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Asylum Information  
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Asylum Information Database

# National Country Report

***Belgium***



**ecre**

European Council  
on Refugees and Exiles

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## The AIDA project

The AIDA project is jointly coordinated by the European Council on Refugees and Exiles (ECRE), Forum R efugi es-Cosi, Irish Refugee Council and the Hungarian Helsinki Committee. It aims to provide up-to date information on asylum practice in 14 EU Member States (AT, BE, BG, DE, FR, GR, HU, IE, IT, MT, NL, PL, SE, UK) which is easily accessible to the media, researchers, advocates, legal practitioners and the general public and includes the development of a dedicated website which will be launched in the second half of 2013. Furthermore the project seeks to promote the implementation and transposition of EU asylum legislation reflecting the highest possible standards of protection in line with international refugee and human rights law and based on best practice.



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## Statistics

**Table 1: Applications and granting of protection status at first and second instance**

	Total applicants in 2012	Refugee status	Subsidiary protection	Humanitarian Protection <sup>1</sup>	Rejections (in-merit and admissibility)	Otherwise closed / discontinued <sup>2</sup>	Refugee rate	Subs.Pr. rate	Hum. Pr. Rate	Rejection rate
	A	B	C	D	E	F	B/(B+C+D+E)%	C/(B+C+D+E)%	D/(B+C+D+E)%	E/(B+C+D+E)%
<b>Total numbers</b>	21463 <sup>3</sup>	3038	1381	0	15312		15%	7%	0%	78%
<b>Breakdown by countries of origin of the total numbers</b>										
Afghanistan	2635	467	878	0	879		21%	39%	0%	40%
Guinea	1808	405	9	0	1993		17%	0%	0%	83%
Russia	1470	198	0	0	1090		15%	0%	0%	85%
DR Congo	1334	134	12	0	1208		10%	1%	0%	89%
Kosovo	983	55	7	0	713		7%	1%	0%	92%
Iraq	803	249	11	0	882		22%	1%	0%	77%
Syria	793	98	382	0	23		19%	76%	0%	5%
Pakistan	759	16	2	0	412		4%	0%	0%	96%
Albania	667	123	3	0	970		11%	0%	0%	89%
Serbia	571	28	1	0	531		5%	0%	0%	95%
<b>Others<sup>4</sup></b>										
Iran	410	132	0	0	128		51%	0%	0%	49%
Somalia	360	88	24	0	149		34%	9%	0%	57%

Source: Office of the Commissioner General for Refugees and Stateless persons

<sup>1</sup> There is no humanitarian protection status granted through the asylum procedure in Belgium (although a procedure for regularisation of the irregular residence status based on humanitarian or medical reasons exists). The number of 0 humanitarian protection decisions is mentioned for the purpose of the formula.

<sup>2</sup> These specific numbers could not be subtracted from the available general numbers.

<sup>3</sup> Including subsequent applications (only 15206 first applications); excluding 6173 children accompanied by their parents.

<sup>4</sup> Other main countries of origin of asylum seekers in the EU.

**Table 2: Gender/age breakdown of the total numbers of applicants in 2012**

	Number	Percentage
<b>Total number of applicants</b>	21463	
<b>Men</b>	14789	68,90%
<b>Women</b>	6674	31,10%
<b>Unaccompanied children</b>	1008 <sup>5</sup>	4,7%

Source: Office of the Commissioner General for Refugees and Stateless persons, Aliens Office or the Council for Alien Law Litigation

**Table 3: Comparison between first instance and appeal decision rates in 2012**

	First instance		Appeal	
	Number	Percentage	Number	Percentage
<b>Total number of decisions</b>	19731		10339 <sup>6</sup>	
<b>Positive decisions</b>				
<b>Total</b>	4419	22,40%	305 <sup>7</sup>	2,95%
<i>Refugee Status</i>	3038	15,40%	-	-
<i>Subsidiary protection</i>	1381	7,00%	-	-
<b>Negative decisions</b>	15312	77,60%	12455	93,16%

Source: Office of the Commissioner General for Refugees and Stateless persons, Aliens Office or the Council for Alien Law Litigation

**Table 4: Applications processed under an accelerated procedure in 2012**

	Number
<b>Total number of applicants</b>	21463
<b>Number of applications treated under an accelerated procedure at first instance</b>	N/A <sup>8</sup>

Source: Office of the Commissioner General for Refugees and Stateless persons, Aliens Office or the Council for Alien Law Litigation

**Table 5: Subsequent applications submitted in 2012**

	Number of subsequent applications submitted
<b>Total number</b>	6257 (29.15%)
<b>Top 5 countries of origin</b>	
<b>Russia</b>	706
<b>Guinea</b>	657
<b>Kosovo</b>	616
<b>Afghanistan</b>	552
<b>Serbia</b>	311

Source: Office of the Commissioner General for Refugees and Stateless persons, Aliens Office or the Council for Alien Law Litigation

<sup>5</sup> The number of unaccompanied children in the [Aliens Office's final annual statistics for 2012](#) are slightly different: on a total of 1529 asylum seekers declaring themselves to be under age, 1035 were found to actually be under age.

<sup>6</sup> Not including the appeals against decisions of non-admissibility (of asylum applications from asylum seekers from safe or EU countries of origin, and (from 1<sup>st</sup> September 2013 on) from asylum seekers who already have obtained refugee status in another EU Member State (non-admissibility decisions of subsequent asylum applications).

<sup>7</sup> No distinctive numbers available per protection status; In addition to recognition or granting of status, also 609 annulment judgments, referring the case back to the CGRS, have been taken (5.89%).

<sup>8</sup> No exact number available: 69 EU citizens (0.32%), 3235 safe countries of origin (15.07%), but no number of accelerated procedures in detention.

## Overview of the legal framework

### **Main legislative acts relevant to asylum procedures, reception conditions and detention**

Title in English	Original title	Abbreviation	Weblink
Law of 15 December 1980 regarding the entry, residence, settlement and removal of aliens	Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen	Aliens Act / Vreemdelingenwet (VW) / Loi 1980	<a href="https://dofi.ibz.be/sites/dvzoe/FR/Documents/19801215_F.pdf">https://dofi.ibz.be/sites/dvzoe/FR/Documents/19801215_F.pdf</a> (in French) <a href="https://dofi.ibz.be/sites/dvzoe/NL/Documents/19801215_n.pdf">https://dofi.ibz.be/sites/dvzoe/NL/Documents/19801215_n.pdf</a> (in Dutch) (up dated, unofficially coordinated texts)
Law of 12 January 2007 regarding the reception of asylum seekers and other categories of aliens	Loi de 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers / Wet betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen	Reception Act/ Loi d'Accueil / Opvangwet	<a href="http://www.ejustice.ju.st.fgov.be/cgi_loi/change_lg.pl?language=nl&amp;la=N&amp;cn=2007011252&amp;table_name=wet">http://www.ejustice.ju.st.fgov.be/cgi_loi/change_lg.pl?language=nl&amp;la=N&amp;cn=2007011252&amp;table_name=wet</a>

### **Main implementing decrees and administrative guidelines and regulations relevant to asylum procedures, reception conditions and detention.**

Title in English	Original title	Abbreviation	Weblink
Royal Decree of 8 October 1981 regarding the entry on the territory, residence, settlement and removal of aliens	Arrêté du 8 octobre 1981 concernant l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers / Koninklijk Besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en verwijdering van vreemdelingen	Royal Decree 1981 / AR 1981 / KB 1981	<a href="https://dofi.ibz.be/sites/dvzoe/FR/Documents/19811008_f.pdf">https://dofi.ibz.be/sites/dvzoe/FR/Documents/19811008_f.pdf</a> (unofficial coordination)
Royal Decree of 11 July 2003 determining certain elements of the procedure to be followed by the Aliens Office charged with the examination of asylum applications on the basis of the Law of 15 December 1980	Arrêté royal du 11 Juillet 2003 fixant certains éléments de la procédure à suivre par le service de l'Office des étrangers chargé de l'examen des demandes d'asile sur la base de la loi du 15 décembre 1980 / Koninklijk besluit van 11 juli 2003 houdende vaststelling van bepaalde elementen van de procedure die dienen gevolgd te worden door de dienst van de Dienst Vreemdelingenzaken die belast is met het onderzoek van de asielaanvragen op	Royal Decree Asylum Procedure AO / AR Procédure d'asile OE / KB asielprocedure DVZ 2003	<a href="http://www.ejustice.ju.st.fgov.be/cgi_loi/change_lg.pl?language=nl&amp;la=N&amp;cn=2003071106&amp;table_name=wet">http://www.ejustice.ju.st.fgov.be/cgi_loi/change_lg.pl?language=nl&amp;la=N&amp;cn=2003071106&amp;table_name=wet</a>

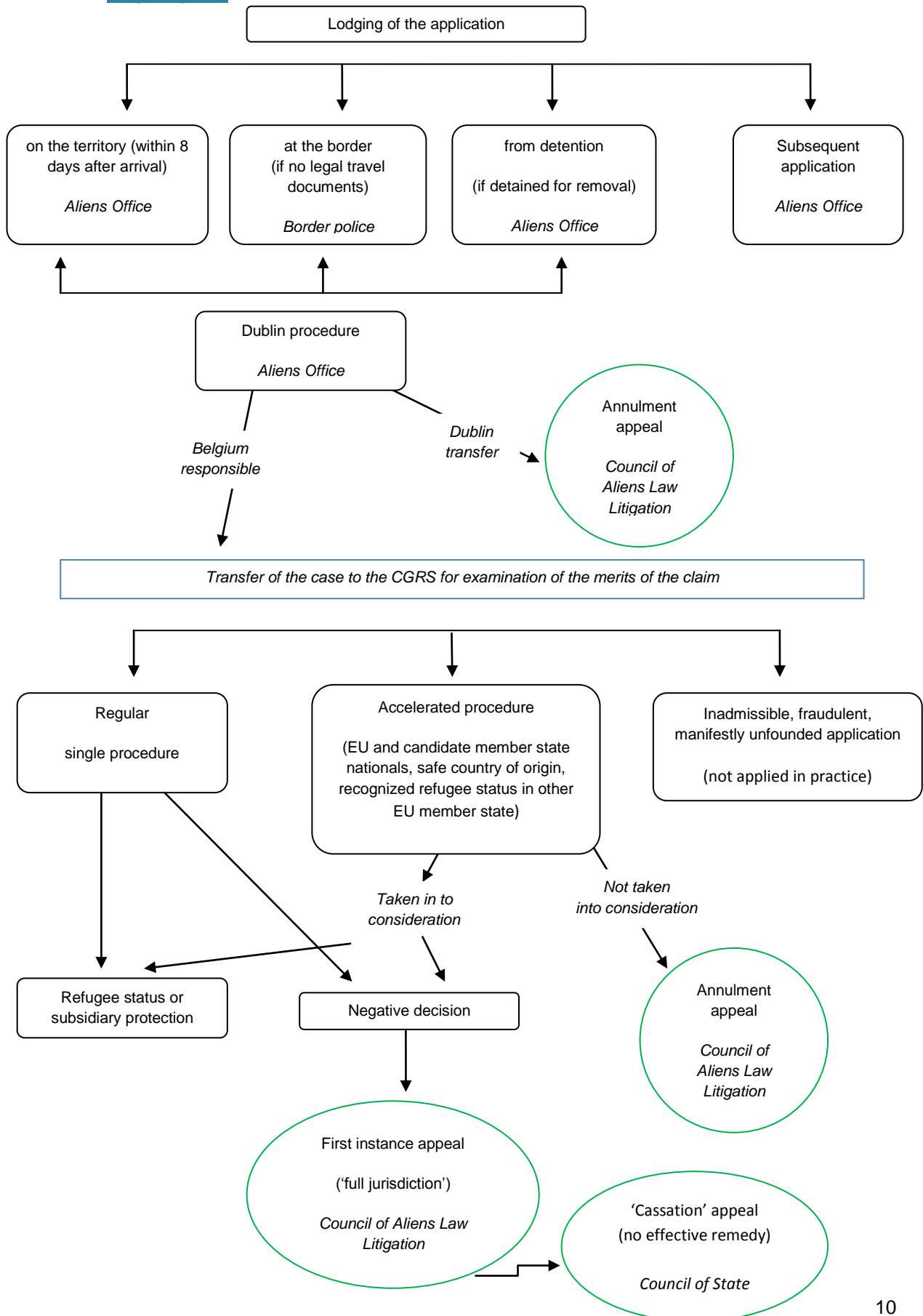


	basis van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen		
Royal Decree of 11 July 2003 determining the procedure and functioning of the Office of the Commissioner General for Refugees and Stateless persons	Arrêté royal du 11 Juillet 2003 fixant la procédure devant le Commissariat général aux Réfugiés et aux Apatrides ainsi que son fonctionnement / Koninklijk besluit van 11 juli 2003 tot regeling van de werking van en de rechtspleging voor het Commissariaat-generaal voor de Vluchtelingen en de Staatlozen	Royal Decree Procedure CGRS / AR Procédure CGRS / KB Procédure CGVS	<a href="http://www.ejustice.ju st.fgov.be/cgi_loi/change_lg.pl?language=nl&amp;la=N&amp;cn=2003071105&amp;table_name=wet">http://www.ejustice.ju st.fgov.be/cgi_loi/change_lg.pl?language=nl&amp;la=N&amp;cn=2003071105&amp;table_name=wet</a>
Royal Decree of 9 June 1999 implementing the law of 30 April 1999 regarding the employment of foreign works	Arrêté royal du 9 juin 1999 portant exécution de la loi du 30 avril 1999 relative à l'occupation des travailleurs étrangers / Koninklijk besluit van 9 juni 1999 houdende de uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers	Royal Decree Foreign Workers / AR Travailleurs étrangers / KB buitenlandse werknemers	<a href="http://www.ejustice.ju st.fgov.be/cgi_loi/change_lg.pl?language=fr&amp;la=F&amp;cn=1999060935&amp;table_name=loi">http://www.ejustice.ju st.fgov.be/cgi_loi/change_lg.pl?language=fr&amp;la=F&amp;cn=1999060935&amp;table_name=loi</a>
Royal Decree of 2 August 2002 determining the regime and regulations to be applied in the places on the Belgian territory managed by the AO where an alien is detained, placed at the disposal of the government or withheld, in application of article 74/8 §1 of the Aliens Act	Arrêté royal de 2 août 2002 fixant le régime et les règles de fonctionnement applicables aux lieux situés sur le territoire belge, gérés par l'OE, où un étranger est détenu, mis à la disposition du Gouvernement ou maintenu, en application des dispositions citées dans l'article 74/8, § 1er, de la loi du 15 décembre 1980 / Koninklijk besluit van 2 augustus 2002 houdende vaststelling van het regime en de werkingsmaatregelen, toepasbaar op de plaatsen gelegen op het Belgisch grondgebied, beheerd door de DVZ, waar een vreemdeling wordt opgesloten, ter beschikking gesteld van de regering of vastgehouden, overeenkomstig de bepalingen vermeld in artikel 74/8, § 1 van de Vreemdingenwet	Royal Decree Closed Centers / AR Centres Fermés / KB Gesloten Centra	<a href="http://www.ejustice.ju st.fgov.be/cgi_loi/change_lg.pl?language=fr&amp;la=F&amp;cn=2002080275&amp;table_name=loi">http://www.ejustice.ju st.fgov.be/cgi_loi/change_lg.pl?language=fr&amp;la=F&amp;cn=2002080275&amp;table_name=loi</a>

# Asylum Procedure

## A. General

### 1. Organigram



## 2. Types of procedures

### Indicators:

Which types of procedures exist in your country? Tick the box:

- regular procedure: yes  no
- border procedure: yes  no
- admissibility procedure: yes  no
- accelerated procedure (labelled as such in national law): yes  no
- accelerated examination ("fast-tracking" certain case caseloads as part of regular procedure):  
yes  no
- prioritised examination (application likely to be well-founded or vulnerable applicant as part of regular procedure):  
yes  no
- Dublin Procedure yes  no
- others: a residence status as protection for medical reasons is granted through a regularisation procedure rather than the asylum procedure, even though the serious risk of inhumane treatment in case of return to the country of origin satisfies the subsidiary protection definition<sup>9</sup>

Are any of the procedures that are foreseen in national legislation, not being applied in practice? If so, which one(s)? No.

