of civil state (for instance birth certificate,...).

to the recognition of statelessness. A stateless person must thus follow the common rules of the Aliens Act.¹²⁰

A prejudicial question regarding the fact that recognised stateless persons do not benefit from a right of residence contrary to recognised refugees has been forwarded to the Constitutional Court. In its judgment on this issue, the Constitutional Court stated that when a foreign national has been recognised as stateless because he has lost his nationality involuntarily and when this foreign national shows that he cannot obtain a legal residence in another state, the fact that the stateless foreign national cannot obtain a residence permit in Belgium, places him in a situation which undermines the exercise of his fundamental rights in a discriminatory manner. The Court concluded that this discrimination is the consequence of the lack in Belgian legislation which foresees a right of residence to stateless persons.¹²¹

Notwithstanding this judgement, at this moment a stateless person who is staying illegally in Belgium, can only apply for an authorization of residence by invoking a pressing humanitarian situation: it could be argued that a stateless person finds himself in such a personal situation that his only rescue would be the regularization of his stay.

The same argument could be made for some non-removable persons, in particular where this non-removability is due to force majeure/circumstances beyond one's control.

However, since these two categories have not even been listed explicitly in the annulled ministerial instruction of 19 July 2009, ID will, on a discretionary basis, eventually decide upon such cases. Practice and case law indicate that the non-issuance of a residence permit to illegally staying stateless persons is not always considered a possible violation of article 3 ECHR.¹²²

Starting up such a judicial procedure does not affect the possible illegal residence of a foreign person, nor does the recognition of a person as stateless automatically install a residence right. However, jurisprudence has, in some cases, obliged the Belgian authorities to grant a temporary right of residence during the judicial procedure. This jurisprudence based itself upon articles 6, 13 and 3 ECHR and was concerned with the right of the applicant to have an effective access to judicial procedure as well as avoiding the applicant ending up in a so-called "refugee in orbit"-situation. See for instance: Brussel 4 May 1999, Rev. Dr. étr. 1999, 243. See also Brochure on Stateless persons, Stad Gent Staatlozen: nergens en nooit onderdaan, overal en altijd vreemdeling, 2007, <http://www.gent.be/docs/Departement%20bevolking%20en%20Welzijn/Integratiedienst/Map%20Staatslozen/Handleiding%20staatlozen.pdf>, 49-63. S. BOUCKAERT, Documentloze vreemdelingen, Antwerpen, Maklu, 2007, 138-141.

The government has stated on 18 March 2008 to introduce a new procedure for the recognition of stateless persons, which will be implemented by the CGRS, and which will attach a (temporary) residence status to the recognition of statelessness. (<http://www.premier.be/files/NVERKLARINGtien-zondervoettekst.pdf>).

120 Article 98 of the Royal Decree of 8 October 1981 on the entry, residence, settlement and removal of foreign nationals.

121 GwH 17 December 2009, nr. 198/2009, B.7-B.9.

122 It could be argued that it is the duty of the Belgian authorities not to submit a stateless person illegally residing in Belgium, to an inhuman or degrading treatment. Repeated efforts to remove stateless person, although he or she is not admitted in another state nor is able to obtain a durable and legal residence in another state, might amount to such treatment (so-called "refugees in orbit"-situation). See Commission Human Rights, 17 July 1980, Giama v. Belgium. However, contrary to jurisprudence relating to illegal persons applying for recognition of their statelessness, jurisprudence regarding recognised stateless persons staying illegally in Belgium has not been willing to oblige Belgian authorities to grant a residence permit. See RvS 20 August 2004, nr. 134.347, Rev. Dr. étr. 2004, 417. Jurisprudence has however annulled the order of removal, notified to an illegal stateless person because the ID was well aware of the impossibility of the stateless person to enter another country. The deprivation of the applicant of a legal residence and the impossibility to enter another country amounted to an inhuman and degrading treatment in the sense of article 3 ECHR. See RvS 23 September 1998, nr. 75.896, T. Vreemd. 1998, 181.

b. Legal framework, national policy and practical implementation

The legal basis for granting a residence permit on humanitarian grounds is article 9bis of the Aliens Act. During the course of the years, this article has become a catch-all provision.

It is used, amongst others, as a basis for granting a residence permit on humanitarian grounds to foreign nationals staying illegally in Belgium.

The criteria for the granting of a residence permit on humanitarian grounds are not established formally in the Aliens Act. The ID, which is the competent authority for these decisions, decides at its own discretion. The granting of a residence permit on humanitarian grounds is a favour, not a right.

However, during the years, certain administrative practices have been formed, as well as case law. A few of these practices or case law were reflected in the annulled ministerial instruction of 19 July 2009 which laid down six concrete situations which can give cause to the granting of a residence permit on humanitarian grounds. This list was non-exhaustive, meaning that other situations can also lead to a residence permit but they are left to the discretion of the ID.

c. Conditions

- Identity document
In principle the applicant must bring forward an identity document. However two exceptions are made:
 - the foreign national who can validly prove the impossibility to obtain the required identity document in Belgium;
 - the asylum seeker who has not yet received a final decision on his application or who has introduced an appeal for annulment with the Council of State which has been declared admissible.
- Proof of 'exceptional circumstances'

The Aliens Act does not clarify what 'exceptional circumstances' are, it only enumerates some situations which are not 'exceptional circumstances'.

The lack of real criteria establishing 'exceptional circumstances' has led to much case law, some of which has eventually been adopted in administrative practices and internal instructions. Some of these administrative practices and internal instructions were formally recognised in the Minister's instructions of 19 July 2009, now annulled.

It was assumed that the foreign national who fulfils the criteria establishing the existence of one of the six "pressing humanitarian situations" was considered to deliver sufficient proof of 'exceptional circumstances' justifying the introduction of an authorisation of residence in Belgium instead of with the competent diplomatic posts abroad.

d. Assessment of the need for protection and evidence

The burden of proof lies entirely with the foreign national. All useful elements of proof must be

handed over. An individual assessment of each application will take place, verifying whether the applicant meets the general criteria (pressing situation, removal is a violation of fundamental right, residence is the only option).

e. Public order issues and non-refoulement

It is within the ID's discretionary power to exclude following persons from the benefit of a residence permit on humanitarian grounds:

- persons who are a danger to the public order or national security;
- persons who have deceived the authorities or committed fraud.

As stated above, the non-refoulement principle of article 3 ECHR remains directly binding upon the relevant Belgian authorities. Moreover, the provisions in the Aliens Act that deal with the removal measures indicate that the authorities when executing these measures must take into account "derogations defined in an international treaty or in national law"¹²³ or "more favourable provisions in an international treaty"¹²⁴. The prohibition of non-refoulement is absolute. Whilst the foreign national may not be removed, no alternative protection status is granted either.

f. Appeal possibilities

Against a negative decision or revocation of the residence permit, an appeal can be introduced with the ALC.

This is an appeal of annulment, which means that the ALC can only examine the decision on its legality.¹²⁵ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect. Thereto a separate appeal for stay of execution of removal measures must be lodged.

The appeals for annulment and stay of execution of the removal measures must be lodged in one and the same petition within 30 days after the notification of the contested decision.

The introduction of an appeal for stay of execution of the removal measures does not automatically suspend the removal measure. Only when the removal is stayed by the ALC, will the execution of the measure be suspended.

In case of extremely urgent necessity, the appeal for stay can be introduced separately from and prior to the appeal for annulment. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time.

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

¹²³ Article 3 Aliens Act.

¹²⁴ Article 7 Aliens Act.

¹²⁵ Article 39/2, § 2, Aliens Act.

g. Data

During the last years (2005-2008) some 40.000 (41.500) foreign nationals have obtained a residence permit on medical grounds (3.B.1) or on the basis of (other) humanitarian grounds (3.B.2.). Around 57% have been regularised because of a lengthy asylum procedure (4 years in general or 3 years if minor school attending children are involved) and around 20% because of medical grounds.

3.B.3. Residence status for victims of human trafficking and aggravated forms of human smuggling

a. Definition

Belgian legislation has defined human trafficking and human smuggling as follows:

Human trafficking¹²⁶:

The recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, for the purpose of

- the exploitation of that person in child pornography;
- the exploitation of that person in prostitution;
- the exploitation of that person's labour or services in circumstances which are in violation of human dignity;
- the exploitation of that person in mendacity;
- having that person give up organs or tissues, in violation with the relevant legislation;
- having that person commit a crime or offence against his will.

Victims of trafficking may obtain protection status. The consent of the victim to the exploitation, intended or actual, is irrelevant, except in the last case.

Human smuggling¹²⁷:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry, transit or residency of a person into a Member State of which the person is not a national or a permanent resident.

To obtain protection status, the victim of human smuggling must show that one of the following aggravating circumstances apply to him:¹²⁸

- the victim is a minor;
- abuse was made of the particular vulnerable situation of the victim, leaving the victim no other real and acceptable choice than to be abused;
- direct or indirect use of deception, violence, threats or any other form of coercion;

¹²⁶ Article 433 quinquies Penal Code.

¹²⁷ Article 77bis Aliens Act.

¹²⁸ Article 77quater Aliens Act.

- the life of the victim has been put at risk deliberately or by serious negligence
- the human smuggling has led to an apparently incurable illness, a permanent physical or mental disability, the full loss of an organ or use of the organ, or a serious mutilation.

b. Legal framework, national policy and practical implementation

The international legal framework binding upon Belgium consists of:

- UN Convention against Transnational Organised Crime, supplemented by a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and a Protocol Against the Smuggling of Migrants by Land, Sea and Air, signed by the EC and the 15 Member States in December 2000, Palermo;
- Council Decision 2001/87/EC of 8 December 2000 on the signing, on behalf of the European Community, of the United Nations Convention against transnational organised crime and its Protocols on combating trafficking in persons, especially women and children, and the smuggling of migrants by land, air and sea;
- Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence;
- Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings;
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

The national legal framework originated from a 1994 ministerial circular that established an “administrative” procedure and status for victims of human trafficking.¹²⁹ In 1995 a law was adopted to combat trafficking in human beings and child pornography¹³⁰, amended in 2005 in order to increase the fight against human trafficking and human smuggling and against the practices of rack-renters.¹³¹ The legislation was complemented by a ministerial circular of 1997¹³², which was later modified by ministerial guidelines in 2003¹³³, containing guidelines for the ID, the Public Prosecutor offices, the police and the social inspection on assistance to victims of human trafficking. This Belgian administrative practice has inspired the Council Directive 2004/81/EC.

The adoption of this Council Directive led to a modification of the Aliens Act¹³⁴, formalising the pre-existing administrative practice and status, by introducing a separate chapter dedicated solely to the procedure of issuing residence permit to victims of human trafficking and human smuggling

¹²⁹ Ministerial circular of 7 July 1994 regarding the issuance of residence and work permits to foreign nationals, victims of human trafficking.

¹³⁰ Law of 13 April 1995 regarding the combat against human trafficking, BS 25 April 1995.

¹³¹ Law of 10 August 2005 amending several provisions with the aim to increase the combat against human trafficking and human smuggling and against rent-rackers, BS 2 September 2005.

¹³² Ministerial guidelines of 13 January 1997 to the ID, the Public prosecutors’ office, the police and the social inspection, BS 21 February 1997.

¹³³ Modification of the Ministerial guidelines of 13 January 1997 to the ID, the Public prosecutors’ office, the police and the social inspection, B.S. 27 May 2003.

¹³⁴ Law of 15 September 2006 modifying the Aliens Act, BS 6 October 2006.

cooperating with the authorities.¹³⁵

However, during the transposition Belgium choose to go further than what the Council Directive prescribes, making use of article 6 allowing for more favourable provisions.

The reason for this is that concern for and protection of the victim has always been central in the Belgian approach towards combating human trafficking and human smuggling. It does not limit itself to a repressive approach but gives a central place to the victims through an elaborate social component in its policy and a multidisciplinary approach.

The Council Directive on the other hand lays predominant emphasis on the combat against illegal immigration and contains certain distrust towards victims of trafficking.¹³⁶

The Belgian approach thus deviates from the EU approach as follows:

- the scope of protection includes both victims of human trafficking and victims of human smuggling if aggravating circumstances apply;
- protection is accorded both to third country nationals and EU nationals with regard to victims of human trafficking (with regard to protection for victims of human smuggling – this only relates to third country nationals);
- protection is also awarded to non-accompanied minors;
- the protection procedure contains the possibility of permanent residence.

Finally, the details of the procedure for receiving the status of victim of human trafficking or human smuggling was worked out in the ministerial circular of 26 September 2008, which replaced all former circulars.¹³⁷ The circular also organizes the cooperation between the several parties involved: police and social inspection, ID, the specialised reception centres, and the public prosecutors, thus establishing a multidisciplinary approach. The 2008 circular also devotes a separate chapter to the vulnerable situation of unaccompanied minors who are victims of human trafficking or smuggling and establishes a series of special measures.

c. Conditions

Victims must fall within the definition of human smuggling and the aggravated forms of human trafficking.

In order to benefit from the full protection status and the permanent residence permit, they must fulfil following conditions:

- they may not return to the persons or network that was exploiting them;
- they must agree to be counselled by a recognised and specialised reception centre;
- they must cooperate with the authorities investigating the crimes, by making statements or making a complaint against the persons or networks that have exploited them.

¹³⁵ Articles 61/2 – 61/5 Aliens Act.

¹³⁶ I. AENDENBOOM, I. "Van doe-het-zelver tot designer? Aanpassingen verblijfsregeling slachtoffers mensenhandel", T.Vreemd. 2007, 85-92.

¹³⁷ Ministerial circular of 26 September 2008 regarding the introduction of a multidisciplinary cooperation towards victims of human trafficking and/or aggravating forms of human trafficking, BS 31 October 2008.

However, the granting of the protection status as victim takes place within a gradual process. The process of examining whether the foreign national fulfils the abovementioned requirements consists of 4 phases, as explained in chapter 4.B.3.

d. The assessment of the need for protection¹³⁸

A potential victim is detected by the declarations or statements he makes and/or the assessment of indications which show that his situation corresponds with the situation of human smuggling or an aggravated form of human trafficking as described by law.¹³⁹

The person that is intercepted by the police or social inspection must not immediately make a statement in order to be found a victim. The assessment of indications is sufficient.

To assess indications of human smuggling or trafficking the police or social inspection make use of indicators and guidelines which have specifically drawn up for that purpose.

It can happen that victims do not see themselves as victims, for instance because they work in circumstances that are better than in their country of origin. However, such situation must be judged on the basis of Belgian criteria applying to these circumstances and not in function of criteria applying in the country of origin.

e. Evidence

The victim is not required to put forward proof (material evidence) of his exploitation, but must cooperate with authorities by making truthful statements or making a founded complaint.

The victim must also prove his identity by handing over a passport, travel document or identity card. If the victim cannot bring forward an identity document, he must communicate which steps were undertaken in order to prove his identity.¹⁴⁰

If the authorities find that the victim's cooperation is deceptive or that his or her statements are unfounded or misleading, the residence permit will be ended.

f. Public order issues

The relevant residence permit will be ended if the victim constitutes a danger to the public order or national security.¹⁴¹

The Aliens Act does not mention whether a victim, whose protection status is ended because of reasons of public order or national security, will still benefit from non-refoulement. This will depend on the individual circumstances of the case.

As stated above, the non-refoulement principle of article 3 ECHR remains directly binding upon the relevant Belgian authorities. Moreover, the provisions in the Aliens Act that deal with the removal measures indicate that the authorities when executing these measures must take into account

138 Point III.B of the ministerial circular of 26 September 2008.

139 The detection and identification of victims remains difficult as the human trafficking is no longer limited to sexual exploitation but more and more takes the form of economic exploitation. See more in CGKR, Jaarverslag 2007, Mensenhandel en –smokkel.

140 Article 110bis Royal Decree of 8 October 1981.

141 Article 61/2, § 3, article 61/4, § 3 and article 61/4, §§ 1-2, Aliens Act. This article has only been applied once – interview with CGKR, 13 October 2009.