## 3. List of authorities intervening in each stage of the procedure (including Dublin)

Stage of the procedure	Competent authority in EN	Competent authority in original language (FR/NL)
Application at the border	Federal police (General Directorate of Administrative Police)	Police Fédérale (Direction générale de la police administrative) / Federale politie (Algemene directie van de bestuurlijke politie)
Application on the territory	Aliens Office (AO)	Office des étrangers (OE) / Dienst Vreemdelingenzaken (DVZ)
Dublin (responsibility assessment)	Aliens Office (AO)	Office des étrangers (OE) / Dienst Vreemdelingenzaken (DVZ)
Refugee status determination	Office of the Commissioner General for Refugees and Stateless Persons (CGRS)	Commissariat général aux réfugiés et aux apatrides (CGRA) / Commissariaat-generaal voor Vluchtelingen en Staatlozen (CGVS)
Appeal procedures - first appeal - second (onward) appeal	- Council for Alien Law Litigation (CALL) - Council of State (CS)	- Conseil du contentieux des étrangers (CCE) / Raad voor Vreemdelingenbetwistingen (RvV) - Conseil d'Etat (CE) / Raad van State (RvS)
Subsequent application (admissibility) - registration - admissibility decision	- Aliens Office (AO) - Office of the Commissioner General for Refugees and Stateless Persons (CGRS) <sup>10</sup>	- Office des étrangers (OE) / Dienst Vreemdelingenzaken (DVZ) - Commissariat général aux réfugiés et aux apatrides (CGRA) / Commissariaat-generaal voor Vluchtelingen en Staatlozen (CGVS)

<sup>9</sup> Article 9ter Aliens Act

<sup>10</sup> The CGRS has the competence to decide on the admissibility of subsequent application since the legislative amendment introduced by an Act of 8 May 2013, that was published in the *Moniteur belge* on 22<sup>nd</sup> August 2013 and entered into force on 1<sup>st</sup> September 2013 (new Article 57/6/2 Aliens Act). The AO is still competent to register the subsequent application and to transfer it to the CGRS (modified Article 51/8 Aliens Act).

**4. Number of staff and nature of the first instance authority (responsible for taking the decision on the asylum application at the first instance)**

Name in English	Number of staff (specify the number of people involved in making decisions on claims if available)	Ministry responsible	Is there any political interference possible by the responsible Minister with the decision making in individual cases by the first instance authority? Y/N
<i>Office of the Commissioner General for Refugees and Stateless Persons (CGRS)</i>	450 (full time equivalent) staff, of whom 230 (full time equivalent) protection officers (incl. 6 heads of service and supervisors).	State Secretary for Asylum and Migration (and Social Inclusion and Poverty Reduction) - associated to the Minister of Justice	There's no interference by the State Secretary with the refugee status determination; the protection policy belongs to the independent competence of the CGRS

**5. Short overview of the asylum procedure**

An asylum application may be lodged either on the territory (within 8 working days after arrival with the Aliens Office) or at the border (in case the asylum seeker does not dispose of valid travel documents to enter the territory with the border police) or from a detention centre (in case the person is already being detained for the purpose of removal). The examination of an asylum application lodged in Belgium roughly involves three main stages:

1. the examination of the criteria in the Dublin Regulation by the Aliens Office (AO) to determine whether Belgium is the responsible authority;
2. the examination of the merits of the asylum application by the Commissioner-General for Refugees and Stateless Persons (CGRS);
3. an appeal against a negative decision of the Commissioner-General before the Council for Aliens Law Litigation (CALL).

The Aliens Office is the mandated administration of the Minister responsible for the entry to the territory, residence, settlement and removal of foreign nationals in Belgium. It also has the competence to register asylum applications and deciding on the application of the Dublin criteria. Until recently, it also had the competence to decide whether a subsequent application had to be taken into consideration (and examined on its merits by the CGRS) or not, but this has now become the competence of the CGRS since the law of 8 May 2013 entered into force on 1 September 2013. The AO now only registers subsequent applications and transfers them to the CGRS.<sup>11</sup>

The CGRS is the central administrative authority exclusively responsible for the first instance examining and granting, refusing, and withdrawing of the refugee and/or subsidiary protection status. A single procedure applies and includes a possibility for a person granted subsidiary protection to lodge an appeal in order to obtain refugee status. It is independent in taking individual decisions on asylum applications and is not taking any instructions from the competent Minister – or State Secretary – for Asylum and Migration in this respect, with the exception of some organisational aspects and a limited so-called injunction right as regards cases that should be examined with priority.

<sup>11</sup> See new Article 57/6/2 Aliens Act and modified Article 51/8 Aliens Act.

The Council of Aliens Law Litigation (CALL) is an administrative Court competent for handling appeals against all kinds of appeals against migration decisions, among others against the first instance negative decisions of the CGRS. These appeals are dealt with by chambers specialised in the field of asylum. Appeals before the CALL against the decisions of the CGRS have automatic suspensive effect and must be lodged within 30 calendar days after the decision has been notified to the applicant. The CALL has no investigative competence and has to take a decision based on all elements in the file presented by both parties (the applicant and the CGRS). It can reform a CGRS decision, by granting a protection status, confirm the negative decision of the CGRS or annul it if it considers essential information is lacking in order to decide on the appeal and further investigation by the CGRS is needed. An onward appeal before the Council of State (CS) is possible but only points of law can be litigated at this stage. The appeal before the CS has no suspensive effect on decisions to leave or refuse entry, which are issued with, or even before, a negative decision of the CGRS.

An accelerated admissibility procedure – although not defined as such in the law – applies with regard to asylum applications by EU nationals and nationals of EU accession candidate countries, as well as with regard to asylum seekers from a safe country of origin (based on a list) or who have already obtained refugee status in another EU Member State. In those cases the CGRS can decide ‘not to take into consideration’ such applications (a decision of inadmissibility) if no elements are submitted that the person has a well-founded fear of persecution or there are serious grounds for a real risk of serious harm, within five or fifteen working days respectively. Also on subsequent applications the CGRS has to take a decision of admissibility or inadmissibility within eight working days (or two for a detained asylum seeker). According to the law, the CGRS can also consider an application as fraudulent or manifestly unfounded, but in practice this is not applied anymore.

An annulment appeal can be lodged with the CALL against decisions by the CGRS not to take an asylum application into consideration and against a decision taken by the AO in application of the Dublin Procedure. Such an appeal does not examine the merits of the claim and is not automatically suspensive. However a suspension of the decision to remove or refuse entry can be requested for together with the annulment appeal, or prior to it in case of ‘extremely urgent necessity’. Both annulment and suspension appeal must be lodged within 30 calendar days after notification of the negative decision.

For asylum seekers in detention (and in cases where the competent Minister uses his injunction right) a prioritized (accelerated) first instance procedure – two months or fifteen days in case of public order issues (or ministerial injunction right cases) – as well as an accelerated appeal procedure – with very short deadlines of one to five working days for each procedural step – for the examination of the well-foundedness of the protection claim are also provided for.

As to subsidiary protection needs for medical reasons, a specific procedure has been put in place, which is not formally part of the asylum procedure. A person who suffers from an illness that constitutes a real risk to their life or physical integrity or for which there is a real risk of inhuman or degrading treatment should there be no adequate treatment in their country of origin or residence, should apply for a residence permit in a so-called regularization procedure for medical reasons based on Article 9ter of the Aliens Act. This procedure has much less procedural guarantees and residential rights than is the case in the asylum procedure.<sup>12</sup>

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<sup>12</sup> The scope of this protection for medical reasons and how this relates to Article 3 ECHR is currently the subject of diverging jurisprudence by the Dutch-speaking and French-speaking chambers of the Council of State. CS (Dutch Chamber), judgments n° 223.961 of 19 June 2013 and n° 225.632, 225.633 and 225.635 of 28 November 2013 expands the protection under Article 9ter Aliens Act to all diseases without an accessible treatment in the country of origin that entail a real risk to life or physical integrity or to inhuman or degrading treatment; CS (French Chamber, judgment n° 225.522 and 225.523 of 19 November 2013 limits it to life threatening diseases in an advanced stage.

## B. Procedures

### 1. Registration of the Asylum Application

#### Indicators :

- Are specific time limits laid down in law for asylum seekers to lodge their application?  
 Yes       No
- If so, and if available specify
  - o the time limit at the border:      as soon as the person is inquired about the purpose of the journey
  - o the time limit on the territory:      within 8 working days upon arrival
  - o the time limit in detention:      idem
- Are there any reports (NGO reports, media, testimonies, etc) of people refused entry at the border and returned without examination of their protection needs?       Yes  No

The Aliens Office (AO) is the authority responsible for the registration of asylum applications. At the border asylum applications can be made with the border police section of the Federal Police, and in penal institutions with the prison director. They refer the asylum application immediately to the AO, who informs the Commissioner General for Refugees and Stateless Persons (CGRS) about it.<sup>13</sup>

A change in legislation in 2007 abolished the general admissibility procedure, which was the Aliens Office's exclusive competence. Today, the asylum section of the Aliens Office is still responsible to:

- a. receive the asylum application,
- b. register the asylum seeker in the so-called waiting register (provisional population register for foreign nationals) and
- c. take finger prints and a photograph, make a chest x-ray to detect tuberculosis and verify which EU Member State or Schengen Associated State is responsible for examining the asylum application (the Dublin-procedure).

At the AO a short interview takes place to establish the identity, the origin and the travel route of the asylum seeker and to fill in a questionnaire for the CGRS about the reasons why they fled their country of origin, or, in case of a subsequent asylum application, which new elements are being submitted. If Belgium is the responsible EU-state, the file is sent to the CGRS. Also the questionnaire about the reasons for the asylum application and the impossibility of a return to the country of origin has to be filled in by the staff member of the AO, if necessary with the help of an interpreter, and then transferred to the CGRS.<sup>14</sup> The asylum section of the Aliens Office is furthermore responsible for the follow-up of the asylum seeker's legal residence status throughout the procedure as well as the follow-up of the final decision on the asylum application. This means in the case of a positive decision, registration in the register for foreigners or in the case of a negative decision issuing an order to leave the territory. Within the Aliens Office the Closed Centre section is responsible for all the asylum applications lodged in the detention centres and prisons, while the Border Inspection section is responsible for asylum applications lodged at the border. The three sections within the Aliens Office (Asylum section, Closed Centres section and Border Inspection section) follow the exact same procedure within Aliens Office's general competence, each for their respective 'categories' of asylum seekers.

On the territory (whether in liberty or detained or in prison) asylum applications have to be made within 8 working days after the arrival; at the border they have to be made immediately upon the request of the border police officer about the purpose of the journey to Belgium.<sup>15</sup> There is no specific sanction for not

<sup>13</sup> Article 50 Aliens Act and Article 71/2 Royal Decree 1981.

<sup>14</sup> Article 51/3-51/10 Aliens Act; Article 10 and 15-17 Royal Decree Asylum Procedure AO

<sup>15</sup> Articles 50 and 50ter Aliens Act.

respecting this time limit, but it can be taken into consideration by the CGRS as one of the elements in assessing the credibility of the asylum claim.

The Aliens Office's competence to decide on whether or not subsequent asylum applications must be taken into consideration (admissibility) is transferred to the CGRS since September 2013.<sup>16</sup> Now the AO only has to register the asylum seeker's declaration about the new elements and the reasons why he could not deposit them earlier, and transfer the file 'without delay' to the CGRS.<sup>17</sup> It should be noted that technically the AO could refuse to transfer the subsequent application to the CGRS if it considers that no new element was submitted and therefore cannot be registered as such.

Besides the sporadic stories of other detained asylum seekers to the visitors of closed centres at the border (which are impossible to check, for lack of a systematic independent monitoring of all arrivals at the border), there are no published reports of NGOs about cases of actual *refoulement* at the border of persons wanting to apply for asylum, but being refused to get their application registered or even at least getting their application examined on its admissibility. There are some reports though, also referred to by the Committee Against Torture of the UN Human Rights Council, about extraditions (by Ministerial Decree) and repatriations after an in-merit examination of the well-foundedness of the asylum application, but without having respected the absolute nature of Article 3 ECHR.<sup>18</sup>

In French, returning someone at the border (so without having allowed him to access the territory), but after having examined his asylum application on its well-foundedness, is wrongly referred to with the legal term *refoulement*. This may add to the confusion between a genuine *refoulement* (or push-back) and the execution of a return decision.

## 2. Regular procedure

### General (scope, time limits)

#### Indicators:

- Time limit set in law for the determining authority to make a decision on the asylum application at first instance (in months):  N/A
- Are detailed reasons for the rejection at first instance of an asylum application shared with the applicant in writing?  Yes  No
- As of 31<sup>st</sup> December 2012, the number of cases for which no final decision (including at first appeal) was taken one year after the asylum application was registered \* (number not available - see below)

<sup>16</sup> This was the most important change introduced in the Aliens Act – together with the introduction of some additional non-admissibility grounds and a partial transposition of the Recast Qualification Directive – by the Law of 8 May 2013, published in the [Moniteur belge](#) on 22 August 2013 and entered into force on 1 September 2013.

<sup>17</sup> Art. 51/8 Aliens Act

<sup>18</sup> UNHRC, CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 51<sup>th</sup> Session (28 Oct 2013 - 22 Nov 2013), [Belgium](#). Also the submissions of Amnesty International, the *Ligue des Droits de l'Homme* (French speaking Belgian Human Rights League) and the Center for Equal Chances and the Fight against Racism are included here, in which at least three cases of extradition by Ministerial Decree are mentioned in which the Minister of Justice overruled non-binding opinions by different instances (among others the CGRS) and relied on diplomatic assurances (Article 53bis Aliens Act). In one such case the European Court of Human Rights ruled that Belgium had violated Article 3 ECHR by repatriating an Iraqi, excluded from the subsidiary protection (presupposing a real risk of serious harm) because of terrorism-related offences (ECtHR, *M.S. v. Belgium*, n° 500012/08, 31 January 2012). Amnesty International considered it a violation of the principle of non-*refoulement*.



The asylum applications, for which Belgium is responsible according to the Dublin Regulation, are transferred to the office of the Commissioner General for Refugees and Stateless Persons (CGRS) to be examined on their merits. The CGRS, which is an independent administrative authority, is exclusively specialised in asylum decision making. In a single procedure, the CGRS first examines whether the applicant fulfils the eligibility criteria for refugee status and, only if they are not, subsequently whether they are eligible for subsidiary protection status.<sup>19</sup> The CGRS has the competence to: (1) recognise/grant and refuse refugee status or subsidiary protection status; (2) to decide on the admissibility of asylum applications of EU nationals, of persons from a safe country of origin or of persons already having obtained refugee status in a EU member state that is still effective, and of subsequent asylum applications; (3) to apply cessation and exclusion clauses or to revoke refugee status recognitions or subsidiary protection status; (4) to confirm and refuse refugee status of a refugee recognised in another country; (5) to reject asylum applications for technical reasons<sup>20</sup> and (6) to issue civil status certificates for recognised refugees.<sup>21</sup>

There is no provision in the law imposing an obligation on the CGRS to take a decision within a certain period of time in the regular procedure (this is different for accelerated or 'prioritized' procedures: see below).<sup>22</sup> At the beginning of 2012 the new Secretary of State for Asylum and Migration declared in Parliament that it is her intention to provide for a quick and high quality procedure that allows for new asylum applications to be decided on within an average time frame of three months (first instance decision) or six months (including final decision on appeal).<sup>23</sup> To achieve this, among other measures the LIFO (Last-In-First-Out) principle was generally applied – meaning that priority was to be given to handling the most recently introduced asylum application over handling the older ones – and the capacity of the asylum authorities was reinforced with an extra 100 staff. This resulted in a considerable shortening of the total processing time of new asylum applications and a higher overall output. New applications lodged in 2012 were processed by the CGRS on average in 80 calendar days, counting from the moment of transfer of the file by the Aliens Office. However, when taking into account the existing backlog of older files (i.e. one or two years old), the average processing time is still at 275 calendar days. There is no exact number available for cases that are still pending more than six months or more than a year after the registration of the asylum application.