"derogations defined in an international treaty or in national law"¹⁴² or "more favourable provisions contained in an international treaty"¹⁴³. The prohibition of non-refoulement is absolute. In any case, there is no alternative protection status granted automatically if a person falls under the scope of article 3 ECHR.

g. Appeal possibilities

Against a decision of the ID to end the temporary residence permit, an appeal can be introduced at the ALC.

This is an appeal of annulment, which means that the ALC can only examine the decision on its legality.¹⁴⁴ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect. Thereto a separate appeal for stay of execution of removal measures must be lodged.

The appeals for annulment and stay of execution of the removal measures must be lodged in one and the same petition within 30 days after the notification of the contested decision.

The introduction of an appeal for stay of execution of the removal measures does not automatically suspend the removal measure. Only when the removal is stayed by the ALC, will the execution of the measure be suspended.

In case of extremely urgent necessity, the appeal for stay can be introduced separately from and prior to the appeal for annulment. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time. (e.g. detention in a closed centre because of forced repatriation).

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

h. Relationship with refugee status and subsidiary protection

Article 4 of the Council Directive states that this directive shall be without prejudice to the protection extended to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.

The provision is directed in particular at persons seeking international protection who cross frontiers with the help of networks of traffickers or smugglers. It also covers situations where victims want to apply for international protection in view of the dangers of reprisals which they run after having cooperated with the authorities against traffickers or smugglers.

Similarly, this provision also entails the application of all of the articles of the European Convention on Human Rights and its protocols, particularly as regards conditions of residence and removal.

This article has not been explicitly transposed in Belgian legislation.

If during the asylum procedure, the CGRS receives indications that the asylum applicant is also a victim of human trafficking or smuggling, he will be referred to the appropriate instances. The

142 Article 3 Aliens Act

143 Article 7 Aliens Act

144 Article 39/2, § 2, Aliens Act.

person will not be excluded from the asylum procedure: the examination of the application will still take place and many victims can be recognised as refugees through the notion “social group”.¹⁴⁵ However, it is not clear whether the opposite also takes place, namely whether the appropriate instances counselling a victim of human trafficking or smuggling also refer the person to the asylum instances if there are indications of a need to international protection.¹⁴⁶

Figures

Year	Number of new introduced cases	Proved to be a victim of human trafficking
2003	205	Not available
2004	184	33
2005	145	Not available
2006	160	65
2007	178	52
2008	174	47
2009	124	73
2010	137	52

Source: Bureau Minteh/Immigration Office

In 2010 the main countries of origin are Brazil, China, Morocco, India, Romania and Bulgaria.

3.B.4. Special protection status for non-EU unaccompanied minors¹⁴⁷

a. Definition

Unaccompanied minors (hereafter: UMs) are under Belgian legislation, more specifically the Guardianship Act of 22 December 2002¹⁴⁸, defined as following:

- 1) not having reached the age of 18 years;
- 2) without the guidance of a person with parental authority or a person that has guardianship over the minor;
- 3) originating from a country that does not belong to the European Economic Area (EEA);
- 4) having applied for asylum or not fulfilling the conditions to enter or reside on the Belgian territory.

¹⁴⁵ Interview with the CGRS on 19 October 2009.

¹⁴⁶ In this regard, see J. BHABHA and C. ALFIREV, The identification and referral of trafficked persons to procedures for determining international protection needs, UNHCR report October 2009 (PPLAS/2009/03) at <http://www.unhcr.org/protect>.

¹⁴⁷ This part was based to a large extent on the report of the Belgian Contact point of the EMN, Policies on reception, return and integration arrangements for, and numbers of, unaccompanied minors in Belgium, July 2009, 86p.

¹⁴⁸ Guardianship Act of 24 December 2002 (Title XIII, Chapter VI “Unaccompanied minor aliens”, of the Programme Law of 24 December 2002, BS 31 December 2002). Modified by the Programme Law of 22 December 2003 and the Programme Law of 27 December 2004.

A minor who meets these conditions, will be assigned a guardian by the Guardianship Service by the Justice Department.

A contrario, this means that the following categories of unaccompanied minors do not fall under the definition of the Guardianship Act and will thus not benefit from the assignment of a guardian:

- UMs who are nationals of the EEA. In Belgium this is of specific interest as UMs from Bulgaria and Romania accounted for a relative big number of UM (before their accession in 2007). As a consequence the Service SEMK was created which stand for the Service for European UM in a vulnerable situation. (the special case of the EEA UMs will be discussed later);
- UMs who enter the Belgian territory with valid travel documents (e.g. with visa for student, family reunification, tourism, etc.). However, once e.g. the validity of the documents expire, it is possible that these persons can be considered as an UM.

Once an UM has been brought to the attention of the Guardianship Service, for instance by the police or the ID, the UM will be registered and a guardian will be appointed.

Once UMs have been registered by the Guardianship Service, they will have access to several possibilities of legal residence. The guardian, in consultation with the UM, will decide which procedure is in the best interest of the child.

- 1) The UM can apply for asylum. If he does, he will benefit from the appointment of a guardian, who informs and assists them during the asylum procedure. A specialised case manager will interview them and examine their case file. From a protection point of view, their asylum applications are treated with priority and in an accelerated manner in order to provide them as swiftly as possible with more clarity about their possibilities of residence in Belgium.
- 2) The UM can be considered as a victim of human trafficking. The Belgian law of 15 September 2006 that amends the Aliens Act (art 61/2 to 61/5) and articles 110bis en 110ter of the Royal Decree of 8 October 1981 are of relevance. The Law specifically mentions the status of unaccompanied minors and stresses the importance of the best interests of the child during the whole procedure. Belgium has decided to apply the procedure for human trafficking also on minor victims. The procedure differs nonetheless from those for adults: there is no reflection period of 45 days and the UM receives immediately a residence permit valid for three months.
- 3) The guardian can apply for a residence permit on the basis of specific procedure for unaccompanied minors described in the Circular Letter of 15 September 2005¹⁴⁹;
- 4) The UM can apply for a residence permit on medical grounds or humanitarian grounds according to art 9bis or 9ter of the Aliens Act).

With exception of the asylum procedure, other procedures do not foresee in a specially adapted treatment of UMs – they will be treated in the same way as adults.

149 BS 7 October 2005.

Some procedures can be started up simultaneously, e.g. asylum and victim of human trafficking; asylum and residence permit on medical or humanitarian grounds. However, the procedure for a residence permit as an UM according to the Circular Letter of 15 September 2005 can only be started when the UM has no other procedure in progress. If no residence procedure is undertaken, the UM will find himself in an illegal residence situation.

The study will focus now on the specific protection status for unaccompanied minors.

b. Definition and conditions

The specific protection status is applicable to:

- unaccompanied minors who fulfil the abovementioned definition;
- who do not claim asylum (or whose asylum procedure has ended with a negative decision by the asylum authorities); and
- who have not claimed a residence status under another procedure (victims of trafficking, residence permit on medical or humanitarian grounds according to articles 9bis and 9ter).

It thus applies only to those UMs who reside illegally on the territory and who are not involved in another procedure.

This specific procedure can only be initiated by the guardian on a written basis.

c. Legal framework, national policy and practical implementation

The specific protection finds its roots, amongst others, in the UN Convention on the Rights of Children and the Resolution of the European Council of 26 June 1997 on unaccompanied minors from third countries¹⁵⁰.

In 2005 a Ministerial Circular Letter was published which foresees a specific procedure for UMs to apply for an authorisation to reside on the Belgian territory until they reach the age of 18. This Circular Letter has a more or less legally binding character.

The Circular also describes the specific duties of the *Bureau Minors* (also known as Bureau Minor, or Bureau MINTEH) of the ID. This Bureau is not competent for UMs from the European Economic Area and UMs who have claimed asylum.

If there are doubts about the age of the UM, the bureau MINTEH will ask the Guardianship Service of the Justice Department for an age assessment by means of a medical test as well as a verification of his identification. The bureau MINTEH will only take into consideration an application for protection, introduced by the guardian, if it receives confirmation from the Guardianship Service that the person seeking protection is indeed an UM.

The protection procedure aims at finding a “durable solution” for all UMs who initiate this proce-

¹⁵⁰ OJ C 221, 19 July 1997.

dure. The Bureau MINTEH is competent to decide on what is the durable solution for each UM on the territory and should see to it that this solution is in the best interests of the child and that the fundamental rights are respected. Guardians play an important role in this phase. Under the Guardianship Act (Art3§2 section 4) they have to see to it that the competent authorities seek a durable solution for the UMs as soon as possible. In practice they have to make a proposition of what is the durable solution for the UM to the Bureau. To this end, from June 2009 onwards, the UM and his guardian are invited and during one or several interviews the situation of the UM in Belgium and in the country of origin is to be looked at. The different possibilities of the durable solution are investigated by the Bureau and the guardian on a regular basis. The Bureau is also responsible for the issuance of temporary or definitive residence documents.

d. The assessment of the need for protection and evidence

The durable solution referred to above can be found in Belgium, in the country of origin or in any other country where the UM has a right of residence. The Circular Letter describes three options that qualify as 'a durable solution':

- family reunification in Belgium or abroad¹⁵¹;
- return of the UM to the country of origin or any other country where he has a right of residence with guarantees of an adequate reception and care, according to the needs of the UM taking into account his age and his degree of self reliance. This reception and care must be provided by his parents or by government authorities or NGOs;¹⁵²
- unlimited stay or settlement in Belgium.

These three options should be considered on an equal basis, without preference for any of these options. It should be decided on a case by case basis, after a thorough analysis of the situation and after a balance between the advantages and disadvantages of the different possible solutions.¹⁵³ As a decision on what is the durable solution in the best interests of the child will be taken on the basis of a maximum of objective information regarding the UM, the guardian has an important duty. He has to undertake all the necessary measures to track down the family of the UM, in Belgium or abroad. He can contact the Tracing Service of the Belgian Red Cross¹⁵⁴; the Bureau MINTEH can ask for some support from the Foreign Affairs Department to contact the family in the country of origin. The guardian should also collect all kinds of documents and provide these to the Bureau (travel documents, identity documents, legal documents, school attestation, etc.), or communicate all the steps he has undertaken to try to obtain identification documents. He should also communicate to the Bureau any changes in the situation of the UM that could have an effect on the 'durable solution'. This communication should happen in a written way.

151 In conformity with articles 9 and 10 of the UN CRC.

152 In conformity with article 5 of the resolution of the European Council of 26 June 1997 on unaccompanied minors from third countries. However, in two cases the Court of first instance of Brussels judged that there must be absolute certainty about the possibility of return with the necessary guarantees but that account must also be taken of the reception situation in Belgium, which in some cases could be a "more" durable solution than return. Rb Brussel 13 January 2006 (kort geding), J.dr.jeu. 2006, 32-35, noot C. VAN ZEEBROECK. Rb Brussel 27 March 2006 (kort geding), T. Vreemd. 2006, 246-347.

153 C. VAN ZEEBROECK, Plate-forme Mineurs en exil. Aspects législatifs de la situation des mineurs étrangers non accompagnés en Belgique, Mars 2008, 355.

154 <http://tracing.rodekruis.be/>

According to the case law of the ALC, the Bureau MINTEH also has responsibilities: it must investigate and verify the reception possibilities and guarantees for the UM in the country of origin before deciding that return to the country of origin is the best durable solution.¹⁵⁵

The Bureau will finally take a decision on what is the durable solution for the UM. Doing so might take a long time and the options can change over time. When a durable solution has been found, the Bureau will invite the UM to explain which decision has been taken regarding his residence status. If the final decision of the Bureau differs from the one proposed by the guardian, the reasons thereto should be duly motivated.

In case the guardian does not agree with the 'durable solution' proposed by the ID, the guardian can file an appeal with the ALC.

Amendments to the Circular Letter are currently being discussed (2009) and a decision has to be taken as whether it should be adopted as statutory law. Some changes have already been mentioned: (as from 1 June 2009 on) all UMs and their guardians have to be heard systematically by the Bureau on issues that directly concern them (family situation, residence status in Belgium or abroad, ...). Until now this only happened on an ad hoc basis. The Bureau will also do the follow up of the UM until he reaches the age of 18.¹⁵⁶

e. Public order issues and non-refoulement

The circular of 2005 does not make a specific mention of public order issues, but on the basis of the basic provisions of the Aliens Act, the ID could decide to exclude UMs from the benefit of the circular if they are a danger to the public order or national security.

As stated above, the non-refoulement principle of article 3 ECHR remains directly binding upon the relevant Belgian authorities. Moreover, the provisions in the Aliens Act that deal with the removal measures indicate that the authorities when executing these measures must take into account "derogations defined in an international treaty or in national law"¹⁵⁷ or "more favourable provisions contained in an international treaty"¹⁵⁸. The prohibition of non-refoulement is absolute. In any case, there is no alternative protection status granted automatically if a person falls under the scope of article 3 ECHR.

f. Appeal possibilities

The decision of the Bureau can be appealed to the ALC. This is an appeal of annulment, which means that the ALC can only examine the decision on its

¹⁵⁵ See RvV 22 January 2008, nr. 21.818 and RvV 28 November 2008, nr. 19633. This includes also investigating the possibility of education in the country of origin: RvV 1 October 2009, nr. 32.338.

¹⁵⁶ See report of Belgian Contact point-EMN, Policies on reception, return and integration arrangements for, and numbers of, unaccompanied minors in Belgium, July 2009, 35.

¹⁵⁷ Article 3 Aliens Act

¹⁵⁸ Article 7 Aliens Act

legality.¹⁵⁹ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect. Thereto a separate appeal for stay of execution of removal measures must be lodged.

The appeals for annulment and stay of execution of the removal measures must be lodged in one and the same petition within 30 days after the notification of the contested decision.

The introduction of an appeal for stay of execution of the removal measures does not automatically suspend the removal measure. Only when the removal is stayed by the ALC, will the execution of the measure be suspended.

In case of extremely urgent necessity, the appeal for stay can be introduced separately from and prior to the appeal for annulment. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time. (e.g. detention in a closed centre because of forced repatriation).

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

g. The particular case of EU unaccompanied minors

There are no legislative arrangements in place for EU unaccompanied minors. These minors are not assigned a guardian and do not benefit from a special protection status.

The CGRS has complained about the fact that minors from EU Member States do not benefit from the appointment of a guardian and therefore often find themselves “lost” in the asylum procedure, lacking efficient legal protection.¹⁶⁰

Unaccompanied minors originating from EEA (European Economic Space) Member States have been excluded under article 5 from the benefit of the Guardianship Act on the following grounds: “problems with non-accompanied minors originating from one of these (EEA) countries can be resolved quite simply and rapidly through direct contact with the national authorities or diplomatic or consular representations of those countries, while (...) contacts with embassies or consulates of other countries are not sufficient and do not offer the possibility to find a solution for the child in short term”.¹⁶¹ In 2002 the EU existed only of 15 Member States.

However, these minors are not completely ignored¹⁶². In order to find a solution for this group of minors, the Circular Letter¹⁶³ of 2 August 2007 created a new service within the Guardianship Service for European UM in a vulnerable situation, namely SEMK/SMEV.¹⁶⁴ Not all European UMs

¹⁵⁹ Article 39/2, § 2, Aliens Act.

¹⁶⁰ CGRA, Annual Report 2007, http://www.cgvs.be/nl/binaries/Jaarverslag%202007_tcm127-20712.pdf, 30.

¹⁶¹ Parl.St. Kamer 2002-2003, doc nr. 50_2124/15, 23.

¹⁶² report of the Belgian EMN contact point on Policies on reception, return and integration arrangements for; and numbers of, unaccompanied minors in Belgium, July 2009, 50.

¹⁶³ Circular Letter of 2 August 2007 regarding unaccompanied European minors in a vulnerable situation, BS 17 September 2007.

¹⁶⁴ Dienst Signalement van niet-begeleide Europese minderjarigen in kwetsbare toestand/Service signalement des mineurs européens

are considered, just those in a 'vulnerable situation'. This means those in an irregular administrative or unstable social situation; in case of pregnancy, mental or physical handicap; victims of human smuggling or trafficking, and those in beggary.¹⁶⁵

In case e.g. the police encounter such a European UM, they will inform the SEMK/SMEV within the Guardianship Service. They will take a temporary charge of the EU UM, but this is not a guardianship. The UM will be placed in one of the Observation and Orientation Centres (OOC) (specifically set up for Ums) and sometimes referred to the Youth Welfare Services of the Communities; or to the non-profit organisation Foyer¹⁶⁶ in Brussels that has a specific service for young Roma; or to the specialised centres for victims of human trafficking.¹⁶⁷ For some European UMs there is however no specific reception and they are left on their own again. They will not have access to a guardian. The SEMK/SMEV tries to find a solution for these UMs. Temporarily taking charge of European UMs aims at protecting them against vulnerable situations, such as crimes and human trafficking.

Currently, there is a debate in Belgium on whether to include the European UMs in the definition of the Guardianship Act, so they would have the same treatment as the other UMs. Recommendations of NGOs and a proposition of law have been formulated in that sense. It is suggested to include these European UMs, at least as a provisional measure, in the definition. Additionally, Belgium wants to avoid that this becomes a pull-factor by wrongly suggesting that the appointment of a guardian implies a right of residence. In the interest of the European UM the return to his country of origin should be encouraged, in so far as this would not be manifestly against the best interests of the UM, and therefore bilateral readmission agreements could be negotiated. It is mentioned that Belgium and other countries have the duty to point out to the concerned Member States that they have the responsibility to provide sufficient reception of these UMs.¹⁶⁸

Meanwhile the ID counts more on co-operation between the EU Member States and the development of a network of contacts via the embassies. As it concerns Member States of the European Union, it should be easier to locate the family members in the country of origin. It is also mentioned that European UMs often come to Belgium to get education; therefore specific programs of the EU in those Member States could help tackle this problem. Meanwhile there is the awareness that specific initiatives should be developed in Belgium, as these UMs often disappear from the OOCs, and refuse the help offered to them.

non accompagnés en situation de vulnérabilité.

165 Vlaams minderheden centrum, Verblif in België van niet-begeleide minderjarige vreemdelingen. <http://www.vmc.be/vreemdelingenrecht/wegwijs.aspx?id=148#nbem>

166 Foyer: www.foyer.be/?lang=en&pageb=article&id_article=1353

167 UNICEF : de bescherming van niet-begeleide minderjarige vreemdelingen slachtoffer van kinderhandel en –smokkel. Verkennend onderzoek – samenvatting. November 2008.

168 Lanjri Nahima: wetsvoorstel tot wijziging van artikel 479 van de Programmawet (I) van 24 december 2004 met betrekking tot de voogdij over niet-begeleide minderjarige vreemdelingen. Belgische Senaat 4-578/1; 22/02/2008.

3.B.5 Suspension of removal measures for families with school going children in a situation of illegal stay¹⁶⁹

a. Definition

Families residing illegally in Belgium, with school going children under 18 years, can apply to be granted a suspension of the execution of a removal order until the end of the school year.

b. Legal framework, national policy and practical implementation

The general principle underlying this policy is the right to education as guaranteed by:

- the UN Convention on the Rights of Children (Articles 28 and 29);
- the ECHR (Article 2 Protocol 1);
- the ICESCR (Article 10);
- UDHR (Article 26);
- Article 24 of the Belgian Constitution.

The access to education of illegally staying children has been problematic in the past.¹⁷⁰ Core legislation on education did not require a legal residence status for having access to education. Given the uncertainty with the school authorities on the specific consequences of an illegal stay, more legal instruments have confirmed that the principle of the right to education does not depend upon having a legal residence status. Within the federal context, education is mainly regulated at Community level.

For example, the Flemish circular on the right of education for children without a legal residence status, explicitly states that “all children on the Belgian territory have the right to education”. An inscription in a school cannot be refused by the mere fact that the residence status of the parents of the child is irregular.¹⁷¹

A decree of the Francophone community subscribes to this principle in the same vein.¹⁷²

To give legal certainty to previous agreements that were made between the Ministry of Interior (ID) and the Community ministers for education, the ministerial circular of 29 April 2003 stipulates the modalities of a possible intervention of the police when executing a removal order which involves illegally staying children. For example, the police is discouraged to take post at schools in order to ‘capture’ children in a situation of illegal stay.¹⁷³

Moreover, reconnecting with the right to education, this circular also provides the possibility of

169 See more in S. BOUCKAERT, “Onderwijs voor minderjarige vreemdelingen zonder wettig verblijf: ontwikkelingen in regelgeving en rechtspraak”, T.O.R.B. 2007-2008, 387-405.

170 More information in BOUCKAERT, S., Documentloze vreemdelingen, Antwerpen, Maklu, 2007, 1007-1020.

171 Omzendbrief van de Vlaamse gemeenschap van 24 februari 2003 betreffende het recht op onderwijs voor kinderen zonder wettig verblijfsstatuut, <http://www.ond.vlaanderen.be/edulex/database/document/document.asp?docid=13382>

172 Décret de la Communauté Française du 30 juin 1998 – réglementation relative à l'accès aux établissements scolaires dans l'enseignement organisé ou subventionné (articles 20 à 24), BS 22 August 1998.

173 Omzendbrief van 29 april 2003 betreffende de verwijdering van gezinnen met schoolgaand(e) kind(eren) van minder dan 18 jaar – optreden van politiediensten in scholen, BS 13 June 2003.

granting a suspension of the removal order to families with school going children, in order to allow these children to finish their school year.

The circular does not give a right to a temporary residence status in order to finish the school year; it only limits itself to a mere suspension of the removal order.¹⁷⁴

c. Conditions

The circular only applies to families with school going children younger than 18 years who effectively attend school. proof of enrolment in the school is required.

Besides the minor school attending child, the following family members can benefit from the suspension:

- parent(s);
- cohabitating partner of the parent;
- cohabitating brothers and sisters who do not have an own family;
- cohabitating ascendants.

The circular only applies to removal orders which have been issued from the beginning of the Easter holidays until the end of the school year.

Suspension of the removal order is only granted until the end of the school year. If the children have a re-examination in August than the suspension can be prolonged until the end of the second examination period.

d. The assessment of the need for protection and evidence

The ID will assess whether the application fulfils the abovementioned conditions on a discretionary basis. The suspension of the removal order is a favour, not a right.

In 2007 there were 11 such applications, in 2008 17 and in 2009 29, originating from a wide range of countries. In about half of the cases the removal order was suspended.

e. Public order

The circular of 2003 does not make a specific mention of public order issues, but given that decision

¹⁷⁴ However there is jurisprudence where Courts of First instance have judged that on the basis of articles 3 and 28 of the UNCRC, or on the basis of art. 2 of the First protocol to the ECHR, in individual situations it can be a violation of the child's right to education when due to a removal order it is not longer able to follow the school courses. To protect the best interests of the child in these individual situations the courts judged that as a temporary measure, the removal order was to be annulled and a temporary residence permit to be granted. See Rb. Brussel 2 November 2004 (kort geding), [www.sdj.be](#); Rb. Brussel 13 May 2005 (kort geding), [www.sdj.be](#); Rb. Brussel 7 December 2004 (kort geding), [J.dr.jeun. 2006, 37-38](#); Rb. Brussel 31 May 2006, T. Vreemd. 2006, 427-428; Rb. Brugge 28 March 2007 (kort geding), T.Vreemd. 2007, 212 – this last judgment was however annulled by the Court of Appeal of Ghent, which stated that if the continuity of the studies of the children was endangered by the removal order, this was only due to the fact that the parents never follow up on the first removal order and stayed illegally Belgium. This is a decision that they took and which is their own responsibility – Gent 21 June 2007, T. Vreemd. 2007, 280.

making takes place on a discretionary basis, the ID can decide to exclude families from the benefit of the circular if they are danger to the public order or national security.

As stated above, the non-refoulement principle of article 3 ECHR remains directly binding upon the relevant Belgian authorities. Moreover, the provisions in the Aliens Act that deal with the removal measures indicate that the authorities when executing these measures must take into account “derogations defined in an international treaty or in national law”¹⁷⁵ or “more favourable provisions contained in an international treaty”¹⁷⁶. The prohibition of non-refoulement is absolute. In any case, there is no alternative protection status granted automatically if a person falls under the scope of article 3 ECHR.

f. Appeal possibilities

Against a removal order and its underlying refusal of entry or residence, an appeal of annulment can be introduced at the ALC.

This is an appeal of annulment, which means that the ALC can only examine the decision on its legality.¹⁷⁷ The appeal, which must be introduced within 30 days after notification of the decision, will not examine the substance of the application, nor will it have automatic suspensive effect. Thereto a separate appeal for stay of execution of removal measures must be lodged.

The appeals for annulment and stay of execution of the removal measures must be lodged in one and the same petition within 30 days after the notification of the contested decision.

The introduction of an appeal for stay of execution of the removal measures does not automatically suspend the removal measure. Only when the removal is stayed by the ALC, will the execution of the measure be suspended.

In case of extremely urgent necessity, the appeal for stay can be introduced separately from and prior to the appeal for annulment. This is for instance possible in the case that the foreign national will be subjected to a removal measure that can be executed at any time. (e.g. detention in a closed centre because of forced repatriation).

Moreover, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the tribunal of first instance.

3.B.6. Delay of departure / prolongation of declaration of arrival or temporary residence title

In certain cases delay of departure or an exceptional prolongation of a declaration of arrival (tourist/ business visit) or of a temporary residence permit are allowed.

¹⁷⁵ Article 3 Aliens Act

¹⁷⁶ Article 7 Aliens Act

¹⁷⁷ Article 39/2, § 2, Aliens Act.

Some of these cases are protection-related, for instance when:

- a foreign national cannot leave the country due to illness and/or treatment thereof or pregnancy
- a foreign national intends to marry another foreign national legally residing in Belgium or a Belgian national.

In these cases, removal from the territory would constitute a violation of respectively article 3 ECHR and article 8 ECHR.

This possibility is foreseen in the ministerial circular of 26 January 2004.¹⁷⁸

Proof is to be delivered in the form of a medical certificate or a public notice of the intended marriage.

The ID will discretionarily assess whether the application fulfils the necessary conditions.

The delay of departure or prolongation of the temporary residence permit is a favour, not a right. Against a negative decision an appeal of annulment can be introduced with the ALC or, if a fundamental human right is at stake, a petition for summary proceedings can be introduced at the court of first instance.

3.C. Minimum protection in reception policy and social policy: factors in consolidating possible claims to a residence status

In principle, foreign nationals illegally residing in Belgium do not have a right to social aid. However, Belgian social policy legislation does contain certain exceptions to this principle. Granting material or financial aid to foreign nationals without residence documents follows from case law which has stated that social aid cannot be denied to foreign nationals who cannot leave the country due to reasons or circumstances beyond their control.

Although in principle they do not draw any residence rights from these limited social rights, in some cases this situation can give rise to a consolidation of their applications to a residence status.

3.C.1. Urgent Medical Care as a minimum *minimorum* right¹⁷⁹

First and foremost, all undocumented foreign nationals have a right to “urgent medical care”. Under the law of 15 July 1996 modifying the Aliens Act as well as the Law of 8 July 1976 regarding the Public Centres for Social Welfare, undocumented foreign nationals cannot longer benefit from the social services and social aid provided by the Centre for Social Welfare. The only exception foreseen is ‘Urgent Medical Care’. This notion was introduced by the Law of 30 December 1992

¹⁷⁸ Not published: see http://www.vmc.be/uploadedFiles/vreemdelingenrecht/Wegwijs/verblijfsstatuten/Uitstel_van_vertrek/2004%2001%2026%20OB%20verlenging%20kort%20verblijf%20nl.pdf

¹⁷⁹ See more in S. BOUCKAERT, “Het recht op dringende medische hulp voor vreemdelingen zonder wettig verblijf: materieelrechtelijke en procedurele aspecten, de lege lata en de lege ferenda”, T. Vreemd. 2008, 6-25.

and the modalities were further established by the Royal Decree of 12 December 1996 concerning the provision of this Urgent Medical Care to illegally staying residents.¹⁸⁰

The Royal Decree of 12 of December 1996 defines 'Urgent Medical Care' as both preventative and curative aid. Therefore, 'Urgent Medical Care' refers to a wide variety of urgent care provisions, like an operation, childbirth an examination, physiotherapy, medication, etc. These treatments can be provided through ambulatory care as well as in a nursing institute; including the necessary aftercare. Since 1 July 2006 psychiatric hospitals and homes are included.

Urgent Medical Care must be differentiated from Emergency Medical Assistance. Emergency Medical Assistance is the assistance required immediately in case of an accident or illness. Emergency Medical Assistance is specifically regulated by another law and applies to everyone, including illegally staying residents.

Urgent medical care does not include the costs of food, clothing and housing.

The Public Social Welfare Centre will pay the costs of urgent medical care if three conditions are fulfilled:

- the person must be staying illegally in Belgium;
- the illegally staying person is needy or destitute and does not have the own necessary means to pay for the medical care; and
- a medical certificate must be presented wherein the urgent necessity of the care is established by a recognized care provider (e.g. general practitioner, specialist, ...).

3.C.2. Right to material aid

Certain categories of illegally residing foreign nationals have a more "expanded" right to aid and can receive material aid.

Material aid includes:¹⁸¹

- housing in a community centre;
- food;
- social, psychological and medical care;
- access to legal aid;
- help with voluntary return;
- right to education and professional training.

The beneficiaries are identified by the relevant Belgian legislation on the reception of asylum seekers and other categories of foreign nationals.

Belgian authorities have decided, when transposing the EU directive on reception conditions for asylum seekers, not to limit the benefit of material aid to asylum seekers but to grant this aid also

¹⁸⁰ BS 31 December 1996. The Royal Decree entered into effect on the 10th of January 1997.

¹⁸¹ Articles 16-32 of the Law of 12 January 2007 regarding the reception of asylum seekers and certain categories of foreign nationals, BS 7 May 2007.

to certain categories of legally¹⁸² and illegally residing foreign nationals.

Following categories of illegally residing foreign nationals are included:

- 1) Failed asylum seekers who have requested the suspension of removal measures due to school attending children.¹⁸³ The material aid ends when the request is not granted or when the suspension of the removal measure has ended.
- 2) Failed asylum seekers who cannot give heed to the removal order due to a pregnancy of more than six months.¹⁸⁴ The material aid ends maximum two months after giving birth.
- 3) Failed asylum seekers who cannot leave the territory because of medical reasons and consequently apply for a residence permit on the basis of article 9ter Aliens Act and who can prove that it is medically not possible for them to leave the open reception centre (through a medical certificate).¹⁸⁵
- 4) Children who are staying illegally in Belgium with their parents and where the Local Public Welfare Centre has determined that the parents are not able to provide for their children.¹⁸⁶

This material aid can only be provided in an open reception centre. The right to material aid belongs to the child, not his parents. However, both parents will also be received at the open reception centre. The following conditions must be fulfilled:

- the child must be minor than 18 years;
- the child and its parents must be staying illegal on the territory;
- there must be proof of the family relationship;
- the child must be found to be needy/destitute as a consequence of the fact that parents are not complying with their duty of maintenance or are not able to do so.

An application for material aid must be introduced at the Local Public Welfare Centre that will undertake a social inquiry into the family situation. If the conditions are fulfilled, the child and its parents will benefit from material aid in an open reception centre. This right will end on the moment that the child turns 18 years old.

This right to material aid for illegally residing children and their parents finds its origin in judgments by the Belgian Constitutional Court.¹⁸⁷ In its judgment of 22 July 2003 the Constitutional Court decided that Article 57, § 2 of the Law on the Public Welfare Centres, which limited the right to social assistance of illegally residing foreign nationals to solely "urgent medical aid", was in violation of the UN Convention on the rights of the child.

In its judgment the Court acknowledged a limited right to material aid to the illegally residing

182 For instance, foreign nationals who have been recognised as refugees have right to material aid up to two months after the recognition of the refugee status.

183 Article 7, § 2, 1° of the Law on reception. See previous chapter 3.B.5.

184 Article 7, § 2, 2° of the Law on reception. See previous chapter 3.B.6.

185 Article 7, § 2, 6° of the Law on reception. See previous chapter 3.B.1.

186 Articles 2, 3°, 652 and 60 of the Law on reception, as well as the Royal Decree of 24 June 2004 regarding the conditions and the modalities for providing material aid to a minor foreign national who is staying illegally in Belgium with his parents, BS 1 June 2004, as amended by the Royal decree of 1 July 2006.