It should be noted that the CGRS now considers a number of 4000 undecided asylum applications to be a normal working volume meaning that only a number above 4000 is considered to be backlog. By the end of 2012 (when a normal working volume was still considered to be 4500 files) the backlog consisted of 6995 files - for a total working volume of 11.495 files – and as of 1 October 2013 of only about 4000 files – for a total of 7926 files to be examined. A considerable catch-up effort has been accomplished throughout the year 2012 (considering the fact that in March 2012 there was a total of 15.343 files pending) and 2013 so far, and more applications were treated than introduced. This is partly due to a sharp rise in the number of decisions taken, but also to a serious drop of the number of asylum applications in 2012, and even more so in 2013 so far. Nevertheless the intended total processing time of six months, appeal included, has clearly not been reached.

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<sup>19</sup> Article 49/3 Aliens Act.

<sup>20</sup> The so called 'technical reasons' to refuse an asylum application are: to deliberately 'withdraw oneself' from a border procedure; not appearing on the date of the interview without giving good reasons within fifteen days; not delivering the information one is asked for within a month without good reasons; and to withdraw oneself from an obligation to report for at least fifteen days (Art. 52 Aliens Act)

<sup>21</sup> Article 52, 57/6, 57/6/1, 57/6/2 and 57/6/3 Aliens Act (the last two being new provisions since September 2013).

<sup>22</sup> Article 23/1 of the Royal Decree Procedure CGRS mentions the possibility for the asylum seeker to ask for a justification if no decision has been made within six months after the asylum application was made.

<sup>23</sup> Belgian Chamber of Representatives, [General Policy Note 2012 – Asylum and Migration Reform](#), 20 December 2011, p. 4.



## Appeal

### Indicators:

- Does the law provide for an appeal against the first instance decision in the regular procedure:
  - Yes  No
  - o if yes, is the appeal  judicial  administrative
  - o If yes, is it suspensive  Yes  No
- Average delay for the appeal body to make a decision: 104 days \* (not including the non-suspensive appeals for annulment of refusals for EU-citizens and safe country of origins and of Dublin-decisions- see below)

A judicial appeal at the Council of Aliens Law Litigation (CALL) can be introduced against all negative in merit decisions of the Commissioner General for Refugees and Stateless Persons (CGRS). These appeals (and the 30 calendar days period to lodge it) have an automatic suspensive effect on removal decisions following the refusal decision of the CGRS.<sup>24</sup> In those cases the CALL has a so-called “full jurisdiction” which allows it to reassess the facts and to take one of three possible decisions: (1) to confirm the negative decision of the CGRS, (2) to overturn it by granting refugee or subsidiary protection status or (3) annul the decision and refer the case back to the CGRS for further investigation.<sup>25</sup> However, the CALL has no investigative powers of its own, meaning that it must take a decision on the basis of the existing case file - so in case it considers important information to be lacking, it has to annul the decision and send the case back to the CGRS for further investigation.

Other appeals in asylum cases also fall under the competence of the CALL, but have no automatic suspensive effect and are exempt from full jurisdiction: (1) appeals against decisions of the Aliens Office regarding the application of the Dublin II Regulation, (2) appeals against decisions of the CGRS not to take into consideration subsequent applications because serious new elements are lacking and (3) appeals against non-admissibility decisions (i.e. decisions ‘not to take into consideration’) of the CGRS regarding asylum applications of EU citizens, persons from a safe country of origin or persons who already have refugee status in another EU Member State (see section on admissibility procedure for further details). In these cases the procedure before the CALL is an annulment procedure, which is limited to a judicial review of the legality of the decision of the Aliens Office or the CGRS. The CALL can only annul the decision and refer it back to the Aliens Office or the CGRS, but cannot decide on the protection status as such. Since the annulment procedure has no automatically suspensive effect, in order to have the execution of the decision to leave the territory suspended an additional petition requesting suspension should be introduced (normal suspension request). If necessary, such suspension must be requested through a separate ‘extremely urgent necessity’ procedure if a ruling on a normal suspension request could be too late and ineffective.

Appeals must be lodged within 30 calendar days after notification of the decision – unless the person is detained in which case an appeal against whichever decision should be made within 15 calendar days.<sup>26</sup> All procedures before the CALL are formalistic and essentially written, which makes the intervention of a lawyer necessary. All relevant elements have to be mentioned in the petition to the CALL.<sup>27</sup> At the hearing the parties, the asylum seeker as well as the Aliens Office or the CGRS, and their lawyer can orally explain their arguments to the extent that they were mentioned in the petition.<sup>28</sup> In the full jurisdiction appeals however, the CALL is now also obliged to take into consideration every new element brought forward by one of the parties with an additional written note before the end of the hearing. Depending on how the CALL assesses the chance that this new element(s) might lead to the

<sup>24</sup> Art. 39/70 Aliens Act.

<sup>25</sup> Art. 39/2 Aliens Act.

<sup>26</sup> Article 39/57 Aliens Act.

<sup>27</sup> Article 39/69 Aliens Act.

<sup>28</sup> Article 39/60 Aliens Act.

recognition or granting of an international protection status, it can annul the decision and send it back to the CGRS for additional examination (unless the CGRS can submit a report about its additional examination to the CALL within eight days) or leave the asylum seeker the opportunity to reply on the new element (brought forward by the CGRS) with a written note within eight days (the sanction being a presumption to agree with the CGRS on this point).<sup>29</sup> Still, in its recent Singh judgement, the European Court of Human Rights (ECtHR) also found a violation of the right to an effective remedy because the CALL did not respect the part of the shared burden of proof that lies with the asylum authorities, by refusing to reconsider some new documents concerning their nationality and protection status in a third country, the aspects of the asylum seekers' declarations that were questioned before in the preceding full jurisdiction procedure.<sup>30</sup>

In 2012 14.554 appeals in asylum related cases were introduced for which the breakdown is as follows: 10.934 in the full jurisdiction procedure and 3620 in the annulment procedure, of which 343 against Dublin decisions of the Aliens Office, 895 against Aliens Office decisions not to take into consideration a subsequent asylum application,<sup>31</sup> 11 against CGRS decisions not to take into consideration asylum applications of EU citizens and 197 concerning applicants from safe countries of origin. Also 2190 asylum related petitions to suspend were lodged in 2012, of which 200 in the extremely urgent necessity procedure. Of the full jurisdiction appeals 306 were handled in an accelerated procedure and 10.628 in the regular procedure. For 3361 of the latter cases the chamber president decided to handle them according to the purely written procedure, in 2303 (68.5%) of which the applicants asked to be heard anyway.<sup>32</sup> The average time needed by the CALL to issue a decision on the appeal in 2012 was 104 calendar days in full jurisdiction cases and 145 calendar days in asylum related annulment cases. On 31 December 2012 5319 appeals in full jurisdiction were pending, of which only 144 were introduced more than a year before.

Generally speaking lawyers and asylum seekers are quite critical about the limited use the CALL seems to make of its full jurisdiction, which is reflected in the low reform and annulment rates. It is also important to note that there is a big difference in jurisprudence between the Francophone (being more liberal) and the Dutch chambers (more strict) of the CALL. On the other hand it must be acknowledged that the quality of a lot of appeals submitted is often poor, especially if it was not introduced by one of the few specialised lawyers in the field. A 2011 Fundamental Rights Agency study showed that asylum seekers in Belgium faced difficulties in finding a lawyer or had to change lawyer to lodge an appeal. The FRA study revealed that at the hearing they felt either as spectators or were otherwise led hand-held through the process by lawyers who instructed them when to speak and what to say, with

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<sup>29</sup> Article 39/76 Aliens Act. This provision has recently been changed by the law of 8 May 2013. Before, according to this provision, new elements were only to be taken into consideration if they were referred to in the petition for appeal and could not be submitted earlier during the administrative procedure. Alternatively the judge could also decide to take into consideration any new element that did not fulfil these conditions, if it found support in the judicial file, it could decisively establish the founded or unfounded nature of the appeal and the party submitting the element could plausibly explain why this could not be done earlier in the procedure. Any such new element also, additionally to the conditions of both of these alternative situations, had to refer to a situation that occurred after the last phase of the administrative procedure or consist of newly occurred evidence concerning facts stated during that administrative procedure. The old provision was in fact not applied anymore since the CALL itself considered it to be an interference with the rights of the defence. On this issue: CBAR-BCHV, [Nieuwe gegevens voor de Raad voor Vreemdelingenbetwistingen in volle rechtsmacht – In lijn met het Europees recht?](#) (*New elements before the CALL in full jurisdiction – in line with European law?*) (only available in Dutch), June 2010.

The new provision is clearly a simplification of what 'new elements' are to be taken into consideration by the CALL and which are not, and a better protection of the rights of the defence. On the other hand, it also introduces an additional procedural phase with strict time limits to the already formalistic CALL procedure.

<sup>30</sup> Violation of Article 13 taken together with Article 3 ECHR. See European Court of Human Rights, *Singh and Others v Belgium* (French only), Application no. 33210/11, Judgment of 2 October 2012.

<sup>31</sup> The AO still being the competent authority to make these decisions until 1 September 2013.

<sup>32</sup> Article 39/73 Aliens Act

occasionally little explanation. In some cases, hearings where the fate of asylum seekers was going to be decided were perceived as disappointingly short.<sup>33</sup>

A possibility of onward appeal against decisions of the CALL exists before the Council of State (CS) which is the Belgian supreme administrative court.<sup>34</sup> Appeals before the CS must be filed within 30 calendar days after the decision of the CALL has been notified and have no suspensive effect. They are so called “cassation appeals” that allow the CS only to verify whether the CALL respected the applicable legal provisions and substantial formal requirements and requirements under penalty of nullity.<sup>35</sup> It cannot make its own assessment and decision on the facts of the case. Appeals before the CS are first channelled through some kind of admissibility filter, a screening by the CS to filter out, within eight working days, those cassation appeals that have no chances of success or are only intended to prolong the procedure.<sup>36</sup> If the decision under review is annulled (‘quashed’), the case is sent back to the CALL for a new assessment of the initial appeal, observing the judgment of the CS.

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker conducted in most cases in practice in the regular procedure?  Yes  No
- If so, are interpreters available in practice, for interviews?  Yes  No
- In the regular procedure, is the interview conducted by the authority responsible for taking the decision?  Yes  No
- Are interviews conducted through video conferencing?  Frequently  Rarely  Never

At least one personal interview by a protection officer at the Commissioner General for Refugees and Stateless Persons (CGRS) is imposed by law.<sup>37</sup> Generally for every asylum application the CGRS does interview the asylum seeker, though the length and the substance of the questions can vary substantially – depending e.g. on the manifestly founded or unfounded nature of the claim, the presence or absence of new elements presented in case of a subsequent application. The interview serves the CGRS to examine whether the asylum application is credible and qualifies for refugee status or subsidiary protection status (whereby the refugee status is examined first, and only if the asylum seeker does not qualify as a refugee, eligibility for subsidiary protection status is examined). The lawyer and another person of confidence chosen by the asylum seeker can attend the interview.<sup>38</sup> The CGRS elaborated an interview charter as a code of conduct for the protection officers, which is available on its website.<sup>39</sup>

The asylum seeker can request for the assistance of an interpreter when introducing their asylum application with the AO, in case their knowledge of Dutch or French is not sufficient.<sup>40</sup> In that case the

<sup>33</sup> European Union Agency for Fundamental Rights (FRA), [Access to effective remedies: The asylum-seeker perspective](#), 2011, p. 27-34.

<sup>34</sup> Article 39/67 Aliens Act.

<sup>35</sup> Article 14 §2 of the Acts on the Council of State, coordinated on 12 January 1973.

<sup>36</sup> The law, somewhat obscurely, determines cassation appeals to be admissible only (1) if they invoke a violation of the law or a substantial formal requirement or such a requirement under penalty of nullity, in as far as the invoked argument is not clearly unfounded and the violation is such that it could lead to the cassation of the decision and might have influenced the decision; or (2) if it falls under the competence and jurisdiction of the Council of State, in as far as the invoked argument is not clearly unfounded or without subject and the examination of the appeal is considered to be indispensable to guarantee the unity of the jurisprudence (Article 20 of the Acts on the Council of State, coordinated on 12 January 1973). In practice the Council of State does not shed light on what exactly is to be understood under these conditions.

<sup>37</sup> Article 6 Royal Decree Procedure CGRS.

<sup>38</sup> Article 13/1 Royal Decree Procedure CGRS.

<sup>39</sup> [Code of conduct for the protection officers](#).

<sup>40</sup> Article 51/4 Aliens Act.



public centres for social welfare (PCSW). There a first legal advice is given by a lawyer or a person is referred to a more specialised instance, organisation or to the second line assistance, completely free of charge for every person, regardless of income or financial resources. Although legally provided for in every judicial district, in the field of asylum law only very few commissions seem to be actually functioning: there was one in the PCSW of Antwerp and formally there is also one in the closed centre in Bruges, but only the one in the closed centre of Vottem still appears to be functioning. Besides these lawyers' initiatives, there are also other public social organisations and NGO's providing this kind of first line legal assistance.

The "second line assistance" is organised by the local bar association that exists in every judicial district. Each bar association has a bureau for legal assistance that can appoint a lawyer for (entirely or partially) free second line assistance, the so called "pro Deo lawyer". In practice this might limit the free choice of a lawyer to a certain extent, but in theory every lawyer can accept to assist someone "pro Deo" and ask the bureau to be appointed as such, upon the direct request of an asylum seeker and quite some specialised lawyers do so frequently in asylum cases. Within this "second line assistance", a lawyer is appointed to give substantial legal advice and to assist and represent the person in the asylum procedure. A Royal Decree of 18 December 2003 determines the conditions under which one can benefit from this second line legal assistance free of charge.<sup>46</sup> Different categories are defined, in general depending on the level of income or financial resources and, with regard to specific procedures, on the social group they belong to. For asylum seekers and persons in detention, among others, there is a refutable presumption of being without sufficient financial resources (until proof of the contrary). With regard to children (unaccompanied or not), this presumption is irrefutable. In theory only asylum seekers who lack sufficient financial means should be entitled to free legal assistance, but because of the presumption, in practice every asylum seeker will get a lawyer appointed to assist them in all the stages of the asylum procedure.