187 Arbitragehof, nr. 106/2003, 22 July 2003. See more in S., BOUCKAERT, "Maatschappelijke dienstverlening voor minderjarige vreemdelingen in illegaal verblijf: een never ending story over de impact van mensenrechtenbescherming", T. Vreemd. 2005, 286-331.

children and their parents to be provided by the Public Welfare Centres under three conditions:

- the parents are not complying with their maintenance duty or are not able to do so;
- the material aid is necessary for the development of the child;
- the Public Welfare Centre will ascertain that the material aid only serves this purpose.

The Court clarified that the aid was limited to material aid and did not involve financial aid in order to prevent possible abuse by the parents. Moreover it underlined that this measure does not impede the execution of a removal order regarding the parents and their children.

- 5) Failed asylum seekers who cannot leave the territory and return to their country of origin due to circumstances beyond their control and who have introduced a request for suspension of the removal order.¹⁸⁸

In a previous ministerial circular of 26 April 2005 and in the explanatory memorandum of the Law on reception the following situations were identified as examples¹⁸⁹:

- when the political situation in the country of origin impedes every possibility of return;
- when the Belgian authorities cannot determine the nationality of the foreign national and consequently neither the country of origin to which the foreign national must be returned;
- when the authorities of the country of origin refuse to issue the necessary travel documents.

This instruction is a consequence of a judgment of the Court of Cassation of 18 December 2000 which stated that the exclusion of illegally residing foreigners from social assistance in Article 57, § 2 of the Law on the Public Welfare Centres, cannot apply to foreign nationals who due to circumstances beyond their control cannot return to their country of origin.¹⁹⁰ The foreign national must however prove this “force majeure” to the ID. In such case, the illegally residing foreign national benefits from a right to material aid until the request for suspension of removal measures has been refused or the suspension period has ended.¹⁹¹

- 6) Failed asylum seekers who cannot give heed to the removal order because they are the parent of a Belgian child and have introduced an application of authorization of residence on the basis of article 9bis Aliens Act.¹⁹² The right to material aid ends when the ID has taken a decision on the application for authorization of residence.
- 7) Failed asylum seekers who have signed a commitment of voluntary departure.¹⁹³ The right of material aid will last until departure, unless the departure is delayed due to the behaviour of the asylum seeker.

188 Article 7, § 2, 3° of the Law on reception. See previous chapter 3.B.6.

189 http://www.vmc.be/uploadedFiles/Vreemdelingenrecht/Wegwijs/Sociale_rechten/Maatschappelijke_dienstverlening/Omzend-brief%20bepaalde%20vreemdelingen.pdf and <http://www.fedasil.be/home/attachment/i/13558>

190 HvC 18 December 2000, nr. S.98.0010.F/1.

191 See in this context also the judgment of the Constitutional Court stating the lack of legislation on granting a right of residence to recognized stateless persons, puts such persons in a discriminatory situation undermining the exercise of their fundamental rights, like the right to material aid. GwH, 17 December 2009, nr. 198/2007.

192 Article 7, § 2, 4° of the Law on reception. See previous chapter 3.B.2.

193 Article 7, § 2, 5° of the Law on reception.

3.C.3. Right to financial aid in case of a “medical force majeure”

Foreign nationals who have never applied for asylum or who have never benefitted from a right to material aid, and who are staying illegally on the territory, must be given financial aid when due to medical reasons it is absolutely impossible for them to obey a removal order. This principle was set out, on discrimination grounds by the Constitutional Court.¹⁹⁴ Later on, the Court clarified that the impossibility to receive an adequate treatment in the country of origin or the fact that this country does not take back its nationals, also constitute a case of “medical force majeure”.¹⁹⁵

Financial aid is usually given by the local Public Welfare Centres through the monthly payment of the equivalent of the guaranteed means of subsistence under Belgian social security law.

3.C.4. Conclusions

In all of the above described situations, protection is mainly given here to vulnerable foreign nationals from a social-rights perspective or based on the principle of the ‘best interest of the child’. However, this social protection does not establish any sort of residence status.

Nevertheless, the combination of certain elements can become building stones for an eventual claim to a residence status, for instance an application for humanitarian regularisation or a medical residence permit.

This can be the case in the event of:

- suspension of removal order for illegally staying families with school going children and the right to material aid for illegally staying children and their parents or failed asylum seekers with school attending children;
- recognition of statelessness and the right to material aid because inability to return to country of origin;

More specifically, administrative policy and practices followed by the ID (as well as the federal government agreement of March 2008) provide, under article 9bis Aliens Act, the possibility of regularization of residence for:

- persons in a protracted asylum procedure of 3 years (families with school going children) or 4 years (singles, other families);
- persons in a pressing humanitarian situation;
- persons who can prove their durable local integration (i.a. through the education of their children).

In this sense, social protection (against an internal action or treatment) can contribute to the consolidation of a certain claim to residence status.

¹⁹⁴ GwH 30 June 1999, nr. 80/99.

¹⁹⁵ GwH 21 December 2005, nr. 194/2005.

4. PROCEDURES FOLLOWED AND RIGHTS PROVIDED

4.A. Asylum policy

4.A.1. Temporary protection

As stated above, a detailed procedure for the granting of the EU temporary protection status has not been elaborated yet at Belgian level. It is only known that such an application will have to be introduced at the ID that will examine the application on its merits.

With regard to the granting of national temporary protection status, such a procedure will only be established once there is a need for it.

4.A.2. Refugee status and subsidiary protection

a. Competent authorities

1. Immigration Department (or: ID) (*Office des Etrangers/Dienst Vreemdelingenzaken*)

The ID has an administrative function and a decision making function. The ID exercises a mainly administrative supportive function with regard to asylum applications.

The ID is responsible for the administrative processing of the application, which includes

- registration of the application;
- collection of fingerprints;
- taking of photographs;
- X-ray of lungs;
- taking down a declaration in order to establish identity, travel route and origin;¹⁹⁶
- filling in of a questionnaire in order to establish the reasons for fleeing as well as the possibility to return to the country of origin.¹⁹⁷ This questionnaire gives the CGRS an opportunity to prepare its examination and interview of the claimant.

The ID will use the declarations for the exercise of its decision making authority. The ID can take three types of decisions:

- on the basis of the Dublin II regulation, determine if Belgium is the country responsible for the examination of the application;¹⁹⁸

¹⁹⁶ Article 51/10 Aliens Act

¹⁹⁷ Article 51/10 Aliens Act

¹⁹⁸ Article 51/5 Aliens Act

- examine if subsequent applications by an asylum applicant can be taken into consideration or not;¹⁹⁹
- exclude an applicant from the asylum procedure if there are serious reasons of danger to the public order or national security. If so, the CGRS must give an advice with regard to the risks in case of refoulement.²⁰⁰

The fact that the ID has since the introduction of the new asylum procedure in 2007 no longer a role in the determination of the refugee status/subsidiary protection status has been somewhat compensated for by the following elements:

- the Minister competent for asylum and migration has a positive injunction right: in the case of a sudden mass influx, the ID can request the CGRS to treat these applications within a period of 15 days.²⁰¹
- during the first ten years of stay, the Minister or the ID can request the CGRS to withdraw the refugee status obtained on the basis of fraud.²⁰²

The asylum section of the ID consists of a:

- Bureau for interviews and decisions;
- Bureau for registration and administration;
- Dublin bureau;
- Printrak bureau (fingerprints collection).

2. *Office of the General Commissioner for Refugees and Stateless Persons (CGRS) (Commissariat générale aux réfugiés et apatrides / Commissariaat-generaal voor de Vluchtelingen en de Staatlozen)*

The CGRS has become the sole determining authority with regard to grounds for asylum applications.

The CGRS is competent to²⁰³:

- grant refugee status or subsidiary protection status;
- refuse refugee status or subsidiary protection status on substance grounds or formal grounds (so called: technical refusals);
- apply cessation and exclusion clauses or to revoke refugee or subsidiary protection status;
- decide not to consider an application introduced by an EU applicant;
- confirm the refugee status of a refugee, recognized in another country (transfer of refugee status);
- issue civil status certificates for recognized refugees.

199 Article 51/8 Aliens Act

200 Article 52/4 Aliens Act

201 Article 52/2, § 2, 3°, Aliens Act

202 Article 49, § 2, Aliens Act

203 Article 57/6 Aliens Act.

3. Council for Aliens Law Litigation (*Conseil du Contentieux des Etrangers / Raad voor Vreemdelingenbetwistingen*)

This Council is responsible, among others, for examining appeals against decisions taken by the CGRS.

It can confirm, reform or annul the CGRS decisions.

b. The asylum procedure

A schematic overview of the procedure can be found in annex 1.

1. Applications

In compliance with the Aliens Act, applications for asylum may be submitted at the border or in the territory. The authority in charge of receiving these applications is the ID of the Ministry of the Interior.

If the application is submitted at the border – in practice, at the international airports or sea-ports – the border police official must record the applicant's basic biographical data and the circumstances of his arrival, including itinerary. That information is forwarded to the ID (article 50 ter of the Aliens Act).

Applications within the territory must be made directly to the ID or, if the person is detained, to the authority in charge of the prison or detention centre. At the latest, these applications must be submitted within eight working days following arrival in Belgium (Articles 50 and 51 of the Aliens Act). If the asylum applicant has a permit to stay in Belgium he must submit the claim before the authorization expires (Article 51 of the Aliens Act).

The ID registers the application, and investigates, as per the EU Dublin Regulation, which country is responsible for the treatment of the application. If another country is deemed to be responsible, the ID will contact that country with a view to the transfer of the asylum seeker. If Belgium is found to be responsible, the application will be transmitted to the CGRS for status determination.

2. Subsequent applications

Repeated applications will only lead to a renewed procedure if the application contains new elements which occurred after the first application. The ID will first investigate whether there are new elements in the application before forwarding it to the CGRS.

3. Procedure before the CGRS: first instance

- In country applications

The examination of the content and substance of the application starts at the CGRS, an independent and federal institution. All applicants are heard, at least once, by staff of the CGRS. It is the only stage in the asylum procedure where the applicant can fully present his asylum application in a personal interview. After the interview the CGRS examines whether the claim is credible

and whether the applicant can be granted protection.

In addition to granting refugee status, the CGRS can also grant subsidiary protection. The procedure for obtaining refugee status or subsidiary protection is a single procedure.

Negative decisions are provided with written reasons. Decisions granting refugee or subsidiary protection statuses are never motivated which makes it difficult to assess the scope of the application of the criteria for refugee or subsidiary protection. However, in positive decisions granting subsidiary protection, the reasons for not awarding the refugee status are given.

The length of the procedure has not been prescribed in the Aliens Act but the CGRS has committed itself to treat an application within a short period, guaranteeing quality and efficiency. The CGRS also gives priority to applications of minors and applications for which the legislation prescribes that they have to be treated in an accelerated and prioritized manner. The prescribed time period of these accelerated and prioritized procedures can vary from 2 months to 15 days to 5 days.

In accordance with Article 52 Aliens Act, an application may be examined with priority and within a period of two months (calendar days) if an asylum applicant attempts to enter or has entered the country without the necessary entry documents and:

- the application is considered to be deceptive;
- the motives for the application are unrelated to the criteria for qualification for international protection;
- the application is considered manifestly unfounded because the asylum applicant does not show substantial grounds for believing that there is a well founded fear for persecution or a real risk of serious harm;
- the applicant voluntarily withdrawn himself from the asylum procedure at the border;
- the applicant did not appear on the scheduled date for the personal interview and did not justify the absence within 15 days of that date or has failed without good reason to provide information within a month of the request, or;
- the applicant has not fulfilled his/her duty to report at the designated reception centre for a period of 15 days.

Article 52/2 Aliens Act permits the examination of certain applications in an even shorter time frame of 15 calendar days. This may apply to applications by applicants who:

- are detained in closed centres at the border (border procedure) or in-territory
- are in prison serving a sentence
- are considered to pose a danger to public order or national security

and where the Minister requests that an applicant's application be examined within 15 days in the context of a mass influx of applicants from a particular country where it is suspected that there is a manifest improper use of the asylum procedure or that a network of smugglers is active.

Under *Article 57/6, § 2, of the Aliens Act*, the applications of EU nationals may be prioritised and examined within five working days if the statement of the applicant does not raise issues which are relevant to qualification for international protection.

The CGRS may occasionally decide to freeze the decision making with regard to certain categories of claims. This is mainly done when the situation in the country of origin has seriously evolved and where the CGRS needs time to assess the implications. If asylum cases are “frozen” – this will not take more time than a couple of days, maximum a couple of weeks.²⁰⁴

- Applications by resettled refugees

Belgium does not have a formalised resettlement procedure. However, Belgium has undertaken a pilot project, in the framework of the JHA Council decision of 13 February 2009, to resettle Iraqi refugees, mainly women-at-risk and their children, located in refugee camps in Syria and Jordan, as well as Palestinian refugees from the al-Tanf camp at the Syrian-Iraq border.

These refugees were referred by UNHCR that made a first selection.

CGRS case managers went on site to make a final selection. For this selection the same criteria for refugee status were applied as in the national asylum procedure. This selection was approved by the competent Minister. The Ministry of Foreign Affairs delivered the necessary identity and travel documents. Once the refugees arrived in Belgium, they still needed to introduce a formal asylum application, which received a pro forma positive decision from the CGRS.

As already mentioned, Belgium responded in 2011 to a request made by UNHCR to resettle a group of 25 refugees originating from the Shousha camp in Tunisia. This group mainly consisted of families with children and some single persons. They came from Eritrea or DR Congo and lived in Libya for a long time, which they had to flee because of the insurrections started in February 2011.

4. Appeals to the Council for Aliens Law Litigation (ALC)

Appeals against negative decisions by the CGRS lie with the ALC, a specialized administrative tribunal. Appeals in status determination cases automatically stay the execution of removal orders. A further appeal lies with the Council of State on leave of appeal by the Council that will filter out appeals that do not raise important issues of law.

The appeals procedure against decisions of the CGRS before the ALC is an entirely written procedure, necessitating legal assistance. The ALC, which has been in operation since 1 June 2007 can either confirm a negative decision of the CGRS, overturn it, thereby granting refugee status, or quash the decision and refer the case back to the CGRS for further investigations. The ALC has no authority to conduct investigations into any claim; it has to decide on the basis of the case-file presented.

The ALC is also the appeals body against decisions of the ID concerning the application of the Dublin II mechanism as well as against decisions of the ID not to take a subsequent application into consideration, and against other decisions concerning removal from the territory. This is an annulment procedure, which is limited to a review of the legality of the decisions of the ID. This is also an entirely written procedure, necessitating legal assistance.

Finally, the ALC is the appeal body against decisions of the CGRS not to take into consideration

²⁰⁴ Such a measure was taken with regard to the situation in Guinea. Interview with the CGRS on 19th October 2009.

asylum applications introduced by EU-citizens, which is an annulment procedure. The annulment procedure at the ALC does not have automatic suspensive effect.

5. *The particular case of unaccompanied minor asylum seekers*

In principle, each non-EU unaccompanied minor applying for asylum will have a guardian appointed to him, who will be able to inform the minor on the procedure and the interview. The guardian and legal representative are, in practice, also present during the CGRS hearing. There is a legislative proposal which will formalize this practice and states that the CGRS can not interview the unaccompanied minor when the legal guardian under Belgian legislation is not present.

The application of the unaccompanied minor will be treated in an accelerated manner, but this makes no difference in terms of procedural guarantees in law nor in practice. The CGRS shall, in principle, take an asylum decision within 15 days. The CGRS case manager, who will interview the non accompanied minor and examine his application, will always be an official who received specialised training in the interviewing of unaccompanied minors and the examination of such case files. The unaccompanied minor will be interviewed in a hearing room specifically suited for minors.

The CGRS has complained about the fact that minors from EU Member States do not benefit from the appointment of a guardian and therefore often find themselves lost in the asylum procedure, lacking efficient legal protection.²⁰⁵

Minors originating from the EEA (European Economic Area) have indeed been excluded under article 5 from the benefit of the Law of 24 December 2002. This exclusion was motivated on following grounds: “problems with non-accompanied minors originating from one of these (EEA) countries can be resolved quite simply and rapidly through direct contact with the national authorities or diplomatic or consular representations of those countries, while (...) contacts with embassies or consulates of other countries are not sufficient and do not offer the possibility to find a solution for the child in short term”.²⁰⁶ However, there exists a pilot project at the Ministry of Justice for non-accompanied European minors in a vulnerable situation. The Ministry of Justice aims at guaranteeing adequate social counselling and support to the minor, but this does not include the appointment of a guardian. The European non-accompanied minors equally benefit from free legal assistance.

Unaccompanied minors applying for asylum at the border will not be held in the regular closed centre, but will be transferred to separate closed “observation and orientation centres”, which are specifically set up for unaccompanied minors. There are two of these centres and they are located near Brussels International Airport. The accelerated asylum procedure applies to unaccompanied minor asylum seekers while held in the observation and orientation centres.²⁰⁷

205 CGRS, Annual Report 2007, http://www.cgvs.be/nl/binaries/Jaarverslag%202007_tcm127-20712.pdf, 30.

206 Parl.St. Kamer 2002-2003, doc nr. 50_2124/15, 23. Please note that in 2002 the EU existed only of 15 Member States.

207 Reading article 41 of the Reception Law, together with article 52/2, § 2, 1° and article 74/8, § 1 of the Aliens Act.

The purpose of the orientation and observation centre is to identify the most suitable reception structure available for the minor. (Royal Decree of 9 April 2007 regarding the structure and management of the observation and coordination centre, BS 7 May 2007).

The unaccompanied minor asylum seekers are in principle held for 15 days in these centres, which can be prolonged up to 30 days. During this time, the minors are not allowed to enter the territory. They are confronted with certain problems regarding access to legal assistance and the gathering of elements to support their claim. These problems are sometimes aggravated due to the minor's age and vulnerable profile.²⁰⁸

Unaccompanied minors who are granted refugee status or subsidiary protection status enjoy the same rights and benefits as adults.

Unaccompanied minors, who fail in their asylum application, can benefit from an alternative procedure aimed at finding a durable solution.

6. Removals

Failed asylum seekers without another residence status are ordered to leave Belgium and failing to do so, may be deported. There has been category of asylum applicants for which the ID systematically deferred removal orders.

A number of circulars dated 25 August 2003, 24 February 2004, 24 August 2004, 9 February 2005, 1 September 2006 and 1 April 2007 stated that the orders to leave the territory, given to Afghan nationals who had introduced an asylum application before 1 January 2003, were to be temporarily suspended finally until 1 March 2006.²⁰⁹

This practice can be understood as a general acknowledgment of non-refoulement vis-à-vis failed Afghan asylum seekers, in a time where subsidiary protection was not yet in force in Belgian legislation.²¹⁰

208 For more detailed on unaccompanied minors and the asylum procedure, please consult the report of the Belgian EMN contact point on "Policies on reception, return and integration arrangements for; and numbers of, unaccompanied minors in Belgium", July 2009.

209 These failed asylum seekers benefited equally from the granting of a temporary work permit, see relevant circulars of 6 October 2003, 8 March 2004, 3 September 2004, 14 March 2005, 31 August 2005, 23 May 2006 and 26 October 2006.

210 See more in S. BOUCKAERT, Documentloze vreemdelingen, Antwerpen, Maklu, 2007, 444-446.



4.A.3. Rights

Asylum seekers + frozen case files	Temporary protection	Refugee status	Subsidiary protection status	Advice on removal orders + humanitarian clause	Suspension of removal (Afghan case)
<p>Length of authorisation to reside</p> <p>Until a final decision has been taken, asylum seekers have a limited right of temporary residence (certificate of immatriculation type A valid for 3 months)</p>	<p>Temporary residence permit of one year</p>	<p>Refugees immediately receive a permanent residence permit.</p> <p>After five years of regular and uninterrupted stay to be counted from the day of the introduction of the asylum application:</p> <p>right of establishment</p>	<p>First five years: Temporary residence permit, valid for one year</p> <p>After five years, to be counted from the day of the introduction of the application: Permanent residence permit</p> <p>After five years of regular and uninterrupted stay, to be counted from the day of the introduction of the application, and after having obtained a permanent residence permit: Right of establishment</p>	<p>Occasionally, the deadline included in the order to leave the territory can be prolonged</p>	<p>The order to leave the territory was suspended</p>

Renewal

The certificate is renewed until a final decision is taken

Temporary residence permit is automatically prolonged with six months for a second period of one year, unless the relevant Council decision does not end the temporary protection earlier.

The total period of two years can be prolonged with a new period of maximum one year if there is a new Council decision.

None, but the refugee status can at all times be revoked if the exclusion clauses apply.

The status can be revoked if the status was granted on misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of refugee status, as well as when personal behaviour indicates that the foreign national does not fear persecution.

Finally the status can also be ended if the cessation clauses apply.

First five years: temporary residence document is valid for one year and must be renewed each year.

During this period of temporary residence, the status can be revoked if the exclusion clauses apply; or ended if the cessation clauses apply.

The status can furthermore be revoked during the first ten years of residence, if the status was granted on misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of refugee status, as well as when personal behaviour indicates that the foreign national does not fear persecution.

n/a

The suspension of the removal orders was prolonged several times on the basis of ministerial instructions

Naturalisation	no	no	<p>After two years of regular and uninterrupted residence (to be counted from the date of the introduction of the asylum application), refugee can apply for naturalisation, which is a favour bestowed by the Belgian Parliament.</p> <p>After seven years of regular and uninterrupted residence and after having obtained a permanent residence permit, these persons can obtain the Belgian nationality by putting forward a declaration of nationality</p>	<p>After three years of regular and uninterrupted residence, persons enjoying subsidiary protection status can apply for naturalisation, which is a favour bestowed by the Belgian Parliament.</p> <p>However, practice shows that the Parliament will only grant naturalisation once permanent residence has been obtained – after 5 years.</p> <p>After seven years of regular and uninterrupted residence and after having obtained a permanent residence permit, these persons can obtain the Belgian nationality by putting forward a declaration of nationality</p>	no	no
Long-term residence status	no	no	Excluded from LTR status	Excluded from LTR status	no	no

	Asylum seekers + frozen case files	Temporary protection	Refugee status	Subsidiary protection status	Advice on removal order + humanitarian clause	Suspension of removal (Afghan case)
Medical assistance and social benefits	Asylum seekers have a right to medical assistance and care but this is limited to what is necessary in order to allow a dignified level of living - right to material aid.	Access to medical care, including the right to a medical insurance by registering with a health insurance provider. During temporary stay: entitled to social aid provided by the Public Social Welfare Centres.	Access to medical care, including the right to a medical insurance by registering with a health insurance provider. Entitled to social aid and state benefits, such as family benefits	Access to medical care, including the right to a medical insurance by registering with a health insurance provider. First five years – temporary stay: entitled to social aid provided by the Public Social Welfare Centres. After five years – permanent stay: Also entitled to state benefits, such as family benefits	Failed asylum seekers benefit in some instances from a right of material aid in an open reception centre. They can obtain limited medical assistance through the centre. In case these foreign nationals do not benefit from a right of reception, they still have a right to 'urgent medical assistance'.	In some cases these failed asylum seekers benefit from a right of reception in an open reception centre. They can obtain limited medical assistance through the centre. In case these foreign nationals do not benefit from a right of material aid, they still have a right to 'urgent medical assistance'.
Education	Access to primary and further education – the right to education does not depend on legal residence status	Access to primary and further education.	Access to primary and further education	Access to primary and further education	Access to primary and further education	Access to primary and further education

Family reunification

Right to family reunification with following members:

- husband or wife
- registered partner
- children younger than 18 years

Family members receive a temporary residence permit valid for the same amount of time as the one of the main beneficiary.

Right to family reunification with following family members:

- husband or wife
- partner
- children younger than 18 years

who lived together with the main beneficiary before the events leading to the mass influx and who were dependent on the beneficiary.

Family members receive temporary residence permit for the same duration as the main beneficiary

Right to family reunification with following family members:

- husband or wife
- partner
- children younger than 18 years

Conditions to be fulfilled:

- sufficient housing
- health insurance in respect of all risks normally covered for Belgian nationals.

Conditions do not apply if the family relationship existed before the arrival in Belgium and if the request for family reunification was introduced in the year following the decision of recognition of refugee status.

However the Minister

Right to family reunification (husband/wife, registered partner, children minor than 18 years) but must prove sufficient housing and health insurance in respect of all risks normally covered for Belgian nationals.

Family reunification also applies to handicapped dependent children over 18 years, but in this case proof of stable, regular and sufficient means of existence is required.

Family members receive a temporary residence permit valid for the same period as the one of the main beneficiary.

When the main beneficiary has obtained permanent residence, his family

n/a

n/a

	<p>can require applying the conditions if family reunification would be possible in another country, with which the refugee has a particular relationship.</p> <p>Handicapped children over 18 years can also benefit from family reunification but in this case the conditions always apply. The conditions never apply in the case of reunification of a refugee, younger than 18 years, and a former non-accompanied minor asylum seeker, with his parents.</p> <p>Family members receive a temporary residence permit, valid for three years, which is afterwards replaced by a permanent residence permit.</p>	
<p>members will obtain a temporary residence permit valid for three years which afterwards is replaced by a permit of permanent residence.</p>		

Access to the labour market	Yes, the asylum seeker is awarded a work permit C if he already has spend six months in the asylum procedure	During temporary stay: need a work permit (type C, annually renewable, valid for any profession, obtained with few formalities), as well as a 'professional card' for purposes of self-employment	Yes – exempted from work permit and professional card	First five years – temporary stay: need a work permit (type C, annually renewable, valid for any profession, obtained with few formalities), as well as a 'professional card' for purposes of self-employment After five year – permanent stay: exempted from work permit and professional card	n/a	n/a
Travel document	n/a	n/a	Refugees can obtain a travel document for refugees	During the first five years of temporary residence, the foreign national must apply for travel documents at the embassy of the country of origin. From the moment that a permanent stay has been obtained (after five years) beneficiaries are entitled to a special travel document for foreigners who cannot obtain a passport from their own authorities.	n/a	n/a

4.B. Migration policy

4.B.1. Residence permit on medical grounds

a. Procedure

The procedure is characterised by its formal and written nature.

1. Introduction of the application

An application for residence permit on medical grounds must be sent directly to the ID by registered mail and must include the required documents and proof.²¹¹

2. Admissibility phase

The application must at least a number of elements.²¹² If these elements are not forwarded, the application will be declared inadmissible.

- Proof of identity and nationality

Originally, an identity document or national passport was required with exception made for:

- asylum seekers who have not yet received a final decision on their application;
- asylum seekers who introduced an administrative appeal of annulment at the Council of State which has been declared admissible;
- the foreign national who prove that it is impossible for him to obtain identity documents in Belgium.

If a foreign national could not bring forward an identity document or prove the impossibility to obtain identity documents, his application would be declared inadmissible.

However, this requirement has been judged too strict by the Constitutional Court. The Court has listed other kinds of proof that the ID must accept regarding identity and nationality:

- identity and nationality can be proved sufficiently and satisfyingly by another way than the presentation of an identity document;
- each document of which the authenticity cannot be discussed, must suffice as proof of identity;
- it is possible, as is the case with asylum applicants, to establish his identity without requiring that the applicant possesses an identity document.²¹³

Legislation was modified accordingly.²¹⁴ It is now accepted that identity is proven sufficiently when the applicant is able to present a document that fulfils following cumulative conditions:

- it contains the full name, the place of birth, date of birth and nationality of the applicant;

²¹¹ Point D of the ministerial circular of 21 June 2007 regarding modifications in the legislation on the residence of foreign nationals as a consequence of the entry into force of the law of 15 September 2006, BS, 4 June 2007.

²¹² Article 7 of the of the Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006, BS, 31 May 2007

²¹³ GwH 26 November 2009, nr. 193/2009, B.5.3.

²¹⁴ Art 9ter, § 2, Aliens Act

- it is issued by a competent authority in accordance with international private law
- it allows the establishment of a physical link between the holder of the document and the applicant
- it has not been drawn up solely on the basis of declarations by the applicant.

Identity can also be established by presenting a combination of documents which taken together contain the several constitutive elements of identity as explained above.

An exception for the applicant who proves that it is impossible for him to obtain such documents in Belgium is no longer foreseen in the new legislation.

Any applicant who is not able to prove identity according to the new rules, will receive a decision of inadmissibility. However, if his medical situation is serious, he will not be removed as that would constitute a violation of article 3 ECHR.²¹⁵ He will however not be able to obtain a residence status.

- A medical certificate

A standard obligatory medical certificate must be filled in.²¹⁶ A physician may not refuse to deliver such a certificate. The ID is not allowed to perform a medical assessment in the admissibility phase.²¹⁷

- Any other element of information of proof with regard to the illness of the foreign national at the moment of his application

What is meant by this description are all useful information elements with regard to the availability and accessibility of the medical care in the country of origin or habitual residence.

- The address of residence in Belgium.

The application may be done either in Dutch, French or German.

The application may not be based on elements which should have been invoked earlier during an asylum procedure or in an application for a residence permit on humanitarian grounds on the basis of article 9bis. If there are no new elements, the application on the basis of article 9ter will be declared inadmissible.²¹⁸

Medical elements which were invoked during an earlier asylum procedure but which do not form grounds for the recognition of refugee or the granting of subsidiary protection status (e.g. because there is no link with one of the five persecution grounds or because this is not a case of inflicted harm), can however be used again in an application for residence permit on medical grounds.

²¹⁵ Explanatory memorandum to the law of 15 September 2006 amending the Aliens Act, Parl. St. Kamer 2005-2006, nr. 51-2478/001, 35

²¹⁶ Art. 9ter, § 1, Aliens Act.

²¹⁷ RvV 30 April 2009, nr. 26.762.

²¹⁸ Article 9ter, § 3, Aliens Act.

3. Control on residence and identity²¹⁹

If the application fulfils all prior admissibility criteria, the ID will ask the commune of residence to execute a check on the effective residence and the identity and nationality of the foreign national. The commune will ask the local police to visit the applicant at the address mentioned in the application and will ask for the original identity documents. If the foreign national does not live at this address or if the original identity documents cannot be shown, the application will be declared inadmissible. When the place of residence and identity are established, the foreign national will receive a temporary residence permit valid for three months.

4. Examination on the merits

A medical officer of the ID will, on the basis of the case file, make an assessment of the risk and the possible treatment in the country of origin. The medical officer can examine the foreign national but is under no obligation to do so. This only done if the medical evidence already presented is not clear. If the foreign national refuses to be examined by the medical officer, his temporary residence permit can be revoked.²²⁰

The medical officer can also request the advice of external medical experts.²²¹ The medical expert must give his advice within 30 days. This period can be prolonged with another 30 days.

The case manager of the ID will take a decision on the basis of the advice of the medical officer and other elements, such as considerations of public order and national security.

5. Residence status

- At the moment of introduction of the application

The introduction of an application for a residence permit on medical grounds does not change the residence status of the foreign national as long as there has not been a decision on the admissibility. However, the ID cannot remove the foreign national at this stage if his medical condition entails a real risk of inhuman or degrading treatment upon return (article 3 ECHR) and if this concern was not appropriately addressed and motivated in the removal order of the ID.

- When the application has been declared admissible

If the application has been found admissible and the residence and identity control turned out to be positive, the foreign national will receive a temporary residence permit valid for three months which can be prolonged three times, each time for a period of three months. After a year, this temporary residence permit will be prolonged every time with one month.²²²

²¹⁹ Point D of the ministerial circular of 21 June 2007 regarding modifications in the legislation on the residence of foreign nationals as a consequence of the entry into force of the law of 15 September 2006, BS 4 June 2007.