The law permits the bureau for legal assistance to apply a preliminary merits test before appointing a pro Deo lawyer in order to refuse those manifestly unfounded requests, which have no chance of success at all.<sup>47</sup> However, this provision is only very rarely applied in practice. In one judicial district the appointment of a free lawyer was made dependant of a preliminary positive advice on the matter by another lawyer, but this practice has been halted by a judgement of the labour tribunal. So in practice if a person entitled to it asks for a lawyer free of charge to be appointed, the bureaus or legal assistance grant this quasi-automatically. However, there are reports of a more stringent appointment practice in some districts when the lawyers request to be appointed themselves after having been consulted by an asylum seeker, especially in case of subsequent asylum applications.<sup>48</sup>

Pro Deo Lawyers receive a fixed remuneration for every specific procedure or action by the bureau for legal assistance, which are financed by the bar associations that receive a fixed annual subsidy 'envelope' from the Ministry of Justice. In theory costs can be re-claimed by the state if the asylum seeker would appear to have sufficient income after all, but this does not happen in practice. A Ministerial Decree of 5 June 2008 has determined a list of points granted per service rendered:

- assistance during the first instance procedure at the Commissioner General for Refugees and Stateless Persons (CGRS): 5 points; in case it also includes attending the interview: 15 points;

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<sup>46</sup> Koninklijk besluit van 18 december 2003 tot vaststelling van de voorwaarden van de volledige of gedeeltelijke kosteloosheid van de juridische tweedelijnsbijstand en de rechtsbijstand / Arrêté royal de 18 décembre 2003 déterminant les conditions de la gratuité totale ou partielle du bénéfice de l'aide juridique de deuxième ligne et de l'assistance judiciaire (Royal Decree of 18 December 2003 establishing the conditions for second line legal assistance and legal aid fully or partially free of charge); (in [Dutch](#)) / (in [French](#)).

<sup>47</sup> Article 508/14 Judicial Code.

<sup>48</sup> E.g. the Dutch speaking Brussels bar association is much more stringent in appointing a lawyer upon his own request if another one had been appointed already before. This causes a lot of disputes between the bureau for legal assistance of that bar association and lawyers or bureaus for legal assistance of bar associations from other districts.



- an appeal before the Council of Aliens Law Litigation (CALL) : 15 points; in case it includes a public hearing : 25 points; in case it includes an 'extremely urgent necessity' procedure 35 points;
- an appeal with the Council of State: 15 points in case it is declared non admissible, 25 points in case it is declared admissible and a session of the Council of State is being held.<sup>49</sup>

Currently the Minister of Justice has engaged to pay about 26 euros per point.<sup>50</sup> However, this amount could not be upheld in practice since the total amount reserved by the Minister of Justice for compensation of pro Deo lawyers is fixed in advance and has not changed a lot in recent years with the number of procedures having more than doubled since 1999. The amount actually paid per point is said to be only 24.03 € in 2013.<sup>51</sup> Also since 2013, lawyers are subjected to a Value Added Tax (VAT) of 21%, which they cannot recover from asylum seekers, but will have to pay from their pro Deo remuneration. These evolutions certainly make the pro Deo remuneration system less attractive for lawyers. Another obstacle for lawyers to engage in this area of legal work is the fact that they are only paid once a year for all the cases they have closed and reported to their bar association in the previous year. Closure of the case can only take place once all procedures are finished, which in reality is long after the actual interventions were undertaken by the lawyer.

The 2011 Fundamental Rights Agency study showed that asylum seekers feel that they have sufficient choice in selecting their lawyer in Belgium. However, they also reported bad experiences, including having paid private lawyers who never provided any help or only delayed the process. Language barriers in communicating with lawyers were also listed as one of the main obstacles faced with regard to the submission of an appeal, as well as the fact that they sometimes did not receive a copy of the submitted appeal and having been discouraged by their lawyers to appear at the hearing. For border accelerated and admissibility asylum procedures and asylum procedures while in detention centres it was reported that asylum seekers found it difficult to have a lawyer appointed in time because of practical obstacles.<sup>52</sup>

### 3. Dublin

#### *Indicators:*

- Number of outgoing requests in the previous year (2012): 4119 persons (not files)
- Number of incoming requests in the previous year (2012): 3381 persons
- Number of outgoing transfers carried out effectively in the previous year (2012): 970 persons
- Number of incoming transfers carried out effectively in the previous year (2002): 931 persons

#### *Procedure*

#### *Indicator:*

- If another EU Member State accepts responsibility for the asylum applicant, how long does it take in practice (on average) before the applicant is transferred to the responsible Member State? \* (not available - see below)

<sup>49</sup> Ministerieel besluit van 5 juni 2008 tot vaststelling van de lijst met punten voor prestaties verricht door advocaten belast met gedeeltelijk of volledig kosteloze juridische tweedelijnsbijstand / Arrêté ministériel de 5 juin 2008 fixant la liste des points pour les prestations effectuées par les avocats chargés de l'aide juridique de deuxième ligne partiellement ou complètement gratuite (Ministerial Decree of 5 June 2008 establishing the list of points for tasks carried out by lawyers charged with providing second line legal assistance fully or partially free of charge); (in [Dutch](#)) / (in [French](#)).

<sup>50</sup> This is the gross amount, meaning that is it before deduction of income taxes.

<sup>51</sup> [Order](#) of French- and Germanspeaking Bar Associations.

<sup>52</sup> See footnote 18. Also even fewer lawyers are willing to take charge of asylum or detention procedure cases of persons in the detention centers.

In practice all asylum seekers are fingerprinted and checked in the EURODAC database immediately after lodging their asylum application with the Aliens Office (AO).<sup>53</sup> Systematically for every asylum application the AO first determines which EU state is responsible for examining it, based on the criteria of the Dublin II Regulation. This is a preliminary procedure to decide whether or not the file must be transferred to the Commissioner General for Refugees and Stateless Persons (CGRS).

The law uses the term 'European regulation' where it refers to the criteria in the Dublin II Regulation for determining the responsible state. The sovereignty clause is explicitly mentioned in Article 51/5 Aliens Act, but the humanitarian clause is not. Both clauses are sometimes applied in practice but not systematically and it is very unclear in which situations this is done. No specific statistics are available relating to this. Since the *M.S.S. v. Belgium and Greece* judgment of the European Court of Human Rights, condemning Belgium for sending back an asylum seeker to Greece under the Dublin II Regulation,<sup>54</sup> detention and reception conditions, guarantees in the asylum procedure and the access to an effective remedy in the responsible state seem to be taken into consideration in some cases when deciding whether or not to apply the sovereignty clause. No requests are made to Greece anymore at all, although at least one transfer to Greece has taken place in 2012 after arrest on the territory.<sup>55</sup> Also with regard to some Dublin transfers to other EU Member States the AO has accepted to apply the sovereignty clause in individual cases (Poland, Malta, Italy, and Hungary in specific cases of vulnerability or other). Following the judgment of the Court of Justice of the European Union (CJEU) on the interpretation of the humanitarian clause,<sup>56</sup> the AO at first accepted to collaborate actively to take charge of adult family members of unaccompanied asylum seeking children in Belgium (under the family reunification provisions of the Dublin II-Regulation), who were still in Greece but for whom the Greek asylum authorities had not yet made a request to Belgium to take charge of the family members concerned. However, the AO now refuses a generalised application of this practice, claiming a more strict interpretation of this judgment (applying it only in case the humanitarian clause applies, and not under the Dublin provisions concerning the criteria for unaccompanied children), and in order to avoid triggering possible abuses (trafficking of children).

The asylum seeker has to attend a specific Dublin interview in which they can state their reasons for opposing a transfer to the responsible EU state.<sup>57</sup> Lawyers are not allowed to be present at any procedure at the AO, including the Dublin interview. However, they can intervene by sending information on the reception conditions and the asylum procedure in the responsible state or with regard to individual circumstances of vulnerability or other.<sup>58</sup> This is important since the Council of Aliens Law Litigation (CALL) has repeatedly demanded from the AO that it responds to all arguments put forward and all information submitted. When a request to take back or take charge of an asylum seeker is being sent to another state, this is mentioned on the document provided to the asylum seeker as proof of registration of the asylum application (the so-called 'Annex 26'). A decision to transfer following a (tacit) agreement to take back or to take charge of an asylum applicant is delivered in a written decision containing the reasons of the decision in person (the so-called 'Annex 26quater'). However, the asylum seeker's lawyer does not receive a copy sent to the asylum seeker.<sup>59</sup> In case Belgium is the responsible State, the asylum seeker's file is transferred to the CGRS, and this is mentioned also on the registration proof of the asylum application.<sup>60</sup>

Persons whose claims are considered to be Dublin cases may in certain cases be detained for a maximum period of one month while the AO is determining which country is responsible for examining

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<sup>53</sup> Art. 51/3 Aliens Act.

<sup>54</sup> European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011, (violation of Article 13 in conjunction with Article 3 ECHR).

<sup>55</sup> Case on file with the author.

<sup>56</sup> Court of Justice of the European Union, Case C-245/11, *K v. Bundesasylamt*, Judgment of 6 November 2012.

<sup>57</sup> Article 10 Royal Decree Procedure AO.

<sup>58</sup> Article 18 Royal Decree Procedure AO.

<sup>59</sup> Article 71/3 Royal Decree 1981.

<sup>60</sup> Article 51/7 Aliens Act.

the asylum application. In particularly complex cases, detention may be extended for an additional month. Once a decision has been taken that Belgium is not the responsible state (technically this implies under Belgian law a decision refusing the right to enter (at the border) or reside on the territory and to transfer - the so-called 'Annexes 25quater' and '26quater'), the person can be detained as well for the time necessary for carrying out the transfer, without exceeding one (additional) month.<sup>61</sup> In practice these time limits are respected, but there have been cases in which the period has been exceeded (see also under the Detention section).

The average delay between the asylum application and the delivery of a decision refusing entry (at the border) or residence on the territory based on the Dublin II Regulation is 78 days. The delay until the actual transfer is not known because the AO does not and cannot keep statistics relating to asylum seekers returning or going to the responsible State on a voluntary basis and the Dublin transfer decisions that are not executed in practice.

## Appeal

### Indicators:

- Does the law provide for an appeal against the decision in the Dublin procedure:
  - Yes       No
  - o if yes, is the appeal  judicial       administrative
  - o If yes, is it suspensive  Yes       No
- Average delay for the appeal body to make a decision: \* (not available - see above, under the regular procedure)

The appeal procedure provided for against a Dublin transfer decision (refusal of entry or residence on the territory) is a non-suspensive annulment procedure before the Council of Aliens Law Litigation (CALL), not a "full jurisdiction" procedure (see above regular procedure).

While controlling if all substantial formalities have been respected by the AO in taking the disputed decision,<sup>62</sup> the CALL also considers whether the sovereignty clause should have been applied by assessing potential breaches of Article 3 ECHR. In order to do this the CALL takes into consideration all relevant elements concerning the state of reception conditions and the asylum procedure in the responsible state where the AO wants to transfer the asylum seeker to.

It is exactly this appeal procedure that was considered by the European Court of Human Rights (ECtHR) not to be an effective remedy in its *M.S.S. v. Belgium and Greece* judgment. Through a number of judgments adopted in its composition of "general assembly" in February 2011 the CALL has brought its procedure more or less in accordance with the jurisprudence of the ECtHR.<sup>63</sup> This means that since then suspension can be applied for during the entire thirty calendar days period for appeal while during the first five calendar days (and no less than three working days) of this period execution of the transfer decision is suspended automatically. If an appeal (in an extremely urgent necessity procedure) has been lodged before the CALL within these five days or afterwards, while invoking a potential breach of Article 3 European Convention on Human Rights (ECHR) in the petition, the appeal continues to be suspensive until a judgment is issued.<sup>64</sup>

<sup>61</sup> Article 51/5 Aliens Act

<sup>62</sup> Article 39/2, §2 Aliens Act.

<sup>63</sup> CALL, judgment n° 56201 (a.o.), 17 February 2011. On this issue, see: CBAR-BCHV, *UDN als effectief rechtsmiddel post-M.S.S. Overzicht van de rechtspraak van de Raad voor Vreemdelingenbetwistingen: In overeenstemming met de Europese waarborgen tegen mishandeling en foltering bij de uitvoering van uitwijzingsbeslissingen* (only in Dutch) ([Extremely urgent necessity as an effective remedy post-MSS. An overview of the jurisprudence of the Council of Alien Law Litigation: In accordance with the European guarantees against mistreatment and torture when decisions to return are executed](#)), June 2012.

<sup>64</sup> Articles 39/83 and 39/82 Aliens Act.



There is no information available with regard to the average delay for the CALL to decide on the appeals against Dublin decisions specifically (nor is this available for the annulment or suspension procedures before the CALL in general).

As with all final judgments by administrative judicial bodies also against the judgments of the CALL concerning Dublin transfers a non-suspensive cassation appeal before the Council of State can be introduced (see above regular procedure).<sup>65</sup>

### Personal Interview

*Indicators:*

- Is a personal interview of the asylum seeker conducted in most cases in practice in the Dublin procedure?  Yes  No
  - o If yes, is the personal interview limited to questions relating to nationality, identity and travel route?  Yes  No
  - o If so, are interpreters available in practice, for interviews?  Yes  No

The asylum seeker has to attend a specific Dublin interview in which they can state their reasons for opposing a transfer to the responsible EU state.<sup>66</sup> Lawyers are not allowed to be present at any procedure at the AO, including the Dublin interview. They can nevertheless intervene by sending information on the reception conditions and the asylum procedure in the responsible state or with regard to individual circumstances of vulnerability or other.<sup>67</sup>

As a consequence of the *M.S.S. v. Belgium and Greece* judgment, the AO has accepted to add some more specific questions to the questionnaire relating to elements relevant for determining if the sovereignty clause should be applied to avoid potential inhumane treatment of the person concerned, in case of transfer to another responsible EU or Schengen Associated state. The asylum seeker is asked why they cannot or do not want to return to that specific country, whether they have a specific medical condition and why they have come to Belgium. However, no questions are asked specifically as to what the reception or detention conditions, the asylum procedure and the access to an effective remedy are like in the responsible state. This is for the asylum seeker to invoke.

### Legal assistance

*Indicators:*

- Do asylum seekers have access to free legal assistance at the first instance in the Dublin procedure in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a Dublin decision?  Yes  always/with difficulty  No

The Ministerial Decree of 5 June 2008, laying down the remuneration system for lawyers providing free legal assistance has not determined specific points for a lawyer's intervention in the Dublin procedure at first instance with the Aliens Office (AO). Of course the general Judicial Code and Royal Decree provisions on free legal assistance can be applied and asylum seekers as such are entitled to a pro Deo lawyer also with regard to the Dublin procedure. However, since assistance of a lawyer is not allowed during the Dublin interview, the general category of administrative procedures (10 points) will not be

<sup>65</sup> Article 14 §2 of the Acts on the Council of State.

<sup>66</sup> Article 10 Royal Decree Procedure AO.

<sup>67</sup> Article 18 Royal Decree Procedure AO.

applied by the bureau for legal assistance. It might make an analogy with the category of written legal advice (4 points), if the lawyer intervenes in any other way (written or otherwise) at the AO with regard to a Dublin case.

With regards to the appeal the general rules for free legal assistance in annulment and suspension petitions with the Council of Aliens Law Litigation (CALL) apply (see above regular procedure).

### Suspension of transfers

#### Indicator:

- Are Dublin transfers systematically suspended as a matter of policy or as a matter of jurisprudence to one or more countries?  Yes  No
  - o If yes, to which country/countries? Greece, Malta

Sometimes transfers under the Dublin II Regulation are not executed following an informal (internal) and not explicitly motivated decision of the Aliens Office (AO) itself or a suspension judgment (in some rare cases followed by an annulment judgement) of the Council of Aliens Law Litigation (CALL). Besides the general suspension of transfers to Greece, there have been suspensions on a case-by-case basis of transfers to Poland, Hungary, Italy and Malta. This has been done *inter alia* for reasons of specific vulnerability of the asylum seeker concerned, reception conditions of children, push back practices to third countries. For Malta there appears to be an overall suspension of transfers in place now as well since the CALL decided that there is a serious risk of inhuman treatment of asylum seekers in Malta because of its non-compliance with the EU asylum directives.<sup>68</sup>

Once the maximum time limit under the Dublin Regulation for executing the transfer has passed (which is prolonged in case the persons did not have a known address with the AO), Belgium's responsibility for examining the asylum application will be accepted when the person concerned presents themselves to the AO again. Technically this will be registered as a subsequent asylum application, contrary to what the Dublin II Regulation seems to determine – without demanding 'new elements' to be submitted though before taking the asylum application 'into consideration' and transferring it subsequently to the Commissioner General for Refugees and Stateless Persons (CGRS), but hindering as such the immediate access to accommodation in a reception centre.