²²⁰ Article 7, § 2, of the Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006, BS 31 May 2007

²²¹ Article 4 of the Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006, BS 31 May 2007

²²² Point D of the ministerial circular of 21 June 2007 regarding modifications in the legislation on the residence of foreign nationals as a

- When the application has been declared inadmissible

Case law from the ALC has stated that in this case no removal order can be given to the foreign national without the authorities examining and motivating why this removal measure does not entail a real risk of inhuman or degrading treatment with regard to the medical condition of the applicant.²²³

- When the application is well founded
- A temporary right of residence

The foreign national will receive a temporary residence permit valid for at least one year.²²⁴

The foreign national must ask for renewal between the 45th and 30th day before the expiry of the validity of the permit.

- A conditional right of residence

The ID can at all time revoke the right of residence if it finds that the medical grounds which were the reason for the granting of this protection status, are not present any more.²²⁵

Such a revocation can only take place if the state of health has drastically and durably improved. A temporary or limited improvement in health does not suffice to revoke the right of residence.

If the right of residence is revoked, the foreign national will also receive a removal order.

Against the revocation of the residence permit, an appeal for annulment can be introduced at the ALC which does not stay the execution, but a separate appeal for the stay of execution of the removal measures can be lodged.

- Permanent right of residence after five years

A foreign national who after five years still benefits from this protection status, will be granted a permanent right of residence.²²⁶

The starting point for this period is the day of the introduction of the application, which is prior to the granting of the status.

This permanent residence permit is valid for five years and will be renewed every five years. An improvement in the health situation will no longer be of influence on the right of residence.

During the first 10 years of residence, the residence can be terminated if the foreign national has obtained this right of residence on his misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of this protection status.²²⁷ A removal order will consequently be issued.²²⁸

consequence of the entry into force of the law of 15 September 2006, BS 4 June 2007.

223 RvV 25 July 2008, nr. 14.397.

224 Article 8 of the Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006, BS 31 May 2007.

225 Article 13, § 3, 2°, Aliens Act and article 9

226 Article 13, § 1, Aliens Act.

227 Article 13, §2bis, Aliens Act and article 13, § 5, Aliens Act

228 Article 10 of the Royal Decree of 17 May 2007 establishing the modalities of execution of the law of 15 September 2006, BS 31 May 2007.

b. Rights

Residence permit on medical grounds	Introduction of application	Admissible	Founded – first five years of residence	Founded – after five years of residence
Length of authorization to reside	Introduction of application gives no right of residence, only guarantee of non-refoulement under art. 3 ECHR	Temporary residence permit valid for 3 months	Temporary residence permit valid for one year	Permanent residence permit valid for 5 years
Renewal	No	During examination of application, residence permit can be prolonged three times, each time for a period of three months, afterwards it will be prolonged monthly.	The medical grounds which were the reason for the granting of this protection status must still be present. If there is a drastic and durable improvement in the health situation, the permit will not be prolonged	Automatic renewal – however permit can be revoked during the first 10 years of residence when it was obtained on the basis of misrepresentation or omission of facts, or on the basis of false declarations, false or falsified documents, which were decisive for the granting of this protection status
Long-term residence status	No	No	No	When in possession of a permanent residence permit and after a regular and uninterrupted residence of five years, the foreign national can apply for long-term residence status if he proofs the following: - stable, regular and sufficient means of existence for the foreign national and his family members in

				<p>order to prevent recourse to the social assistance system</p> <ul style="list-style-type: none"> - health insurance in respect of all risks normally covered for Belgian nationals
<p>Naturalisation</p>	<p>No</p>	<p>No</p>	<p>After three years of regular and uninterrupted residence, the victim can apply for naturalisation, which is a favour bestowed by the Belgian Parliament – but in practice this is only granted once permanent residence has been obtained.</p>	<p>After three years of regular and uninterrupted residence, the victim can apply for naturalisation, which is a favour bestowed by the Belgian Parliament.</p> <p>After 7 years of regular and uninterrupted residence and after having obtained a permanent residence permit, this person can obtain the Belgian nationality by putting forward a declaration of nationality</p>
<p>Medical assistance and social benefits</p>	<p>Depending on prior residence status: Illegal stay: right to urgent medical care Failed asylum seeker: right to material aid when proof of medical impossibility to leave the reception centre. Legal stay: keeps social rights attached to that residence status</p>	<p>Right of access to medical care. Right to social aid provided by the Public Social Welfare Centres which includes the payment of medical costs.</p>	<p>Access to medical care, including the right to a medical insurance by registering with a health insurance provider. Entitled to social aid provided by the Public Social Welfare Centres.</p>	<p>Access to medical care, including the right to a medical insurance by registering with a health insurance provider. Besides social aid also entitled to state benefits, such as family benefits.</p>

Education	Access to primary and further education	Access to primary and further education	Access to primary and further education	Access to primary and further education
Access to the labour market	No	Requirement of a work permit (type C, annually renewable, valid for any profession, obtained with few formalities), or professional card for purposes of self-employment	Requirement of a work permit (type C, annually renewable, valid for any profession, obtained with few formalities), or professional card for purposes of self-employment	Exempted from work permit and professional card
Travel	No	No	No	No
Family reunification	No	No	Right to family reunification (husband/wife, registered partner, children minor than 18 years) but must prove sufficient housing and health insurance in respect of all risks normally covered for Belgian nationals. Family reunification also applies to handicapped dependent children over 18 years, but in this case proof of stable, regular and sufficient means of existence is required. Family members receive a temporary residence permit valid for the same amount of time as the one of the main beneficiary.	Right to family reunification (husband/wife, registered partner, children minor than 18 years) but must prove sufficient housing and health insurance in respect of all risks normally covered for Belgian nationals. Family reunification also applies to handicapped dependent children over 18 years, but in this case proof of stable, regular and sufficient means of existence is required. Family members obtain a temporary residence permit valid for three years which afterwards is replaced by a permit of permanent residence.

4.B.2. Residence permit on the basis of humanitarian grounds: pressing humanitarian situations

a. Procedure

This procedure is characterized by its written and formal nature.

The ID will examine whether the application is admissible and whether the application for a humanitarian regularization is well founded.

Admissibility phase

The application must fulfil certain admissibility criteria:

- The application must be introduced at the local town or municipality where the applicant effectively resides. Within 10 days after the introduction of the application, the local authorities must control whether the applicant effectively resides at the mentioned address. If the control turns out positive, the application will be forwarded to the ID. If the control is negative, the application will not be taken into consideration.
- The application must include identity documents (passport, identity card, travel permit, ...) with exception for asylum seekers in ongoing procedures or persons who can prove the impossibility of obtaining such documents
- The application must prove "exceptional circumstances" justifying the introduction of an application for authorisation of residence in Belgium instead of following the regular procedures abroad. As stated above, there is no legal definition of "exceptional circumstances", but it is assessed from case to case. However, it is assumed that where an applicant fulfils the annulled general criteria of a "pressing humanitarian situation", the exceptional circumstances are deemed to be proven.

If the application fails to fulfil the admissibility criteria, the ID will declare the application inadmissible.

Examination on the merits

The ID will next examine whether there is merit to the admissible requests for authorisation to reside on humanitarian grounds and, more particularly, if a pressing humanitarian situation exists. As stated above, the ID will examine whether the general criteria defining a pressing humanitarian situation apply as stipulated in the annulled ministerial instruction:

- it must be a situation of such a pressing nature that the person cannot free himself of it;
- removal of the person would constitute a violation of a fundamental right with direct applicability in Belgium;
- further residence in Belgium would be the only solution.

As stated above, the annulled ministerial instruction of 19 July 2009 summed up six concrete situations that fulfil these criteria, but other cases can be considered as pressing humanitarian

situations. Particular attention could be paid to foreign nationals who are considered to be vulnerable, for instance:

- women and children who have been abused or exploited;
- persons who find themselves in such a personal or family situation that only the regularization of their stay can come to their rescue.

If the ID finds the application to be well founded, a permanent residence permit will be given, valid for renewable periods of five years.²²⁹

²²⁹ Vade-mecum, 4 September 2009, Précisions relatives à l'application de l'instruction du 19 juillet 2009 concernant l'application de l'ancien article 9, alinéa 3 et de l'article 9bis de la loi sur les étrangers: http://www.fedweb.belgium.be/nl/binaries/regeerakkoord180308_tcm120-14855.pdf

b. Rights

Residence permit on humanitarian grounds	Introduction of application	Application is admissible and founded
Length of authorization to reside	Introduction of application gives no right of residence. However the ID cannot deliver an order of removal without first examining the application for humanitarian regularisation, where this application is concerned with fundamental rights (e.g. art. 3 or 8 ECHR), which have been presented in a precise and well motivated manner. ⁴	Permanent residence permit valid for five years ⁵
Renewal	No	Automatic renewal
Long-term residence status	No	When in possession of a permanent residence permit and after a regular and uninterrupted residence of five years, the foreign national can apply for long-term residence status if he proofs the following: <ul style="list-style-type: none">- stable, regular and sufficient means of existence for the foreign national and his family members in order to prevent recourse to the social assistance system- health insurance in respect of all risks normally covered for Belgian nationals.
Naturalisation	No	After three years of regular and uninterrupted residence, the victim can apply for naturalisation, which is a favour bestowed by the Belgian Parliament. After seven years of regular and uninterrupted residence and after having obtained a permanent residence permit, this person can obtain the Belgian nationality by putting forward a declaration of nationality

<p>Medical assistance and social benefits</p>	<p>Depending on prior residence status: Illegal stay: right to urgent medical care</p> <p>Failed asylum seeker: right to material aid, if parent of a Belgian child or impossibility to return to country of origin due to circumstances beyond his own will</p> <p>Legal stay: keeps social rights attached to that residence status</p>	<p>Access to medical care, including the right to a medical insurance by registering with a health insurance provider</p> <p>Also entitled to state benefits, such as family benefits.</p>
<p>Education</p>		<p>Access to primary and further education</p>
<p>Access to the labour market</p>	<p>No</p>	<p>Exempted from work permit and professional card</p>
<p>Travel</p>	<p>No</p>	<p>No^C - must travel with own passport</p>
<p>Family reunification</p>	<p>No</p>	<p>Right to family reunification (husband/wife, registered partner, children minor than 18 years) but must prove sufficient housing and health insurance in respect of all risks normally covered for Belgian nationals.</p> <p>Family reunification also applies to handicapped dependent children over 18 years, but in this case proof of stable, regular and sufficient means of existence is required.</p> <p>Family members obtain a temporary residence permit valid for three years which afterwards is replaced by a permit of permanent residence.</p>

A RW 31 July 2008, nr. 14.727 and RW 31 July 2008, nr. 14.731

B A permanent residence permit is given in the specific case of a pressing humanitarian situation.

C Foreign nationals who have been recognised to be stateless, can obtain specific travel documents from the Ministry of Foreign Affairs, but only once a permanent residence permit has been obtained

4.B.3. Protection for victims of human trafficking and of aggravated forms of human smuggling

The residence procedure consists of 4 phases which are connected with the course of the criminal proceedings brought against the perpetrators of human trafficking and smuggling.

a. Procedure²³⁰

1. Detection and identification of the victim of human trafficking and of aggravated forms of human smuggling – suspension of the order to leave the territory and reflection period of 45 days

When the police or social inspection services detect a possible victim, following instances are contacted:

- the public prosecutor;
- the specialised reception centre (VZW Pag-asa, de VZW Payoke en de VZW Sürya);
- the ID.

The possible victim is transferred to the specialised reception centre which informs the possible victim thoroughly on the procedure and protection status.

The task of the specialised reception centre is multiple:

- reception and residential or ambulant counselling of the victim, on a compulsory basis;
- psycho-social and medical assistance, administrative assistance and legal aid.

If the possible victim resides illegally in the country, the ID will suspend the order to leave the territory for a period of 45 days. During this period the victim can decide knowledgeably whether or not he wishes to make statements or to file a complaint.

If the possible victim is a non-accompanied minor, a temporary residence permit valid for three months is issued immediately.

If the victim does not wish to make use of the reflection period of 45 days, but immediately makes statements or files a complaint, he will also be issued a temporary residence permit valid for three months.

2. Making of statements or filing a complaint – temporary residence permit valid for three months

When the possible victim decides during the course of the reflection period to make statements or file a complaint, he will be issued a temporary residence permit valid for three months.

During this period counselling by the specialised reception centre is still compulsory.

When these three months have expired, the temporary residence permit will be prolonged only once for a period of maximum three months if:

- the file is still being investigated by the public prosecutor,
- with cooperation of the possible victim,
- who has ended all contacts with the smugglers or traffickers,

²³⁰ Articles 61/2 – 61/5 Aliens Act and ministerial circular of 26 September 2008 regarding the introduction of a multidisciplinary cooperation towards victims of human trafficking and/or aggravating forms of human trafficking, BS 31 October 2008.

- but it is still not clear whether the foreign national is indeed a victim of human trafficking or human smuggling.

The possible victim must try to prove his identity by handing over a passport, travel document or identity card

During these two phases of the procedure, the temporary residence can be ended if:

- the victim has actively, voluntarily and of his own will contacted again the persons or networks exploiting him
- the victim constitutes a danger to the public order or national security.

3. The foreign national is found to be a victim of human trafficking or an aggravated form of human smuggling – temporary residence permit valid for six months

When the public prosecutor decides that the foreign national is indeed a victim of human trafficking or of an aggravated form of human smuggling, still showing a clear will to cooperate and the judicial proceedings are still ongoing, a temporary residence permit valid for six months will be issued, which will be renewed every six months until the judicial proceedings have been finalised.

During this phase of the procedure, the residence permit can be ended if:

- the victim has actively, voluntarily and of his own will contacted again the persons or networks exploiting him;
- the victim no longer cooperates;
- the judicial authorities have decided to end the procedure;²³¹
- the victim constitutes a danger to the public order or national security;
- the cooperation of victim is deceptive;
- the complaint is unfounded or misleading.

4. Permanent residence permit

A permanent residence permit is issued to the victim if:

- his statements or complaint have led to a sentence or
- if the public prosecutor has been able to retain the element of human smuggling or an aggravated form of human trafficking as a part of his charge.

The victim is free to return to his country of origin at any time during the procedure

Should the public prosecutor decide to dismiss the case but the victim has been benefiting from a temporary residence permit during two years, the foreign national can apply for a residence permit on humanitarian grounds. Regularisation of stay takes place on a discretionary basis²³², and account will be taken of the manner in which the foreign national has cooperated with the authorities and his counselling by the specialised reception centre.²³³

²³¹ The ID can only end the residence permit if judicial authorities have effectively decided to end the proceedings. It is not up to the ID to decide whether the foreign national qualifies as a victim or not. See RvV 18 April 2008, nrs. 10134 and 10135.

²³² Article 9bis Aliens Act.

²³³ Information obtained on <http://www.vmc.be> and during the interview with the CGKR on 13 October 2009.

b. rights

	1ste phase	2nd phase	3rd phase	4th phase
Victim of human trafficking or an aggravated form of human smuggling				
Length of authorisation to reside	Suspension of order to leave territory (45 days)	Temporary residence permit (three months)	Temporary residence permit (six months)	Permanent residence permit
Renewal	No - the reflection period of 45 days is only given once	Permit can be prolonged for another three months only once (see procedure)	Can be prolonged every six months until judicial proceedings are finalised	No
Long-term residence status	No	No	No	When in possession of a permanent residence permit and after a regular and uninterrupted residence of five years, the victim can apply for long-term residence status if he proves the following: <ul style="list-style-type: none"> - stable, regular and sufficient means of existence for the victim and his family members in order to prevent recourse to the social assistance system - health insurance in respect of all risks normally covered for Belgian nationals

Naturalisation	No	No	No	<p>After three years of regular and uninterrupted residence, the victim can apply for naturalisation, which is a favour bestowed by the Belgian Parliament, but in practice naturalisation is only granted after permanent residence has been obtained.</p> <p>After seven years of regular and uninterrupted residence and after having obtained a permanent residence permit, this person can obtain the Belgian nationality by putting forward a declaration of nationality</p>
Medical assistance and social benefits	<p>Victims in reception centre: receive material aid and have a right of access to medical assistance</p> <p>Not in reception centre: receive social aid provided by the Public Social Welfare Centres and benefit equally from a right of access to medical assistance</p>	Idem	<p>Access to medical care, including the right to a medical insurance by registering with a health insurance provider.</p> <p>During temporary stay: entitled to social aid provided by the Public Social Welfare Centres.</p>	<p>Access to medical care, including the right to a medical insurance by registering with a health insurance provider.</p> <p>Permanent stay: Also entitled to state benefits, such as family benefits.</p>

Education	Access to primary and further education	Access to primary and further education	Access to primary and further education	Access to primary and further education
Access to the labour market	Need a work permit (type C, annually renewable, valid for any profession, obtained with few formalities), as well as a 'professional card' for purposes of self-employment	Idem	Idem	Exempted from work permit and professional card
Travel	No	No	No	No
Family reunification	No	No	<p>Right to family reunification (husband/wife, partner, children minor than 18 years) but must prove sufficient housing and health insurance in respect of all risks normally covered for Belgian nationals.</p> <p>Family reunification also applies to handicapped dependent children over 18 years, but in this case proof of stable, regular and sufficient means of existence is required.</p> <p>Family members receive a temporary residence permit valid for the same amount of time as the one of the main beneficiary.</p>	<p>Right to family reunification (husband/wife, registered partner, children minor than 18 years) but must prove sufficient housing and health insurance in respect of all risks normally covered for Belgian nationals.</p> <p>Family reunification also applies to handicapped dependent children over 18 years, but in this case proof of stable, regular and sufficient means of existence is required.</p> <p>Family members obtain a temporary residence permit valid for three years which afterwards is replaced by a permit of permanent residence.</p>

4.B.4. Special protection status for non-EU unaccompanied minors

a. Procedure

Once an application for an authorisation to reside in Belgium has been introduced by the UMs guardian, the Bureau MINTEH will start looking for a durable solution.

Depending on the state of the procedure, the Bureau can issue residence documents:

- If the Bureau decides that the 'durable solution' for the UM is a return to his country of origin, a removal order will be delivered to the guardian;
- In anticipation of finding a durable solution, the Bureau will:
 - prolong on a monthly basis the validity of the removal order that was delivered after unsuccessfully ending another procedure (e.g. asylum, ...). The prolongation does not take place automatically but is evaluated monthly on the basis of the case file; or
 - deliver a 'declaration of arrival' valid for three months, if the UM never started another procedure, that can be prolonged once.
- After six months of stay with a 'declaration of arrival' or a prolongation of the removal order and on presentation of identity documents²³⁴, the UM will be granted a certificate of registration as foreigner under the form of an electronic identity card A, which is valid for six months to one year, if no other durable solution has been found yet. This temporary residence permit can be prolonged if certain criteria are met:
 - Sufficient knowledge of one of the three national languages;
 - Regular school attendance;
 - Family situation of the UM;
 - Any specific element related to the situation of the UM.
- If after a period of three years with an electronic identity card A, no other durable solution has been found yet, a residence permit for unlimited duration in the form of an electronic identity card B can be issued.

The issuance and prolongation of these residence documents will not happen automatically, but will depend on the appreciation of the Bureau on a case by case basis and after analysis of all elements present in the file of the UM.

There will be an appointment with the guardian and the minor. With each upcoming prolongation of the residence documents the durable solution will be evaluated. Sometimes the Bureau

²³⁴ In case identity documents cannot be presented, an exceptional procedure can apply, in which the guardian will have to prove all the possible steps he has taken to try to obtain the necessary documents. See: <http://www.vmc.be/vreemdelingenrecht/wegwijs.aspx?id=148>

can impose certain conditions: it can for example decide to prolong the residence documents only for 6 months instead of 1 year when e.g. the UM skips classes on a regular basis. If UMs do not meet the conditions, no residence document will be issued, and they will find themselves in an irregular residence situation. However, they will be able to stay in the reception facility and will have the benefits foreseen in the Guardianship Law (e.g. guardian) until the age of 18 is reached.

As mentioned, if no durable solution has been found after three years UMs can receive a residence permit for an unlimited duration. In practice this means that this will only be the case if the UM was 15 years or younger at the time of arrival. So, in most cases the UM will only receive a temporary residence status. This procedure will end once the UM reaches the age of 18: he will no longer have the assistance of a guardian and another Bureau in the ID will take over the file. However, before the UM reaches the ages of 18, the bureau MINTEH must inform him in writing of the upcoming end of the specific procedures and the other different procedures he can undertake under the Aliens Act. The UM can, once he has become of age, apply for a residence permit on the basis of article 9bis Aliens Act (humanitarian grounds). As was already stated, this is decided on discretionary grounds and does not entail a right to residence.

The former UM can equally receive an order to leave the territory.

In a 2009 judgment, the Brussels Court of first instance ordered the Belgian authorities to deliver a temporary residence permit to an UM who turned 18 years which must stay valid until the former UM has enjoyed an adequate education as stipulated in articles 28 and 29 of the UNCRC and article 2 of the First Protocol of the ECHR.²³⁵

²³⁵ Rb Brussel 7 September 2009, <http://www.kinderenopdevlucht.be>

b. rights			
Protection status for UMs	Introduction of application	After six months	After three years
Length of authorization to reside	Prolongation of removal order for one month or Issuance declaration of arrival valid for three months	Temporary residence permit granted valid for six months to one year	Permanent residence permit granted valid for one year
Renewal	Removal order can be prolonged monthly for one month or Declaration of arrival can be prolonged for another period of three months. The issuance and prolongation of these residence documents will not happen automatically, but will depend on the appreciation of the Bureau on a case by case basis and after analysis of all elements present in the file of the UM.	Can be prolonged if certain criteria are met: <ul style="list-style-type: none"> - Sufficient knowledge of one the three national languages; - Regular school attendance; - Family situation of the UM; - Any specific element related to the situation of the UM. 	None-automatically
Long-term residence status	No	No	When in possession of a permanent residence permit and after a regular and uninterrupted residence of five years, the victim can apply for long-term residence status if he proves the following:

<p>Naturalisation</p>	<p>No</p>	<p>No</p>	<ul style="list-style-type: none"> - stable, regular and sufficient means of existence for the victim and his family members in order to prevent recourse to the social assistance system - health insurance in respect of all risks normally covered for Belgian nationals. <p>After three years of regular and uninterrupted residence, the victim can apply for naturalisation, which is a favour bestowed by the Belgian Parliament.</p> <p>After seven years of regular and uninterrupted residence and after having obtained a permanent residence permit, this person can obtain the Belgian nationality by putting forward a declaration of nationality.</p>
<p>Medical assistance and social benefits</p>	<p>A reception arrangement in three phases is applicable to the Ums: social aid is provided in kind and the UM will have access to medical care, where the reception centre will cover the costs.^D</p>	<p>A reception arrangement in three phases is applicable to the Ums: social aid is provided in kind and the UM will have access to medical care, where the reception centre will cover the costs.</p>	<p>Idem.</p> <p>If, in a last and third phase, the UM settles alone and lives in autonomy, he will benefit from social aid provided by the local Public Welfare Centres as well as access to medical care, including the right to a medical insurance by registering with a health insurance provider.</p> <p>Also entitled to state benefits, such as family benefits.</p>
<p>Education</p>	<p>Access to primary and further education</p>	<p>Access to primary and further education – compulsory from 6 until 18 years of age.</p>	<p>idem</p>

<p>Access to the labour market</p>	<p>No</p>	<p>An UM can have a student job if specific conditions have been met. He/she has to be in possession of a residence document (inscription in the foreigner's register). The UM can only work under a student work contract. In case of student labour outside the official school holiday periods, he will have to apply for a work permit type C, he cannot exceed 20 hours work week and the job has to be compatible with his studies. The minor has to be 15 and be in full-time education or have finished the curriculum.</p>	<p>Idem</p>
<p>Travel documents</p>	<p>No</p>	<p>No</p>	<p>No</p>
<p>Family reunification</p>	<p>No</p>	<p>There is no right of family reunification with parents. An application can be introduced but it will be decided upon discretionarily.^E</p>	<p>Idem</p>

D For more information on the reception arrangement in three phases, please see the report of the Belgian EMN contact point on "Policies on reception, return and integration arrangements for, and numbers of, unaccompanied minors in Belgium", July 2009.

E There is only an exception for the UM who is recognised as a refugee, see above.

4.B.5. Suspension of removal order for illegally staying families with school going children

a. Procedure

From the beginning of the Eastern holidays until the end of the school year, the ID can suspend a removal order to allow a minor child that effectively goes to school, to finish the school year. During this period, the applications for suspension and the attestations of school are faxed to the bureau "Illegals" of the ID.

Most of the applications are from failed asylum seekers. Their applications are forwarded by their lawyers or the open reception centres where they still reside or through their local Public Welfare Centre.

If the application is approved, the necessary instructions will be sent to the mayor of the address of residence in order to prolong the order to leave the territory which will be notified to the foreign national.

b. rights					
	Length of authorization to reside	Renewal		Long-term residence status	Naturalisation
Suspension of removal	Prolongation of removal order until the end of the school year	Removal order can be prolonged until the end of the second examination period		No	No
Suspension of removal	Medical assistance and social benefits Failed asylum seekers who have requested the suspension of the removal order because of school attending children, will benefit from an extended right to material aid ¹ : social aid is provided in kind and the UM will have access to medical care, where the reception centre will cover the costs. If there is no right to material aid, then only access to urgent medical care is provided.	Education Access to primary and further education	Access to the labour market No	Travel No	Family reunification No

¹ Article 7, § 2, 1° of the Law on Reception.

4.B.6. Delay of departure / exceptional prolongation of a declaration of arrival or a temporary residence title

a. Procedure

An application for delay of departure or an exceptional prolongation of a declaration of arrival or a temporary residence title due to illness (or pregnancy) or intended marriage must be introduced at the local town or municipality which will forward it to the ID, where the competent services will examine whether the conditions have been fulfilled.

b. Rights

With regard to rights attached to a delay of departure or an exceptional prolongation of the residence title or declaration of arrival it can be stated that these short terms measures do not aim to generate any further claims to naturalisation, long term residence, travel documents, access to the labour market or family reunification.

Access to primary and further education remains an unlimited constitutional right.

The scope of the access to medical assistance and social aid depends on the legal or illegal residence of the foreign national, but as a minimum he will benefit from urgent medical care. For instance, a failed asylum seeker who is six months pregnant can benefit from an extended right to material aid until maximum two months after giving birth.²³⁶



²³⁶ Article 7, § 2, 2° of the Law on Reception.

Based on the above analysis and on national opinions gathered on the granting of protection²³⁷, a number of concluding and summary remarks can be given.

- 1) EU harmonisation in asylum policy has been welcomed in Belgium for two reasons:
 - it provided a good opportunity to give a legal basis (and thus legal certainty) to the practice of a broad interpretation of the Geneva Convention
 - it provided the necessary occasion to introduce a subsidiary protection status in Belgium.

The introduction of subsidiary protection in Belgium by the Law of 15 September 2006 has not led to a decline in the granting of refugee status (for instance, the recognition rate amounted to 15% in 2006, while in 2009 the recognition rate was around 23%). The Office of the Commissioner-general for refugees and stateless persons has maintained the pre-existing practice of a broad interpretation and application of the 1951 Geneva Convention which, in the current single procedure, takes priority over subsidiary protection. Due to the fact that the Belgian authorities have chosen not only to apply the Geneva Convention in a broad manner but the definition of subsidiary protection as well, Belgian authorities also acknowledge that the proper level of EU harmonisation has not yet been attained and that they may also be partly responsible for the current situation of divergent practices in the EU.

However, NGOs have raised concern that the broad application of the Qualification Directive in Belgium is somewhat tempered by a strict credibility assessment or by a difficult access to the asylum procedure specifically with regard to subsequent applications or the application of the Dublin regulation.

NGOs and the CGRS are very much in favour of further EU legislative harmonisation leading to higher standards with regard to not only qualification but also procedure. Practical cooperation is also favoured by some stakeholders (NGOs and CGRS) as a supporting measure to attain harmonisation. However, it was added by the CGRS that practical cooperation only has an added value if it touches also upon more substantial issues (for example, not only exchange of COI but also common guidelines on the application of COI). In general, a further harmonising of the Qualification Directive and the Procedures Directive is welcomed as long as it involves higher and common standards.

- 2) The trend of an increasing amount of practices and procedures of protection at the national level is present in Belgium. Besides refugee protection and subsidiary protection, another 10 protection statuses and administrative practices (former and current) have been identified. The motivation for these protection statuses is often to be found in international obligations, such as the ECHR, the UNCRC, international humanitarian law or the UN Palermo Protocols on

²³⁷ Interview took place with a number of relevant stakeholders: ID, the Office of the Commissioner-general for Refugees and Stateless Persons, the Centre for Equal Opportunities and Opposition to Racism, Belgisch Comité voor Hulp aan de Vluchtelingen en het Vlaams Minderheden Centrum

victims of smuggling and trafficking. International case and national case law have in most cases played a crucial role in the establishment of a national protection status or administrative practice, rather than a deliberate and comprehensive policy vision on protection.

- 3) The number of positive decisions granting subsidiary protection and other forms of protection taken together is higher than the number of decisions recognizing refugee status. However this is maybe due to the number and diversity of protection statuses which are all tailored to respond to a specific need of protection, rather than to a reduction or weakening in the granting of refugee status. In other words, there is no proof that subsidiary protection and national protection statuses or administrative practices have had a negative effect on the granting of refugee status in Belgium.
- 4) Exclusion clauses and/or concerns of national security and public order can be applied in almost all EU and national protection statuses.
- 5) National protection statuses are sometimes more easily accessible and obtainable than EU protection statuses but their legislative basis is less solid. In a number of cases even, the national protection statuses are solely based upon administrative practices.
- 6) National protection statuses, in general, award fewer rights and are often limited in time. The possibilities to end or revoke a temporary protection status are more extensive and render the situations of foreign nationals more precarious. Where a protection status is decided upon a discretionary basis, the burden of proof often lies entirely with the foreign national.
- 7) While the national protection statuses have their deficiencies, stakeholders prefer to ameliorate these statuses on a national level, rather than an EU harmonisation as this might lead to lower standards and rights. If EU harmonisation of national protection statuses is to be expected, stakeholders prefer a "minimum harmonisation": not through imposing minimum standards or rules, but through identifying categories of foreign nationals who are in need of protection and must benefit from such a right. Additionally, the EU should encourage and allow MS to put in place a policy which is able to respond to needs of protection of persons who fall outside the general rules of protection. There are individual situations where only a case by case examination of the particular circumstances and on the basis of international obligations, the necessary protection can be offered. In short, this is a call for flexibility.
- 8) There was not much interest or support for additional protection statuses, for example with regard to environmental migrants. The general feeling was that it was better to work on improving the existing protection statuses rather than working on additional legislation.

In that sense, although the aim of this study is not to evaluate the national protection statuses, the authors would like to give following remarks with regard to some of the discussed protection statuses:

9) Temporary protection

With regard to EU temporary protection, we acknowledge the legislator's choice to keep EU temporary protection outside the regular asylum procedure. Nevertheless, work should be made of establishing, on a legislative basis, of a detailed procedure for the examination of applications in the context of EU temporary protection. The EU legislator could intervene here by laying down a specific procedure for the granting and withdrawing of EU temporary protection status, or it could decide that in such cases the Asylum Procedures Directive, with its obligations and guarantees, equally applies.

In this regard, one can wonder whether an authority, which is no longer responsible for the substantive dealing of the files in the regular asylum procedure, does possess the knowledge or COI in order to identify a person as belonging to the specific groups of persons described in the Council decision.

It is worrisome that the Aliens Act does not foresee in exclusion cases an obligation or possibility to advice on the conformity of a removal order with article 3 ECHR.

When a decision of refusal of EU temporary protection is taken due to a situation of overcapacity, no provisions are in place in the Aliens Act that clarify the status of the foreign national between such a refusal decision and the transfer to another Member State.

Finally, no legislative provisions and procedures are in place in the Aliens Act with regard to "national" temporary protection – a possibility which was explicitly left open by the Belgian authorities. It remains to be seen who will be competent to decide upon applications for "national" temporary protection. According the CGRS, such a competence could, at this moment, not be given to him without modifying article 57/6 Aliens Act which sets out the competences of the CGRS.²³⁸

10) Residence permit on medical grounds

There is a certain ambiguity surrounding article 9ter Aliens Act. Although Belgian authorities have stated that the granting of a residence permit on medical grounds forms part of subsidiary protection, the choice was made not to treat such applications within the asylum procedure. As consequence, applications for medical protection are dealt within the migration policy, through a procedure which includes an admissibility phase as well as an examination of the grounds.