## 4. Admissibility procedures

### General (scope, criteria, time limits)

No specific *admissibility procedure* exists in Belgium but it is nevertheless possible for the Aliens Office (AO) and the Commissioner General for Refugees and Stateless Persons (CGRS) to take a decision refusing to enter into a further in-depth examination of the asylum application according to the regular procedure on the basis of *inadmissibility grounds*. Under Belgian law, this is not referred to as a decision of 'inadmissibility', but as a decision 'not to take into consideration'.<sup>69</sup>

As explained in the section dealing with Dublin, the AO is in charge of determining whether Belgium is responsible for the examination of the asylum application or not on the basis of the Dublin II Regulation.<sup>70</sup> If it decides this is not the case, the Aliens Office can refuse to transfer the case to the CGRS by simply taking a decision to refuse entry (in case of a border procedure) or residence (on the

<sup>68</sup> CALL, judgement n° 72824, 6 January 2012.

<sup>69</sup> Since these decisions 'not to take into consideration' an asylum application have all characteristics of inadmissibility decisions, for reasons of internal coherence with similar types of decisions in other European asylum systems, they are referred to as 'inadmissibility' decisions in this report nevertheless.

<sup>70</sup> Article 51/5 Aliens Act.

territory). This could also be considered as an admissibility procedure, but will not be further dealt with here (see under the section on Dublin).

Since September 2013, the CGRS has become the competent authority to decide whether or not to take subsequent asylum applications into consideration, depending on the presence or absence of new elements (or in case the first asylum application had been refused for technical reasons).<sup>71</sup> This is the only admissibility ground where the law also obliges the CGRS to take a (positive) decision of admissibility, the other grounds only being reason to declare the application inadmissible. The CGRS can further invoke an inadmissibility ground for three other types of caseloads: for asylum applications from EU-citizens, from persons from a so-called safe country of origin<sup>72</sup> and (since September 2013) from persons who already have refugee status in an EU member state that still effectively protects them. These applications are not examined in the same thorough and individual manner as the other asylum applications in the regular procedure. Asylum seekers from these countries are actually confronted with the presumption that the country of origin or first EU country of asylum concerned is safe and has an adequate judicial protection system and it is for the asylum seeker to rebut that presumption. The burden of proof to rebut the presumption of safety is thereby entirely on the asylum seeker. Also these cases are treated in an accelerated manner: a decision of inadmissibility has to be taken by the CGRS for EU-citizens within 5 working days and for those from a safe country or first EU country of asylum within 15 working days.<sup>73</sup> The CGRS does not always respect this 15 days period in practice and argues it is only a so-called term of internal order, entailing no sanction if it is not respected.

For all these grounds only written negative decisions on the admissibility of the asylum application stating the reasons are formally taken and notified to the applicant. Positive decisions on admissibility simply result in a further examination of the well-foundedness of the asylum application by the CGRS without any formal decision stating the reasons for such decision. Positive decisions on the admissibility of subsequent asylum applications (being the only positive admissibility decisions – as opposed to decision of inadmissibility – the Aliens Act imposes the CGRS to take), are delivered as a formal written decision, but are not motivated (since no one has any interest in appealing against a decision in their favor).

In theory there should be no difference in the application of any of these inadmissibility grounds between asylum claims at the border or on the territory. In practice however, subsequent applications appear to be taken into consideration more rarely when the person concerned is in detention, since it is frequently presumed that they apply for asylum again only to avoid the execution of the removal decision. There have been cases in which elements that had not been invoked in an earlier asylum procedure and if found credible might be indications of a well-founded fear of persecution or real risk of serious harm, were not even mentioned in the decision of inadmissibility, resulting in a forced return of the asylum seeker.<sup>74</sup> This might also happen when not detained, but in that case it is easier to appeal

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<sup>71</sup> Article 51/8 and 51/6/2 Aliens Act (respectively modified and newly introduced provisions by the Law of 8 May 2013).

<sup>72</sup> At this moment seven countries are on the list of safe countries of origin: Serbia, Kosovo, Albania, FYR of Macedonia, Montenegro, Bosnia-Herzegovina and India  
Arrêté royal de 7 mai 2013 portant exécution de l'article 57/6/1, alinéa 4, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, établissant la liste des pays d'origine sûrs / Koninklijk besluit van 7 mei 2013 tot uitvoering van het artikel 57/6/1, vierde lid, van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, houdende de vastlegging van de lijst van veilige landen van herkomst (Royal Decree of 7 May 2013 implementing Article 57/6/1, par. 4 of the Aliens Act, establishing the list of safe countries of origin); (in [French](#)) / (in [Dutch](#)). This Royal Decree constitutes a simple renewal by the government of the list published by Royal Decree of 26 May 2012, since the Council of State accepted the list not to be in violation of any substantial legal provision and the Constitutional Court confirmed the constitutionality of the legal concept of 'safe country of origin'.

<sup>73</sup> Article 57/6, 57/6/1 and 57/6/3 Aliens Act (this last provision being introduced by the Law of 8 May 2013).

<sup>74</sup> One such a case is pending before the ECtHR (case of Z.H. v. Belgium, n° 64141/13) : it concerns a person having been forcibly returned to Afghanistan after making a subsequent asylum application in which he wrote on the questionnaire (that was still handed over to the asylum seeker in person until the recent change of law) that he had converted to Christianity, mentioning credible witnesses who could testify to this. This element was not even mentioned in the decision of non-admissibility.

such a decision or to insist with yet another asylum application, possibly supported by an additional declaration from the lawyer or a refugee organisation.

## Appeal

### Indicators:

- Does the law provide for an appeal against the decision in the admissibility procedure:
  - Yes       No
  - o if yes, is the appeal  judicial       administrative
  - o If yes, is it suspensive?  Yes       No

The appeal procedure provided for against any of the inadmissibility decisions (by the Aliens Office (AO) or by the Commissioner General for Refugees and Stateless Persons (CGRS) - refusal of entry or residence on the territory or decision not to take into consideration) is a non-suspensive annulment procedure before the Council of Aliens Law Litigation (CALL) - so not the suspensive “full jurisdiction” appeal as in the regular procedure. These appeals are limited to a judicial review of the legality of the decision of the AO or the CGRS. The CALL can only annul the decision and refer it back to the AO or the CGRS, but cannot take a new decision in their place. To get the execution of an order to leave the territory (or to *refouler* or remove a person) suspended an additional petition requesting suspension should be introduced (normal suspension request). If necessary, such suspension must be requested through a separate 'extremely urgent necessity' procedure if a ruling on a normal suspension request could be too late and ineffective (e.g. when the forced execution of a return decision is imminent). Appeals must be lodged within 30 calendar days after notification of the decision – unless the person is detained in which case an appeal should be made within 15 calendar days. (see also in the section on appeal in the regular procedure)

A possibility of onward 'cassation' appeal against decisions of the CALL exists before the Council of State.

## Personal Interview

### Indicators:

- Is a personal interview of the asylum seeker conducted in most cases in practice in the admissibility procedure?  Yes       No
  - o If yes, is the personal interview limited to questions relating to nationality, identity and travel route?  Yes       No
  - o If so, are interpreters available in practice, for interviews?  Yes       No
- Are interviews conducted through video conferencing?  Frequently       Rarely       Never

Since the procedure that leads to a decision of inadmissibility does not in itself differ from the regular procedure (other than the time period in which a decision has to be made – see the sections on accelerated and prioritised procedure), the same legal provisions apply to the interview taken by either of the two instances.

A regular interview for the registration of the asylum application takes place at the AO.<sup>75</sup> Although there is no explicit legal obligation to enquire specifically and proactively about potential new elements in case of a subsequent asylum application or about conditions which oppose a Dublin transfer, the officer at

<sup>75</sup> Article 51/10 Aliens Act.

the AO is explicitly obliged under the Royal Decree Procedure AO to take into consideration all elements concerning those two aspects, even if they are invoked only after the interview.<sup>76</sup>

At the CGRS the regular personal interview about the facts underlying the asylum application has to take place for EU-citizens, nationals of safe countries of origin and persons with refugee status in another EU member state to the same depth and detail as is the case for other asylum applications.<sup>77</sup> In practice these interviews tend to be much shorter since the burden of proof is explicitly put at the asylum seeker, to rebut the presumption of safety or effective protection, which the CGRS can take for granted. Also, in case of a subsequent application, the interview will be almost exclusively focussed on the new elements; when by example the country of origin or the nationality of the person concerned was considered not to be credible in the first procedure, the interview in the second procedure might only look at the new elements that counter those conclusions from the first procedure decision.

### Legal assistance

#### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the admissibility procedure in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal procedure against an admissibility decision?  Yes  not always/with difficulty  No

In first instance procedures leading to inadmissibility decisions as well as in the appeal procedures, the general provisions about the right and access to free legal assistance apply (also raising the same challenges for the asylum seekers) (see regular procedure section). In practice, a lot less procedural interventions by lawyers, appeals or otherwise, take place in these specific cases.

## 5. Border procedure (border and transit zones)

### General (scope, time-limits)

#### Indicators:

- Do border authorities receive written instructions on the referral of asylum seekers to the competent authorities?  Yes  No
- Are there any substantiated reports of *refoulement* at the border (based on NGO reports, media, testimonies, etc)?  Yes  No
- Can an application made at the border be examined in substance during a border procedure?  Yes  No

Belgium has thirteen external border posts: six airports, six seaports, and one international train station (Eurostar-station Brussels). Belgium has no border guard authority as such; the border control is carried out by police officers from the Federal Police, in close cooperation with the Border Control section at the Aliens Office (AO) (as opposed to the control on the territory, being a competence of the Local Police in the first place).

A person without the required travel documents will be refused entry to the Schengen territory at a border post and will be notified of a decision of refusal of entry to the territory and *refoulement* by the

<sup>76</sup> Articles 10, 16 and 18 Royal Decree Procedure AO.

<sup>77</sup> Article 6 Royal Decree Procedure CGRS.

AO (so-called 'Annex 11ter').<sup>78</sup> Such person may submit an asylum application to the border police, which will carry out a first interrogation and sent the report to the Border Control section of the AO.<sup>79</sup> The decision of *refoulement* is suspended during the investigation of the asylum application but no right to enter the Belgian territory will be granted. (This is also the case during the term to appeal and the whole appeal procedure itself.<sup>80</sup>) The asylum application will be examined while the applicant is kept in detention in a closed centre located at the border. Such detention may last for a period of maximum two months, which may be extended to a total maximum of five months, only if a final and executable decision on the asylum application has already been made within the first two months and if necessary steps to remove the asylum seeker from the territory are being taken by the AO.<sup>81</sup> Families with children are placed in so-called open housing units, which are more adapted to their specific needs, but which are also legally still considered to be border detention centres.<sup>82</sup>

Most of the other asylum seekers who apply for asylum at the border are held in a specific detention centre, called the 'Caricole' situated near the airport, but can also be held in a closed center located on the territory, while in both cases legally not being considered to have formally entered the country yet. Asylum seekers who apply for asylum at the border are systematically detained, without preliminary assessment of their personal circumstances. No exception is made for asylum seekers of certain nationalities or asylum seekers with a vulnerable profile other than being a (family with) child(ren). When the asylum application is rejected, the asylum seeker detained at the border, according to the law has not yet entered the territory and may thus be removed from Belgium under the responsibility of the carrier.<sup>83</sup> This brings with it a potential protection gap since the person concerned should lodge an appeal against the decision of *refoulement*, (return decision issued at the border) that was given to him (when he applied for asylum upon arrival at the border) long before knowing if, where and under which circumstances this would be executed. When the carrier actually decides to return the person to a transit country, the conformity of that particular executing measure and those particular circumstances with Article 3 ECHR will not have been subjected to any in-merit examination.<sup>84</sup> This was one of the aspects of concern for the ECtHR in the Singh case when it ruled Belgium lacked an effective remedy in such situations, in violation of Article 13 ECHR (see also below in the section on appeal in asylum procedures at the border).

The first instance asylum procedure for persons applying for asylum at the border detained in a closed centre or open housing unit is the same as the regular procedure, except for the time limit within which the Commissioner General for Refugees and Stateless Persons (CGRS) must take the decision. Within 15 days after having been notified by the AO that Belgium is responsible for examining the application, the CGRS has to decide on the well-foundedness of the asylum application.<sup>85</sup> In most cases this time frame is respected, but there are no consequences attached to not respecting it since it is considered to be a so-called term of 'internal order', as long as it does not exceed the legal detention period. If no final and executable decision on the asylum application has been made within the first two months of detention, the asylum seeker is released and allowed to enter the territory. The decision of refusal of entry to the territory and *refoulement*, that was notified at the border when applying for asylum, is

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<sup>78</sup> Article 72 Royal Decree 1981 and Article 52/3, §2 Aliens Act. Remarkably, in French the word 'refoulement' is used ('terugdrijving' in Dutch), though it does not concern a violation of the non-refoulement principle, since the persons concerned have been allowed to introduce an asylum application and have it examined.

<sup>79</sup> Articles 50ter and 50 Aliens Act.

<sup>80</sup> Article 39/70 Aliens Act

<sup>81</sup> Article 74/5 Aliens Act.

<sup>82</sup> Article 74/9 Aliens Act.

<sup>83</sup> Chicago Convention of 7 December 1944 on International Civil Aviation.

See on this issue: CBAR-BCHV, [Het Verdrag van Chicago. Toepassing op asielzoekers aan de grens](#) (only in Dutch) (The Chicago Convention. Applicability for asylum seekers at the border), June 2013.

<sup>84</sup> And it will be too late to appeal against it in an effective way, as also the ECtHR has judged in the Singh vs. Belgium-case (See below, in the section on appeal in border procedures).

<sup>85</sup> Article 52/2 Aliens Act.



automatically (*ipso iure*) replaced by an order to leave the territory, that is not executable as long as the CGRS has not taken a decision.<sup>86</sup>

In 2012 538 asylum applications were made at the border (in 2011 there were 711).

## Appeal

### Indicators:

- Does the law provide for an appeal against a decision taken in a border procedure?
  - Yes       No
  - o if yes, is the appeal       judicial       administrative
  - o If yes, is it suspensive?  Yes       No

The full jurisdiction appeal, as well as the annulment and suspension appeals at the border, are the same as in the regular procedure, except for the much shorter time limits that need to be respected. The time period within which any appeal to the Council of Aliens Law Litigation (CALL) must be lodged while in border detention (including for families in an open housing unit) is only 15 calendar days (instead of 30 calendar days in the regular procedure).<sup>87</sup> The case subsequently has to be handled by the CALL in accordance with different procedural steps from the appeal in the regular procedure, all within very short time limits, meaning that a final decision on the appeal must be taken by the CALL within a maximum of 14 working days in total.<sup>88</sup> The asylum seekers can attend the hearing.

In practice asylum seekers do not face obstacles to lodge an appeal against an asylum decision of the Commissioner General for Refugees and Stateless Persons (CGRS) in the border procedure as such, except for the pressing time frame in which to contact a lawyer, prepare and elaborate an appeal.

However, asylum seekers do face serious obstacles in appealing against decisions of *refoulement* (refusal of entry) delivered at the moment of arrival at the border. Since the maximum time limit for lodging the appeal is also limited to 15 calendar days without this period being suspended during the examination of the asylum procedure, this time limit will have passed well before a final decision will have been taken on the asylum application. As a consequence it is not possible anymore for an asylum seeker to raise certain risks of inhuman and degrading treatment (potential violations of Article 3 European Convention on Human Rights - ECHR) that have not yet been examined during the asylum procedure.

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<sup>86</sup> Article 74/5, §5 Aliens Act. This legal practice of giving someone access to the territory and at the same time delivering him an order to leave is an anachronistic application of the two phased asylum procedure as it existed before the legislative change in 2007, when it had an admissibility and an in-merit phase. The admissibility decision on the asylum application from a person detained at the border was also a decision on the right to access the territory, so the person was released. In some situations an asylum seeker was released before that decision on the admissibility was taken (article 74/5, §4), in which case article 74/5, §5 was applied, as there was not yet a decision on the right to access the territory neither. Since that admissibility phase has been abolished, article 74/5, §5 appears to have lost its underlying principle. Nevertheless, the CALL accepts the application of the legal provision, though does not qualify it as a binding obligation for the AO to do so anymore (CALL, General Assembly judgments n° 66.328-66.332 from 8<sup>th</sup> September 2011).

On this issue; CBAR-BCHV, [Frontière-Asile- Détention. Législation belge, normes européennes et internationales](#) (in French and Dutch version) (Border-Asylum-Detention. Belgian legislation, European and international standards), January 2012.

In practice, a staff member of the AO puts a handwritten formula on the Annex 11ter, referring to the legal basis that assimilates it with a normal order to leave the territory within seven days.

<sup>87</sup> Article 39/57 Aliens Act.

<sup>88</sup> Article 39/77 Aliens Act.

For the removal of failed asylum seekers at the border, the AO applies the Chicago Convention, which implies that rejected asylum seekers have to be returned by the airline company that brought them to Belgium to where their journey to Belgium commenced or to any other country where they will be admitted entry.<sup>89</sup> Since in many cases the point of departure (and return) is not the country of origin, and the CGRS does not examine potential persecution or serious harm risks in other countries than the one of the applicant's nationality and the AO does not consider itself to be under an obligation to carry out this examination (as it considers this to be the task of the CGRS), not all issues rising under Article 3 ECHR in the country where the person is (forcibly) returned to will be scrutinised. This is in particular the case where the country of return is another country than the one of his nationality, but also outside the application of the Chicago Convention, in case the CGRS considers it to be unclear what that nationality is (or even if it doubts about his recent stay in that country, making it impossible in their opinion to pronounce itself on the risk of being treated inhumanely there). This last situation is the case for a lot of Afghan asylum seekers whose knowledge about their region of provenance are considered not to be sufficient or their declarations about their recent experiences there not to be credible. Since the CGRA considers it in those cases to be impossible to determine the potential risks in that specific region of Afghanistan (and does evaluate those risks in Afghan asylum files only on a regional level), in these files there will be no evaluation of the risk of inhuman or degrading treatment in case of return to Afghanistan at all. Later, the AO will nevertheless try to expel these persons to Afghanistan anyhow, without them, nor the CGRA, having examined potential Article 3 ECHR violations in Afghanistan.

This represents a serious protection gap and was one of the issues raised before the European Court of Human Rights in the case of *Singh v. Belgium*, where the Court held that the Belgian authorities violated Article 3 and Article 13 ECHR.<sup>90</sup>

### Personal Interview

#### Indicators:

- Is a personal interview of the asylum seeker conducted in most cases in practice in the border procedure?  Yes  No
  - o If yes, is the personal interview limited to questions relating to nationality, identity and travel route?  Yes  No
  - o If so, are interpreters available in practice, for interviews?  Yes  No
- Are personal interviews ever conducted through video conferencing?  Yes  No

As it is the case in the regular procedure, every asylum seeker receives a personal interview by a protection officer of the Commissioner General for Refugees and Stateless Persons (CGRS), after the Aliens Office has conducted a short interview for the purpose of the registration of the asylum application and after the asylum seeker has filled in the CGRS questionnaire.

However, as the border procedure is an accelerated procedure, the interview by the CGRS takes place much faster after their arrival and in the closed centre. This implies that there is little time to prepare and substantiate the asylum application. Most asylum seekers arrive at the border without the necessary documents providing material evidence substantiating their asylum application and contacts with the outside world from within the closed centre are difficult in the short period of time between the arrival and the personal interview. Vulnerable asylum seekers also face specific difficulties related to this accelerated asylum procedure. Because no vulnerability assessment takes place before being detained, their vulnerability is not always known to the asylum authorities who can by consequence not

<sup>89</sup> Article 74/4 Aliens Act.

<sup>90</sup> ECtHR, *Singh and Others v Belgium* (French only), Application no. 33210/11, Judgment 2 October 2012.



take it into account when conducting the interview, assessing the protection needs and taking a decision.

### Legal assistance

#### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in the border procedure in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a decision taken under a border procedure?  Yes  not always/with difficulty  No

Also in detention at the border, asylum seekers are entitled to free legal aid. In principle the same system (as described under the section dealing with the regular procedure) applies for the appointment of a pro Deo lawyer. However, most bureaus of legal assistance appoint junior trainee lawyers for these types of cases, which means that these trainee lawyers are made responsible for taking up very technical type of cases for which they have no experience at all. The contact between asylum seekers and their assigned lawyer is usually very complicated. Often no lawyer is present at the personal interview because asylum seekers cannot get in touch with their lawyer before the interview takes place, and lawyers tend not to visit their client before the interview to prepare it. When a negative first instance decision is taken by the Commissioner General for Refugees and Stateless Persons (CGRS) it is not always easy to contact the lawyer over the phone or in person to discuss the reasons given in the decision. Often the lawyer decides that there are no arguments/grounds to lodge an appeal with the Council of Aliens Law Litigation (CALL), and advises the asylum seeker not to lodge an appeal without explaining the reasons why. Some bureaus of legal assistance have or intend to make pools and lists of specialised alien law lawyers to be exclusively assigned in this kind of cases, but the necessary control and training seem to be lacking to effectively guarantee quality legal assistance.<sup>91</sup>

## 6. Accelerated procedures

### General (scope, grounds for accelerated procedures, time limits)

Belgian legislation does not set out different types of first instance procedures. However, this does not mean that each asylum application is processed within the same time span. In some specifically determined situations, the Commissioner General for Refugees and Stateless Persons (CGRS) has to accelerate or prioritise the examination of the application and has to take a decision within a prescribed period of time that can be two months, fifteen days or even just eight, five or two working days.

In some specific situations, the law determines that examination of the asylum application has to be 'prioritised'. Applications clearly based on reasons that are totally unrelated to asylum, fraudulent asylum applications or applications that are manifestly unfounded should be examined with priority and within a period of two months. Also when an applicant voluntarily withdraws from the border asylum procedure or does not report at the designated reception centre within fifteen calendar days, after having tried to enter the country illegally, or when they do not appear for the scheduled interview or provide the required information within time without good reason, a decision should be made within two months' time.<sup>92</sup>

<sup>91</sup> In some specific cases the system of exclusively appointing listed lawyers to assist asylum seekers at the border, seems to have attracted some lawyers for purely financial reasons rather than out of expertise or even interest in the subject matter or their client's case.

<sup>92</sup> Article 52 Aliens Act.

In case an asylum seeker is being held in a closed centre at the border or on the territory, is subject to a security measure or is in prison, the CGRS must give priority to the examination and decide within two months or fifteen calendar days, depending on the specific ground of detention. The CGRS has to make a decision within two months when the asylum seeker is detained because:

- they did not apply for asylum when the border police enquired about the purpose of their journey,
- they had already made another asylum application,
- because they refused to state or give false information or documents about their identity or nationality,
- they destroyed or disposed of their identity and travel documents,
- they made an application with the sole purpose of postponing or frustrating an immediate expulsion,
- they hampered the collection of their fingerprints,
- they did not indicate that they already made an application in another country or
- they refused to make the declarations required at the registration with the Aliens Office (AO).<sup>93</sup>

When the applicant is detained in a close centre at the border or on the territory for other reasons or is in prison serving a sentence, or when there are indications that he poses a danger to public order or national security or when the Minister/Secretary of State or the AO requests an application be given priority an even shorter time frame of fifteen days is imposed by the law.<sup>94</sup>

As to the (in)admissibility caseload of the CGRS (see the section on the admissibility procedure), different, even shorter decision periods are determined by law, without calling it 'prioritization'. For asylum applications from a person from a safe country of origin or from a person whose refugee status has already been recognised and is still effective in another EU member state a decision on its inadmissibility should be taken within fifteen working days.<sup>95</sup> For applications of EU nationals such a decision should be even taken within five working days.<sup>96</sup> For subsequent asylum applications the CGRS has to take a decision of admissibility or inadmissibility within eight working days – or even only two working days in case such an application is made by a person in detention.<sup>97</sup>

These deadlines are considered by the CGRS to be indicative only, so there are no sanctions attached should they not be respected. As to the first three types of inadmissibility decisions, this seems correct since the law does not impose the CGRS to take formal decisions of admissibility also and the delay in the decision-making has no other direct consequences for the asylum seeker concerned.. However, this is not true in case of decisions on the admissibility of a subsequent asylum application: in that case the law imposes the CGRA not only to take decisions of inadmissibility, but also formal decisions of admissibility within that time period. And it is exactly such a decision that will entitle the asylum seeker to a place in a reception centre or not. In this situation, it could be argued that not respecting the deadline, should automatically bring with it the admissibility of the asylum application.<sup>98</sup>

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<sup>93</sup> Article 52/2 §1 and 74/6 §1bis 8°-15 Aliens Act.

<sup>94</sup> Article 52/2 §2 and Article 74/8 Aliens Act.

This last situation, the so-called positive injunction of the competent Minister (Secretary of State), could be considered to be the only, very limited way for the government to politically influence the asylum policy of the independent CGRS. It has used this right in the past only in very rare situations to give priority to the treatment of the asylum applications of specific nationalities, e.g. those from asylum seekers from the Balkan some years ago.

<sup>95</sup> Articles 57/6/1 and 57/6/3 Aliens Act.

<sup>96</sup> Article 57/6, in fine Aliens Act

<sup>97</sup> Article 57/6/2 Aliens Act.

<sup>98</sup> So far there has not been a final clarification of this issue in the jurisprudence of the Council of Aliens Law Litigation (CALL) or other courts (also because the inadmissibility grounds have only been in force since June 2012 and September 2013).

The exact number of asylum applications that were handled in an accelerated manner according to the various grounds listed above is not available. Numbers of accelerated admissibility procedures and of accelerated border and detention procedures overlap, so there are double countings. 146 EU-citizens applied for asylum. Most were made by persons from Romania (44), Bulgaria (39), Hungary (17) and Slovakia (15); there were also some applications by persons from the Netherlands (7), Lithuania (7), the Czech Republic (5), France (4) and Italy (2); and a single one by someone from Cyprus, Latvia, Luxemburg, Poland, Portugal and Spain. Also 2998 persons from a safe country of origin applied for asylum in 2012. The break-up per nationality is as follows: 983 applications of Kosovars, 667 of Albanians, 571 of Serbians, 476 of Macedonians, 139 of Bosnians, 109 of Indians and 53 of Montenegrins.. The latter caseload includes applications still examined in the regular procedure (until June 2012) as well as applications having had to pass through a preliminary accelerated admissibility procedure (since June 2012, when Article 57/6/1 of the Aliens Act entered into force). There is no final number of accelerated procedures in detention – 538 applications were made at the border, 14 in prisons and 415 in a closed centre on the territory.

## Appeal

### Indicators:

- Does the law provide for an appeal against a decision taken in an accelerated procedure?
 

	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
o if yes, is the appeal:	<input checked="" type="checkbox"/> judicial	<input type="checkbox"/> administrative
o If yes, is it suspensive?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No

The criterion to distinguish between different types of appeal and time limits is whether the applicant concerned is in detention or not, and not the accelerated character of the first instance decision making. The specificities of these appeal procedures are described in the parts of this report about the border procedure and the detention of asylum seekers.

When an appeal against Commissioner General for Refugees and Stateless Persons (CGRS) decisions concerns a person in detention or confinement, the time period to lodge the appeal is limited to fifteen calendar days and the time granted to the Council of Aliens Law Litigation (CALL) to rule on the case is limited to about fourteen working days.<sup>99</sup> For the appeals lodged against other accelerated decisions concerning asylum applicants who are not detained or confined, the regular full jurisdiction/annulment/suspension appeal procedure and time limits apply.

As to inadmissibility decisions - that do not allow for a full jurisdiction appeal, but only an annulment appeal - it is important to note that an additional petition to suspend (that is suspensive in itself) is needed to prevent the execution of a decision to leave the country.

## Personal Interview

### Indicators:

- Is a personal interview of the asylum seeker conducted in most cases in practice in the accelerated procedure?
 

	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
o If yes, is the personal interview limited to questions relating to nationality, identity and travel route?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
o If so, are interpreters available in practice, for interviews?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
- Are interviews conducted through video conferencing?
 

<input type="checkbox"/> Frequently	<input type="checkbox"/> Rarely	<input checked="" type="checkbox"/> Never
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<sup>99</sup> Articles 39/57 and 39/77 Aliens Act.

Exactly the same legal provisions apply to the personal interview as such in accelerated procedures, including the ones dealing with the admissibility of the application (or decisions to take into consideration or not), as to the one in a regular asylum procedure.<sup>100</sup> The only difference provided for is that in case of detention it shall take place in the detention centre where the applicant is being held, but this has no impact on the way the interview takes place as such.<sup>101</sup> Also an interpreter is present during these interviews.

### Legal assistance

#### Indicators:

- Do asylum seekers have access to free legal assistance at first instance in accelerated procedures in practice?  Yes  not always/with difficulty  No
- Do asylum seekers have access to free legal assistance in the appeal procedure against a decision taken under an accelerated procedure?  Yes  not always/with difficulty  No

The right to (free) legal assistance applies in exactly the same way to accelerated procedures as it does to regular procedures.

Pro Deo lawyers get exactly the same remuneration for similar interventions in accelerated procedures as in regular ones. In order to avoid that crucial time would be lost with formally getting the appointment of a lawyer arranged in time, it is accepted that formal appointment of the lawyer can take place until one month after the actual intervention has taken place.

## C. Information for asylum seekers and access to NGOs and UNHCR

#### Indicators:

- Is sufficient information provided to asylum seekers on the procedures in practice?  Yes  not always/with difficulty  No
- Is sufficient information provided to asylum seekers on their rights and obligations in practice?  Yes  not always/with difficulty  No
- Do asylum seekers located at the border have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No
- Do asylum seekers in detention centres have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No
- Do asylum seekers accommodated in remote locations on the territory (excluding borders) have effective access to NGOs and UNHCR if they wish so in practice?  Yes  not always/with difficulty  No

The Aliens Office Procedure Royal Decree provides for an information brochure to be handed to the asylum seeker the moment they introduce their asylum application. The brochure is supposed to be in a language the asylum seeker can reasonably be expected to understand and should at least contain information about the asylum procedure, the application of the Dublin II Regulation, the eligibility criteria of the Geneva Convention and of the subsidiary protection status, the access to legal assistance, the possibility for children to be assisted during the interview, reception accommodation, the obligation to

<sup>100</sup> Article 5 Royal Decree Procedure CGRS

<sup>101</sup> Article 13 Royal Decree Procedure CGRS

cooperate, the existence of organisations that assist asylum seekers and migrants and the contact details of the UNHCR's representative in Belgium.<sup>102</sup>

A brochure, drafted by the Aliens Office and the Commissioner General for Refugees and Stateless Persons (CGRS) together and explaining the different steps of the asylum procedure and the mission of the two authorities, exists in Dutch, French, German and English. Another publication by the CGRS and the reception agency Fedasil, explaining the reception structures and rights and obligations of the asylum seekers, exists in eleven languages (Dutch, French, English, Albanian, Serbo-Croatian, Russian, Arabic, Pashtu, Pharsi, Peul and Lingala) and in a DVD version and is distributed at the dispatching desk of Fedasil, where people are designated to a reception accommodation place.