In essence, some stakeholders are not so much opposed against the separate procedure established for medical cases. However, there is discontent with the fact that the current procedure and status allow for less procedural guarantees and rights.

The admissibility phase which requires the foreign national to forward an identity document has been troublesome for applicants in the past. There was a concern that in some cases this requirement could deny them the necessary treatment and care for their illness. A strict observance of this requirement could lead to a situation where the application of the foreign national for medical protection is found inadmissible. But, paradoxically, although he will thus be denied a residence right, the foreign national cannot be removed from the territory without the ID having examined if removal of the seriously ill foreign national indeed would amount

²³⁸ Interview with CGRS on 19 October 2009.

to a violation of article 3 ECHR. If that would be the case, the foreign national would be in fact “non removable”.

In that sense, the authors warmly welcome the judgement of the Constitutional Court declaring that this admissibility condition is applied too strictly. The judgment of the Court fortunately allows for more flexibility and legislation has been amended accordingly, however without providing for the situation of a foreign national who can prove that it is impossible for him to obtain identity documents in Belgium.

Another consequence of excluding medical protection from the asylum procedure is also noticeable on the level of procedural guarantees. In contrast with the asylum procedure, the procedure for the granting of a residence permit on medical grounds does not foresee the right to a hearing or the right to an appeal with the possibility of reviewing a negative decision both on points of law and on facts. The annulment appeal is limited to reviewing the legality of the decision.

However, on the other hand, it must be admitted that the application of article 3 ECHR in medical cases by the ID does not take place within same restrictive case law of the ECHR. The application of article 3 ECHR in medical cases rather tends to be broadly interpreted by the ID. An EU harmonisation of this protection status might endanger this broad application, unless the EU works with minimal standards, allowing for a higher degree of protection at national level. Nevertheless, there was a call from some stakeholders to establish a European medical database, accessible to everyone, where information on the existence and access of adequate treatment of illnesses in countries of origin can be found.

11) Residence permit on humanitarian grounds

The fact that the annulled ministerial instruction of 2009 included a long-awaited definition of “pressing humanitarian situations” is to be applauded. In the past, this notion existed already but was never clarified. Notwithstanding the annulment by the Council of State of this ministerial instruction, the Minister has declared that he will still respect the directives and criteria which were agreed upon within the Belgian government and which were reflected in the annulled ministerial instruction.

As stated above, article 9bis of the Aliens Act together with the ministerial instruction, offer last-instance-protection to those cases that do not fit within any of the general rules of protection. In that sense, some stakeholders have high expectations on the possible involvement of the Commission of Advice for Foreigners, an administrative organ consisting of two magistrates, two lawyers and persons from civil society involved with defending the interests of foreign nationals.

The Minister competent for Asylum and Migration can in individual cases ask advice from the Commission. This advice is non-binding and the Minister is not obliged to ask for advice. The current Secretary of State has however indicated that it would be desirable if the Commission was to play a role in the further development and interpretation of definition of “pressing humanitarian situations”.

How this remains to be organised in practice is currently an unresolved question.

Finally, for sake of legal certainty, it would be, according to the authors, preferable if the defini-

tion of “pressing humanitarian situation” would become an integral part of the Aliens Act. Such basis would be more solid than a simple reference in a ministerial instruction – a technique which the Council of State has condemned in its judgement.²³⁹

12) Administrative practices

Unfortunately quite a number of the existing protection statuses are based on administrative practices which find their origin in ministerial circulars.

As stated above, it is national and international jurisprudence that has called into existence of most of the national protection statuses, rather than a coherent policy vision from the Belgian authorities on protection. This explains their rather piecemeal and ad hoc approach towards protection that explains these administrative practices.

Particularly with regard to unaccompanied minors, the 2005 ministerial circular provides but a very insecure legislative basis for the granting of protection and does not deal with possible perspectives once an UM turns 18 years.

In these cases, a coherent policy vision on protection for foreign nationals should be put in place and legal certainty would also here be served by consolidating these practices in hard law.

NGOs have argued that European harmonisation could have an added value here by identifying in a coherent manner those categories of persons that are in need of protection.

13) Finally a lack of protection was identified with regard to non-removable persons.

This gap in protection is most visible with regard to stateless persons. Some argue that foreign nationals who are recognised as stateless and for whom there does not exist a right of residence in another country, must be granted a residence permit in Belgium, in order to avoid an illegal but tolerated existence on Belgian territory. Work should be made of the previously announced legislation remediating this situation. This point of view is obviously shared by the Constitutional Court in its judgement.²⁴⁰

The same concern was made by some stakeholders with regard to other categories of non-removable persons. There are various reasons that lead to the non-removability – at least in a forced manner - of a foreign national. More in particular, following categories of non-removable persons are envisaged:

- Persons non removable because of administrative obstacles, for instance when there is no possibility of identification (i.e. where competent authorities for the provision of identity or travel documents are unable or unwilling to do so).
- Persons non removable because of practical obstacles, for instance a lack of transport capacity or closed airports.
- Persons non removable because of substantial obstacles. Specific to the Belgian situation, are following examples:
 - where the CGRS has formulated a negative advice on the conformity of a removal order

239 RvS 9 December 2009, nr. 198.769

240 GWH 17 December 2009, nr. 198/2009, B.9.

with the Geneva Convention, subsidiary protection or article 3 ECHR in the case of an asylum seeker (e.g. when exclusion clauses apply / no access granted to asylum procedure because of public order or national security);

- where the application of a foreign national for a residence permit on medical grounds is found to be inadmissible due to lack of identification;
- where an exclusion clause or public order/national security is applied during the examination of an application for a residence permit on medical grounds or humanitarian grounds.

While such persons cannot be removed, they will not receive a residence permit. Moreover, during their “tolerated” stay, they will only benefit from very minimal and basic rights.

Some stakeholders have referred to the Commission communication of 10 June 2009 on the ‘Stockholm Programme’ on the direction of EU cooperation on Justice and Home Affairs up to the end of 2014, where the Commission wrote: “ ... all too often repatriation measures cannot be carried out on account of legal or practical obstacles. In the absence of clear rules, we should study national needs and practices and consider the possibility of establishing common standards for taking charge of illegally staying immigrants who cannot be deported.”²⁴¹

In a study carried out by the European Group of National Human Rights Institutions (NHRI), it was stated that: “*At the moment there exists no comprehensive regulation regarding non-removable persons in European secondary legislation.*²⁴² *There are only a few regulations from which non-removable persons could derive some benefit despite the fact they are unclear and weakly formulated. Recital 12 and Article 14 of the Return Directive (2008/115/EC) identify “the situation of third country nationals who are staying illegally but who cannot yet be removed” as one which shall require, that the affected persons be provided with written confirmation of their non-removability. Furthermore Article 14 of the Return Directive provides only some safeguards for non-removable persons:*

- *the maintenance of family unity*
- *access to emergency health care and essential treatment of illness*
- *access to the basic education system for minors*
- *that the special needs of vulnerable persons be taken into account.”*

The NHRI lamented the fact that, as of yet, the European secondary legislation, i.e. the Return Directive, has treated the issue of non-removability merely as a temporary phenomenon while experience shows that this is not necessarily the case.

The European Group of National Human Rights Institutions therefore urged EU Member States to include the issue of non-removable persons in the Stockholm Programme, which did not take place. It also called for a strengthening of the human rights of non-removable persons, which ideally should also include the possibility of obtaining legal residency.

Indeed, a further European harmonisation could have an added value for Belgium specifically in dealing with the question of protection for some categories of non-removable persons.

241 Commission of the European Communities, Communication from the Commission to the European Parliament and the Council. COM (2009) 262/4, 26

242 To be found on <http://www.nhri.net>. See also http://www.diversiteit.be/index.php?action=artikel_detail&artikel=305

- AENDENBOOM, I., "Van doe-het-zelver tot designer? Aanpassingen verblijfsregeling slachtoffers mensenhandel", *T.Vreemd*. 2007, 85-92.
- AENDENBOOM, I., "Nieuwe wetsbepalingen tot versterking van de strijd tegen mensenhandel en mensensmokkel. Een overzicht in vogelvlucht.", *T.Vreemd*. 2005, 340-344.
- AENDENBOOM, I., "De wetgeving tot bestrijding van de mensenhandel: roeien met de juridische riemen die men heeft.", *T.Vreemd*. 2003, 5-20.
- BATTJES, H., In Search of a Fair Balance : the Absolute Character of the Prohibition of Refoulement Under Article 3 ECHR Reassessed, *Leiden Journal of International Law* 2009, 583-621.
- BEERNAERT, M.-A., en LE COCQ, P., "La loi du 10 Août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil", *R.D.P.* 2006, 335-406.
- BHABHA, J. and ALFIREV, C., "The identification and referral of trafficked persons to procedures for determining international protection needs", UNHCR report October 2009 (PPLAS/2009/03) at <http://www.unhcr.org/protect>.
- BODART, S., *La protection internationale des réfugiés en Belgique*, Brussel, Bruylant, 2008, 347p.
- BOSSUYT, M., "Het CGVS en de ontheemden uit ex-Joegoslavië", *T.Vreemd*, 1996, 252-259.
- BOUCKAERT, S., "Medische aspecten van het vreemdelingenrecht en artikel 3 EVRM. Een overzicht van rechtspraak van het Europees Hof voor de Rechten van de Mens, de Raad van State en de burgerlijke rechtbanken", *T.Vreemd*. 2005, 186-203.
- BOUCKAERT, S., "Het recht op dringende medische hulp voor vreemdelingen zonder wettig verblijf: materieelrechtelijke en procedurele aspecten, de lege lata en de lege ferenda", *T.Vreemd*. 2008, 1150p.
- BOUCKAERT, S., "Onderwijs voor minderjarige vreemdelingen zonder wettig verblijf: ontwikkelingen in regelgeving en rechtspraak", *T.O.R.B.* 2007-208, 387-405.
- BRIJS, B., "Kanttekeningen bij een nieuw vreemdelingenbeleid", in ANDERSEN, R., HUBEAU, B. en SCHUERMANS, G. (ed.), *Ombudsdiensten en vreemdelingen*, Die Keure, Brugge, 2008, p. 37-76.
- Centrum voor Gelijkheid van Kansen en Racismebestrijding – jaarrapporten m.b.t. mensenhandel: 2008 Bestrijden met mensen en middelen
2007 Een beleidsanalyse vanuit de visie van een nationaal rapporteur (pdf)
2006 Slachtoffers in beeld (pdf)
2005 Het Belgische mensenhandelbeleid: gewikt en gewogen (pdf)
2004 Analyse vanuit het slachtofferperspectief (pdf)
2003 Pleidooi voor een integrale benadering (pdf)
2001 Beeldvorming van de mensenhandel en analyse van de rechtspraak (pdf)
2000 Tussen beleid en middelen: de diepe kloof (pdf)
(<http://www.diversiteit.be>)
- DE HEMRICOURT DE GRUNNE, M., "Reconnaissance et statut des apatrides en Belgique", *Annales de Droit de Louvain*, 1999, p. 343-388.

DE SCHUTTER, O., en VAN DROOGHENBROECK, S., *Droit international des droits de l'homme devant le juge national*, Brussel, Larcier, 1999, 661p.

FOBLETS, M.-C. en VANHEULE, D., "Anno 2006: de Belgische wetgever brengt het vreemdelingenrecht in lijn met de Europese regelgeving. Een tussentijdse stand van zaken", *R.W.* 2006-2007, 902-920.

FOBLETS, M.-C. en VANHEULE, D., "Het federale vreemdelingenbeleid in België: enkele recente wetswijzigingen", *T.B.P.* 2007, 387-408.

FOBLETS, M.-C., en BOUCKAERT, S., "Het Belgische vreemdelingenrecht ingrijpend hertekend. Een overzicht van de wetswijzigingen 2006-2007", *Themis* 2007-2008, p.5-45.

FOBLETS, M., VANHEULE, D. en BOUCKAERT, S., "De nieuwe asielwetgeving: het Belgisch asielrecht kleurt Europeser.", *R.W.* 2007, 942-957.

HIRSCH, M., "La traite des êtres humains. Une législation modèle pour l'Europe?", *J.T.* 1995, 553-564.

HUBEAU, B., "De huisjesmelkerij en de mensenhandel: een stand van zaken over de toepassing van artikel 77bis van de Vreemdelingenwet", *T.Vreemd.* 2003, 283-303.

HUBERTS, C., "Les innovations de la loi du 10 Août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite des êtres humains et contre les pratiques des marchands de sommeil.", *J.D.J.* 2006, 6-22.

LEJEUNE, L., MATHY, FR., "La jurisprudence du Conseil d'Etat au contentieux médical des étrangers", *R.D.E.* 2002, 393-399.

MAES, A., "Is de Raad voor Vreemdelingenbetwistingen bevoegd om artikel 3 EVRM te toetsen?" (noot onder RVV 30 juli 2007), *T.Vreemd.* 2008, 61-67.

MAES, G., "Vreemdelingen zonder legaal verblijf met Belgische kinderen: uitzetting van onderdanen of beschermd gezinsleven als hefboom voor regelmatig verblijf", *T.Vreemd.* 2005, 332-339.

SAROLEA, S., "De omzendbrief van 1 maart 1995 tot herziening van de status van ontheemde", *T.Vreemd.* 1996, 277-280.

SAROLEA, S., "L'apatridie du point de vue interétatique au droit de la personne", *R.D.E.* 1998, p. 183-211.

STAD GENT, "Staatlozen: nergens en nooit onderdaan, overal en altijd vreemdeling", 2007, 124p. <http://www.gent.be/docs/Departement%20bevolking%20en%20Welzijn/Integratiedienst/Map%20Staatslozen/Handleiding%20staatlozen.pdf>

VANDE LANOTTE, J. en HAECK, Y., *Handboek EVRM*, I Algemene beginselen, Antwerpen, Intersentia, 2005, 949p.

VAN DER SIJPT E. en HERBOTS, P., "De verblijfsrechtelijke bescherming van slachtoffers van mensenhandel en -smokkel", *R.W.* 2007-2008, 1010-1030.

VANHEULE, D., "Bedenkingen bij de tijdelijke beschermingsmaatregelen in Europa", *T.Vreemd.* 1996, 270-274.

Van Zeebroeck Charlotte- Plate-forme Mineurs en exil. Aspects législatifs de la situation des mineurs étrangers non accompagnés en Belgique. Mars 2008, p.355.

VERMEULEN, G., "Visa: een instrument in de strijd tegen mensensmokkel en mensenhandel?", *T.Vreemd.* 2007, 194-200.

VERMEULEN, G., VAN DEN HERREWEGEN, E. en VAN PUYENBROECK, L., *Mensenhandel in beeld. Eerste kwantitatieve en kwalitatieve analyse van Belgische slachtofferdata.*, Antwerpen, Maklu, 2007, 487p.

VLUCHTELINGENWERK VLAANDEREN, *Eén jaar subsidiaire bescherming in België*, 2008, 84p.

WALLEYN, L., en TORFS, D., "Staatloosheid in het Belgisch recht" (noot onder Brussel, 27 april 1995), *T.Vreemd*. 1995, p. 280.

Parliamentary documents

Problematiek van de niet-begeleide minderjarigen, *Parl.St. Senaat* 2002-2003, nr. 2-1199/1.

De mensenhandel en de prostitutie in België; *Parl.St. Senaat* 1999-2000, nr. 2-152/1 en 2-152/2.

De regeringsmaatregelen ter uitvoering van de aanbevelingen van de subcommissie "Mensenhandel en prostitutie", *Parl.St. Senaat* 2000-2001, nr. 2-365/1.

Mensenhandel en visafraude, *Parl.St. Senaat* 2002-2003, nr. 2-1018/1

Government documents

Koninkrijk België, De strijd tegen mensenhandel en mensensmokkel, Actieplan 2008, 51p. (<http://www.diversiteit.be>)