Besides these more general brochures directed to all asylum seekers, some specific leaflets are also published and made available. The brochure 'Women, girls and asylum in Belgium' was drawn up for female asylum seekers and is translated in nine different languages. It does not only contain information about the asylum procedure itself, but also on the issues of health, equality between men and women, intra-family violence, female genital mutilation and human trafficking. Also for applicants in a closed centre, at a border or in prison specific information leaflets are available. Designed for unaccompanied children who do not speak any of the official languages in Belgium (Dutch, French and German) there is also the so-called 'Kizito' comic, conceived to be understood only by the drawings, that explains the different steps of the asylum procedure and the life in Belgium.

Also the CGRS has launched several brochures on different aspects of the asylum procedures. There is a code of conduct for interpreters and translators and a so-called charter on interview practices that serves as the CGRS protection officers' code of conduct. Finally also a publication for all professionals assisting asylum seekers throughout the procedure is distributed by the CGRS. All these publications are freely available on the CGRS website.<sup>103</sup>

Specialised national, Flemish and French speaking NGO's such as BCHV-CBAR (Belgian Refugee Council), Vluchtelingenwerk Vlaanderen (Flemish Refugee Action), Kruispunt Migratie-Integratie (Reference Point Migration-Integration), Ciré (Coordination and Initiatives for Refugees and Aliens) and ADDE (Association for Aliens Law) - to name only the most centralised and refugee and alien law orientated ones - have developed a whole range of useful and qualitative sources of information and tools, accessible on their respective websites or through their first line legal assistance helpdesks. A 2008 procedural guide by Ciré was made available in French, Dutch, English, Serbocroat, Turkish, Albanian and Russian. Vluchtelingenwerk published a handbook for professionals assisting asylum seekers and a Dublin brochure in 2013. The BCHV-CBAR developed a manual on asylum procedures at the border for lawyers.

It is not clear however how well known and accessible in practice all of these publications are for the asylum seekers themselves and if they provide them with the information they need. The Fundamental Rights Agency 2011 report mentions varying experiences in Belgium depending on where asylum seekers were hosted: asylum seekers living in the community and particularly those in the hotels during the asylum reception crisis, appeared to have much less information compared with those staying in reception centres. Also it could not be ascertained if in all situations asylum seekers actually receive the information brochures immediately upon the registration of their asylum application at the AO or at the border.

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<sup>102</sup> Articles 2-3 Royal Decree Procedure AO.

<sup>103</sup> All of these brochures are available [here](#).

## D. Subsequent applications

### Indicators:

- Does the legislation provide for a specific procedure for subsequent applications?  
 Yes       No
- Is a removal order suspended during the examination of a first subsequent application?
  - o At first instance       Yes       No
  - o At the appeal stage       Yes       No
- Is a removal order suspended during the examination of a second, third, subsequent application?
  - o At first instance       Yes       No
  - o At the appeal stage       Yes       No

A subsequent asylum application will only lead to a new examination by the Commissioner General for Refugees and Stateless Persons (CGRS) on the well-foundedness of the protection claim if the application contains new elements (or also in case the first asylum application has been refused for technical reasons of asylum seekers not presenting themselves on the date of the convocation for the interview without a valid reason or of withdrawing voluntarily from a border procedure). Since September 2013, the CGRS – and no longer the Aliens Office (AO) – has the competence to decide whether or not to take into consideration such an application (admissibility decision) depending on the presence of new elements or not which, at the same time, should also increase the chance of being eligible for one of the two international protection statuses.<sup>104</sup> The CGRS has to take this (in)admissibility decision within eight working days, or only two in case of detention, after the application was transferred by the AO (see also under the section on accelerated procedures).

As with all asylum applications, the AO is also still the competent authority for the registration of the new asylum application. The AO has to register a declaration of the asylum seeker about the new elements and the reasons why he could not invoke them before and transfer it without delay to the CGRA.<sup>105</sup> Also the same questions about the identity, origin and travel route have to be asked and registered in a written declaration and the questionnaire for the CGRS on the reasons they fled has to be filled in, as is the case with first applications.<sup>106</sup> The lawyer is also not allowed to attend.

The CGRS, after having received the file with the questionnaire on the new application transferred to it by the AO is supposed to take into account all elements, new and old, in examining and deciding on the well-foundedness of the claim, and the personal interview at the CGRS, on the admissibility and/or well-foundedness of the claim, should take place in the same way as is the case with first asylum applications, although it will mostly be limited to elaborating on the new elements.<sup>107</sup>

A non-suspensive annulment appeal can be lodged against a decision not to take into consideration the subsequent asylum application.

There is a so-called stand-still clause in the law suspending the removal of persons automatically during the first three working days after a decision of removal has been notified.<sup>108</sup> The AO considers this period to have passed three working days after the delivery of the first order to leave the country, which has been notified after the first negative decision of the CGRS on the first asylum application.

<sup>104</sup> Article 57/6/2 Aliens Act. This new provision was introduced by the Law of 8 May 2013, that brought the admissibility procedure for subsequent applications in line with the conditions of Article 32 of the Asylum Procedures Directive (2005/85/EG – Article 40 of the Recast Directive 2013/32/EU).

<sup>105</sup> Article 51/8 Aliens Act (modified by the Law of 8 May 2013).

<sup>106</sup> Article 51/10 Aliens Act and article 16 Royal Decree Procedure AO.

<sup>107</sup> Article 16, 17 and 27 Royal Decree Procedure CGRS

<sup>108</sup> Article 39/83 Aliens Act (modified by the Law of 8 May 2013). See also on the MSS-case and its impact on the automatic suspension of a decision to return or transfer, on the subsection on Appeal in the section on Dublin procedures)

Consequently it considers it has the authority to return a person as soon as the decision not to take into consideration the subsequent asylum application has been notified without further delay. There have been some cases of notification of such a decision on the airport immediately preceding the already planned boarding of the plane (the executory measure of the decision to return). Since the person has thus been removed from the territory and no suspensive appeal could be introduced timely and usefully anymore against the order to leave the territory or the executory measure (that is not notified as such), the CALL, nor any other tribunal (in summary proceedings) seems to have issued judgments about this practice.<sup>109</sup>

Legal assistance is arranged in exactly the same way as with regard to first asylum applications. However, in practice some asylum seekers or lawyers themselves experienced difficulties in obtaining pro Deo assignments because the bureau for legal assistance required them to provide proof of the existence of new elements in advance..

In 2012, the total number of subsequent asylum applications was 6.257 (out of an overall number of 21.463 asylum applications), of which 4.375 were second applications, 1.260 third and, 622 fourth or more. About two out of three subsequent applications are not taken into consideration by the AO (that was still the competent authority to decide on admissibility of subsequent applications until September 2013).<sup>110</sup>

## E. Guarantees for vulnerable groups of asylum seekers (children, traumatised persons, survivors of torture)

### 1. Special Procedural guarantees

#### Indicators:

- Is there a specific identification mechanism in place to systematically identify vulnerable asylum seekers?  Yes  No  Yes, but only for some categories (unaccompanied children)
- Are there special procedural arrangements/guarantees for vulnerable people?  
 Yes  No  Yes, but only for some categories (specify psy/UAM/gender)

Only recently, a 'Vulnerability' unit was put in place at the Aliens Office to screen all applicants upon registration on their potential vulnerability. It is not very clear however which impact this has on the procedure and assessment of the asylum application as such. Officials dealing with these vulnerable cases had a specific training and are supposed to be more sensitive to specific implications vulnerability might have on the interview. Besides the general provision that specific circumstances, vulnerability in particular, have to be taken into consideration,<sup>111</sup> only two other procedural provisions exist concerning the handling of specific vulnerable cases at the Aliens Office (AO): unaccompanied and accompanied

<sup>109</sup> This makes it also difficult to assess whether this practice of executing removals following immediately after a decision not to take into consideration a subsequent asylum application is limited to cases in which the subsequent application was introduced with the only intention to delay or prevent the removal and is not violating the *non refoulement* principle, and if this practice does by consequence not violate the conditions imposed by Article 41 (1) of the Recast Asylum Procedure Directive (2013/32/EU). In at least one such a case of immediate removal after an inadmissibility decision of a subsequent application a request has been submitted to the ECtHR (case of Z.H. v. Belgium, n° 64141/13)

<sup>110</sup> The top ten of nationalities from asylum seekers who submitted subsequent asylum applications in 2012 are Russia (706), Guinea (657), Kosovo (616), Afghanistan (552), Serbia (311), Iraq (264), Albania (252), FYR of Macedonia (212), Armenia (202) and DR Congo (171).

<sup>111</sup> Article 11 Royal Decree Procedure AO.



children alike should be assisted during the interview by an adult or tutor (see below)<sup>112</sup> and in gender related asylum claims the official should check if the applicant opposes to a protection officer of the other sex.<sup>113</sup>

Similarly at the Commissioner General for Refugees and Stateless Persons (CGRS) level, there are little specific provisions as to the screening, processing and assessing of vulnerabilities of asylum seekers. More or less the same procedural guarantees are in place. There is a general obligation to take into consideration the individual situation and personal circumstances of the asylum seeker, in particular the acts of persecution or serious harm already undergone, which could be considered a sort of specific vulnerability.<sup>114</sup> Also it is determined that in case of a gender related claim, one can oppose to be interviewed by a protection officer from the other sex,<sup>115</sup> and that children should be interviewed in appropriate circumstances and their best interest should be decisive in the examination of the asylum application.<sup>116</sup>

At the CGRS two vulnerability orientated units have been established that render support to protection officers dealing with such cases. A 'Gender' unit assembles all gender related asylum applications, including applications based on sexual orientation or gender identity (LGBTI), as well as those applications concerning genital mutilation, honour retaliation, forced marriages and partner violence or sexual abuse. Its main task is to guarantee an equal treatment of those asylum applications. A 'Psy' unit assists protection officers in cases where psychological problems might have an influence on the processing of the application or on the assessment of the application itself.

It is difficult to assess to what extent vulnerability is identified systematically from the beginning of the asylum procedure. At least in border procedures no systematic screening seems to be in place except for the screening of unaccompanied children (see below). Also even established vulnerabilities are not always taken into consideration in the assessment of the protection needs when the applicant does not at least refer to it themselves and invokes it as a decisive element for their protection claim.

## 2. Use of medical reports

### Indicators:

- Does the legislation provide for the possibility of a medical report in support of the applicant's statements regarding past persecution or serious harm?  
 Yes       Yes, but not in all cases       No
- Are medical reports taken into account when assessing the credibility of the applicant's statements?       Yes       No

Legislation does not explicitly determine the specific possibility to submit a medical report in the asylum procedure, or the weight to be given to it in the assessment of the asylum application. In practice a distinction can be made between psycho-medical attestations that state something about the mental state of the applicant, relevant to determine what can be expected from them during an interview and to evaluate their credibility, and medical attestations that describe physical or psychological harm undergone in the past and that is potentially important to determine the well-foundedness of the application.

As to the mental state of an asylum seeker and their credibility assessment, there is a so-called 'Psy' unit at the Commissioner General for Refugees and Stateless Persons (CGRS) that provides support

<sup>112</sup> Article 8 Royal Decree Procedure AO.

<sup>113</sup> Article 9 Royal Decree Procedure AO.

<sup>114</sup> Article 27 Royal Decree Procedure CGRS.

<sup>115</sup> Article 15 Royal Decree Procedure CGRS.

<sup>116</sup> Article 14 Royal Decree Procedure CGRS.



services to protection officers who ask for it - so only on their initiative. The protection officers can apply for the unit's psychologist's advice if they think the psychological situation of the asylum seeker might have an impact on the way the interview can be conducted as well as on the determination of the protection need and status. The psychologist can perform an individual examination if deemed necessary and writes a detailed report with their findings. The psychologist can also advise the protection officers about the possibility of an interview taking place and under which conditions. The purpose of the psychologist's intervention is clearly not to confirm or contradict certain elements of the asylum application. Theoretically, the asylum seeker can refuse this evaluation without this having an impact on the further treatment of their file - although it is difficult to see how their refusal to cooperate would not negatively influence the status determination procedure. However, it is still in the first place up to the asylum seeker themselves to deposit a psycho-medical attestation if they want to justify their inability to recount their story in a coherent and precise way without contradictions, since the burden of proof lies with them. It is important in such attestations by external psychologists not to pronounce themselves on the underlying facts that might have led to the psychological harm. The mere attestation of a psychological problem will never suffice for the CGRS to grant a protection status, but it always has to be taken into consideration in determining the protection needs.

For the determination of the well-foundedness of an asylum application based on acts of persecution or serious harm undergone in the past, there is no procedure to establish evidence for the physical harm it might have caused. The general provisions concerning the burden of proof apply in these situations: the burden of proof in principle lies with the asylum seeker, without any explicit reference in legislation to that burden being shared with the CGRS.<sup>117</sup> The procedure provides for the possibility for the CGRS to ask for additional information, for the asylum seeker to deposit all pieces they deem necessary, even after the interview, and obliges the CGRS to take all documents and elements submitted into consideration.<sup>118</sup> The value of such medical reports of physical harm as evidence for the existence of past persecution or inhumane treatment, is mostly put aside by the CGRS arguing that such reports cannot be decisive about the exact cause of the harm or about who inflicted such injuries and for which reasons. Exceptionally the CGRS has been forced by the Council of Aliens Law Litigation (CALL) to further examine the circumstances surrounding the physical harm, after having refused to consider a medical report because it did not allow to determine the exact cause of the harm, and a potential past persecution, with certainty.<sup>119</sup> The CALL ruled that the reversal of the burden of proof in case of past persecution or serious harm applies because of the presence of the physical scars as such, and this obliges the CGRS to conduct additional research into the circumstances surrounding their causes.<sup>120</sup>

An overall exception in the protection practice of the CGRS is the use of medical attestations in case an FGM risk is claimed. In such cases it is even mandatory for the applicants to prove with a medical attestation that the asylum seeker herself or their minor daughter (depending on whose circumcision is said to be feared for) is already, or not yet, circumcised. To keep the protection status, every year a new medical attestation confirming this has to be delivered to the CGRS.

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<sup>117</sup> Article 48/6 (former article 57/7ter Aliens Act, modified by the Law of 8 May 2013). This is still an incomplete transposition of article 4, al. 1 of the Qualification Directive (2004/83/EG and Recast 2011/95/EU), since it does not mention the shared burden of proof for the authorities, who have an obligation to actively cooperate with the asylum seeker (cfr. the *M. v. Minister of Justice*-judgment from the ECJ, C-277/11)).

<sup>118</sup> Articles 10, 22, 17 and 27 Royal Decree Procedure CGRS.

<sup>119</sup> See for example CALL, judgment n° 64786, 13 July 2011: In this case the doctor himself mentioned in his medical report that the injuries were "most probably" inflicted by torture, but the CGRS found this insufficient as evidence since the other declarations were considered to be not credible. The proven hyporeaction, which a psychologist determined to be also "possibly" caused by a traumatic experience, was not accepted as an explanation for the incoherencies in the declarations. The CALL agrees that the medical reports in itself are not sufficient proof to cast out any doubt on the causes of the harm undergone, but states that the presence of the physical scars as such are sufficient reason already to apply the reversal of the burden of proof in case of past persecution or serious harm and urges the CGRS to conduct additional research into the circumstances surrounding their causes. Article 48/7 Aliens Act (former article 57/7bis Aliens Act, modified by the Law of 8 May 2013)

<sup>120</sup> Article 48/7 Aliens Act (former article 57/7bis Aliens Act, modified by the Law of 8 May 2013)

The medical care and consultations asylum seekers are further explained under the reception conditions part of this report. As to the medical reports intended to support the asylum application, they may be delivered by the medical doctor or therapist providing that care under those regulations. Also some NGO's deliver free medical examinations and attestations. The organisation Constat's specific main objective is to defend and promote the full application of the Istanbul protocol in the Belgian asylum procedure, in particular in the examination of physical and psychological consequences of torture and other cruel, inhuman and degrading treatments or punishments for asylum seekers. Other organisations in this specific field are Exil and Medimmigrant.

Here it is also important to mention the so-called "medical regularisation procedure", that is not technically a part of the asylum procedure, but is very closely related to it. In case a return to the country of origin would mean an inhuman or degrading treatment resulting from the deterioration of the health of the person concerned because of a lack of (actual access to) appropriate medical treatment an application should be lodged with the Aliens Office, instead of the CGRS.<sup>121</sup> This medical interpretation of the subsidiary protection definition has been taken out of the asylum procedure and into a completely separated procedure with less procedural guarantees and without a temporary residence permit being granted to the individual concerned during the examination of the application for a residence permit based on medical grounds. In this procedure a standardised medical form has to be filled in and deposited before the request will be taken into consideration and examined on its merits. The mere existence of the procedure is an excuse often used in decisions of the CGRS not to take into consideration and not even to pronounce itself at all about any medical element put forward in the asylum procedure, even if it could have had certain relevance for the asylum application.

### **3. Age assessment and legal representation of unaccompanied children**

#### *Indicators:*

- Does the law provide for an identification mechanism for unaccompanied children?  
 Yes       No
- Does the law provide for the appointment of a representative to all unaccompanied children?  
 Yes       No

Every unaccompanied child (UAM) who applies for asylum or is otherwise detected on the territory or at the border has to be referred to the Guardianship service at the Ministry of Justice. The so-called Programme Law of 24 December 2002<sup>122</sup> has established the service and procedures to be followed in such a case.<sup>123</sup>

The Guardianship service has the general mission to streamline a system of tutors (guardians) intended to find a durable solution for unaccompanied children who are no EU citizens in Belgium, whether they apply for asylum or not. The service has to control first of all the identity of the person who declares or is presumed to be under age (below 18 years of age). If the Guardianship service itself or any other public authority responsible for migration and asylum, such as the Aliens Office (AO) or the Commissioner General for Refugees and Stateless Persons (CGRS), would have any doubt about the person concerned being underage, a medical age assessment can be ordered, at the expense of the authority applying for it.<sup>124</sup> After having been criticized in the past about the accuracy of the medical test to

<sup>121</sup> Article 9ter Aliens Act.

<sup>122</sup> Programmawet / Loi Programmatoire.

<sup>123</sup> Title XIII, Chapter VI: Guardianship of Unaccompanied Minor Aliens Article 479 (called the 'UAM Guardianship Act').

<sup>124</sup> Article 7 UAM Guardianship Act.

establish the age of non-Western children by the Order of Physicians,<sup>125</sup> a margin of error of two years is taken into account. This means that only a self-declared child who is tested to be 20 years of age will be registered as an adult. The identification procedure also entails a risk for unaccompanied children who did not apply for asylum yet but might have protection needs that are still to be discovered, if the Guardianship service would find it necessary to contact the consular services of the country of origin.

Once identified as being under age, a tutor will be assigned to assist the child. The tutor represents their pupil in legal acts and has the responsibility to ensure that all necessary steps are taken during the unaccompanied child's stay in Belgium. The tutor has to arrange for the child's accommodation and ensure that they receive the necessary medical and psychological care, attend school, etc. The tutor has to see onto the child's asylum or other residence procedures, represent and assist them in these and other legal procedures and if necessary find a lawyer. The tutor also has to help in tracing the parents or legal guardians. If that has not been done yet, the tutor can also introduce an asylum application for their pupil.<sup>126</sup> Except for the provisions that allow the tutor to attend the different interviews at the AO and the CGRS, there are no specific legal provisions as to the tutor's role in the asylum procedure.<sup>127</sup>

If necessary a provisional tutor can be appointed immediately upon notice to the Guardianship service, E.g. when a UAM is detained, the directing manager of the Guardianship service or his deputy shall take on the guardianship.<sup>128</sup>

The last years Belgium witnessed a sharp increase of unaccompanied asylum seeking children, with 2011 being the top year with 2040 asylum applications of persons declaring to be an unaccompanied child (compared to 1081 in 2010 and 935 in 2009), of which 1478 turned out to be a child after the age assessment (compared to 860 in 2010 and 711 in 2009). In 2012 the number decreased again dramatically with 1530 persons applying for asylum as a child and 981 persons appearing to be under age after the medical test. Almost half of the asylum applications by unaccompanied children in 2011 were Afghans. AO's Vulnerability unit asked for an age assessment test in 65.09 % of the cases conducted in the Dutch language (in which most of the asylum applications by Afghans are treated) and 34.91 % of the cases conducted in the French-speaking procedure.<sup>129</sup> 70 % of those who have undergone an age assessment appear to have reached the age of majority. Because of this high percentage, the AO has the intention to even increase the number of age tests.

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<sup>125</sup> Order of Physicians (in [Dutch](#)) / (in [French](#)).

<sup>126</sup> Article (479-)9-12 UAM Guardianship Law.

<sup>127</sup> Article 9 Royal Decree Asylum Procedure AO and Article 14 Royal Decree Procedure CGRS.

<sup>128</sup> Article (479-)6 UAM Guardianship Law.

<sup>129</sup> Whether an application is assigned to the Dutch or to the French language role is based purely on an informal agreement between the asylum authorities (the CGRS, the AO and the CALL), who develop an expertise per country mostly just in one or the other language. Unless the asylum seeker does not need an interpreter, in which case he can choose between Dutch or French as the language of the procedure, they has no say in the assignment to one or the other language role. (Article 51/4 Aliens Act)

Since for Afghan asylum applications the language of the examination is Dutch, and by far the most unaccompanied minors are Afghans, the most age assessment tests have been conducted in asylum procedures on the Dutch language role.

## F. The safe country concepts (if applicable)

### Indicators:

- Does national legislation allow for the use of safe country of origin concept in the asylum procedure?  Yes  No
- Does national legislation allow for the use of safe third country concept in the asylum procedure?  Yes  No
- Does national legislation allow for the use of first country of asylum concept in the asylum procedure?  Yes  No
- Is there a list of safe countries of origin?  Yes  No
- Is the safe country of origin concept used in practice?  Yes  No
- Is the safe third country concept used in practice?  Yes  No

With regards to asylum seekers from EU member states (or candidate EU member states) the Commissioner General for Refugees and Stateless Persons (CGRS) can decide not to take into consideration their asylum applications (inadmissibility) in a prioritized way, if the statements of the applicant do not clearly indicate that there is, in their respect, a well-founded fear or a real risk of serious harm. Such a decision should be taken within five working days.<sup>130</sup>

The safe country of origin concept was introduced in the Aliens Act in 2012. A law of 19 January 2012 established an accelerated admissibility procedure similar to the procedure that was already in place for EU citizens and the procedure to determine the countries of origin that are considered to be safe. According to this provision countries can be considered safe if the rule of law in a democratic system and the general political circumstances allow to conclude that in a general and durable manner there is no persecution or real risk of serious harm, taking into consideration the laws and regulations and the legal practice in that country, the respect for the fundamental rights and freedoms of the ECHR and of the principle of non-*refoulement* and the availability of an effective remedy against violations of these rights and principles. After having received a detailed advice of the CGRS, the government approves the list of safe countries of origin upon the proposal of the Secretary of State for Migration and Asylum and the Minister of Foreign Affairs. The list must be reviewed annually and can be adjusted.<sup>131</sup> A Royal Decree of 7 May 2013 reconfirmed the list with seven safe countries of origin that was adopted for the first time in 2012: Albania, Bosnia-Herzegovina, FYROM, Kosovo, Serbia, Montenegro and India.<sup>132</sup> The CGRS has to decide if asylum applications from nationals or stateless residents of these countries are to be taken into consideration or not (inadmissibility) within fifteen working days. To refute the presumption of safety of their country of origin, it has to “appear clearly”, according to the legal provision, from the asylum seeker’s declarations that they have a well-founded fear of persecution as determined in the refugee definition in the 1951 Geneva Convention or runs a real risk of serious harm as determined in the subsidiary protection definition. It remains unclear in how far this burden of proof is any different than the one resting on every asylum seeker.

Appeals at the Constitutional Court and at the Council of State challenging the new provisions, in the law and the Royal Decree respectively, have both been rejected.<sup>133</sup> Since the introduction of the concept in June 2012, a majority of applications from asylum seekers originating from these safe

<sup>130</sup> Article 57/6 Aliens Act.

<sup>131</sup> Article 57/6/1 Aliens Act.

<sup>132</sup> Arrêté royal de 7 mai 2013 portant exécution de l'article 57/6/1, alinéa 4, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, établissant la liste des pays d'origine sûrs / Koninklijk besluit van 7 mei 2013 tot uitvoering van het artikel 57/6/1, vierde lid, van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, houdende de vastlegging van de lijst van veilige landen van herkomst (Royal Decree of 7 May 2013 implementing Article 57/6/1, par. 4 of the Aliens Act, establishing the list of safe countries of origin); (in [French](#)) / (in [Dutch](#)).

<sup>133</sup> Constitutional Court, judgment n° 107/2013 from 18 July 2013, ([Dutch](#))/([French](#)).

countries have been declared inadmissible by the CGRS (in total more than 500 decisions not to take into consideration such an asylum application have been taken in the last seven months of 2012).

With the Law of 8 May 2013, which entered into force on the 1<sup>st</sup> of September 2013, also the concept of a first country of asylum was introduced in the Aliens Act, in two different provisions. First, when an asylum applicant already has refugee status in another EU member state, the CGRS can decide, within fifteen working days, not to take into consideration the asylum application, unless the asylum seeker can prove that they cannot effectively rely on this status anymore (see under the section on admissibility procedures).<sup>134</sup>

Secondly, when there is a first non-EU country of asylum where the asylum seeker already enjoys a 'real' protection, this can be a sufficient reason for the CGRS to refuse the asylum application as unfounded, unless the asylum seeker can prove that he can no longer invoke that real protection or get access to the territory of that state anymore.<sup>135</sup> This is not a ground for inadmissibility, nor are these asylum applications prioritized.

In all of these legal provisions concerning the existence of a safe country as an inadmissibility ground or reason to refuse, a presumption is introduced that there is no need for international protection. This seems to exempt the CGRS of its share in the burden of proof and its obligation to further motivate its decision. The burden of proof of the contrary – that the country of origin is not safe or that there's no effectively accessible international protection available – is put completely on the asylum seeker.

Against any of the inadmissibility decisions (not to take into consideration the asylum application) only an annulment appeal can be lodged at the Council of Aliens Law Litigation (CALL), which will only check the legality of the decision (see above - admissibility procedures). The appeal should also be examined in a prioritized manner within two months.<sup>136</sup>

## G. Treatment of specific nationalities

In October 2010, the then Secretary of State for Migration and Asylum made use of his injunction right to demand the asylum authorities to prioritize the examination of asylum applications of Serbians, Macedonians and Kosovars. In September and October 2011 he demanded the same for applications from Bosnians and Albanians. As a result, in these cases a decision had to be made by the Commissioner General for Refugees and Stateless Persons (CGRS) within fifteen working days.<sup>137</sup> In order to put into practice the prioritised examination of these cases and also to address the backlog with regard to asylum applications from these countries, a so-called "project section" was created within the CGRS, transversal to five existing geographical sections within the CGRS. This prioritisation of asylum applications from the Balkans has been given an explicit legal basis with the introduction in 2012 of the inadmissibility ground and the list of safe countries of origin (see section Admissibility procedure). In 2012, the project section has also added the caseload of asylum applications from Iraq, Afghanistan and Guinea to its list of priorities, although seemingly without the strict time limit of fifteen working days having been imposed by the Secretary of State. Since the treatment of asylum applications of all of these three countries has at different times been 'frozen' because the CGRS's study and documentation service (Cedoca) needed time to research and evaluate certain aspects of the situation in the country of origin, it is not clear if these applications are still prioritised in reality.

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<sup>134</sup> Article 57/6/3 Aliens Act

<sup>135</sup> Article 48/5 §4 ALiens Act

<sup>136</sup> Article 39/81 Aliens Act.

<sup>137</sup> Article 52/2 Aliens Act (so-called positive injunction right).

In addition, the CGRS now generally applies the last in first out (LIFO) principle on all new applications irrespective to the nationality of the applicant. In 2011-2012 only the examination of Syrian asylum applications has been frozen for quite some time, while Cedoca tried to obtain trustworthy information and assess the rapidly changing situation on the ground in Syria. However, the policy of freezing the examination of asylum applications from Syria was not applied to demonstrated situations of particular vulnerability – such applications were examined anyway. The treatment of Syrian asylum applications has resumed completely in 2013.

As to Syrian asylum applications in Belgium, the numbers are relatively low. In 2012 there were 793 applications and in 2013 not more than 877 applications by Syrians, making Syria the fifth country of origin of asylum applicants in 2013.<sup>138</sup> Concerning the decisions made, most of Syrian asylum applicants in Belgium were granted subsidiary protection: out of 503 decisions in 2012, only 98 (or 19%) were positive decisions granting refugee status, and of the 1279 decisions in 2013 there were only 161 decisions to grant refugee protection (just 13%). Respectively, in 2012 and 2013, 382 (76%) and 1013 (79%) were decisions granting subsidiary protection. While in 2012 still an important sub-set of the claims introduced were subsequent applications, which was not the case anymore in 2013.

As to the rights of Syrians, where they have been recognised as refugees or obtained subsidiary protection, there is no difference with other nationalities having these statuses.

Belgium does not provide many legal avenues for Syrian asylum seekers to access the country in a regular manner. No specific practice for Syrians has been put in place. Syrian nationals benefit from the same family reunification procedures as beneficiaries of international protection of other nationalities. Since a Constitutional Court judgment on 26 September 2013,<sup>139</sup> beneficiaries of subsidiary protection are put on an equal footing with recognised refugees with regard to family reunification: this decision is important for Syrians, a majority of whom are granted subsidiary protection status. Aliens Office (the competent authority in charge of family reunification applications) has confirmed that they will adapt their practice to the judgment, though it is not clear yet if the files of those who have been refused on this basis before, will be reviewed or not. It is very difficult for extended family members who do not benefit from the right to family reunification (adult children, siblings, parents, etc.) to obtain a humanitarian visa to Belgium. Also many Syrians who apply for family reunification encounter difficulties in collecting the necessary documents and getting them translated and legalized. The Aliens Office gives priority to Syrian files, but the Belgian authorities do not make exceptions for Syrians concerning document requirements. Family members of those with subsidiary protection, if reunified, will be granted residence for the same duration as the primary recipient of protection. For refugees, their families do not receive permanent residence, and instead acquire a permit of limited duration.<sup>140</sup>

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<sup>138</sup> The numbers differ from the ones used by Eurostat, to which ECRE/ELENA refers in its [Information Note on Syrian Asylum Seekers and Refugees in Europe](#), November 2013, who counts the persons applying for asylum in their own right or otherwise, while the Belgian asylum authorities just count the number of applications without distinguishing the different family member.

<sup>139</sup> [Constitutional Court, judgment](#) n° 121/2013 of 26 September 2013.

<sup>140</sup> For more on Syrian asylum seekers, see the chapter on Belgium in ECRE/ELENA, [Information Note on Syrian Asylum Seekers and Refugees in Europe](#), November 2013, p.49.



## Reception Conditions

### A. Access and forms of reception conditions

#### 1. Criteria and restrictions to access reception conditions

##### Indicators:

- Are asylum seekers entitled to material reception conditions according to national legislation :
  - o During the accelerated procedure?  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During admissibility procedures:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During border procedures:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During the regular procedure:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o during the Dublin procedure:  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o During the appeal procedure (first appeal and onward appeal):  
 Yes                       Yes, but limited to reduced material conditions                       No
  - o In case of a subsequent application:  
 Yes                       Yes, but limited to reduced material conditions                       No
- Is there a requirement in the law that only asylum seekers who lack resources are entitled to material reception conditions?  Yes                       No

According to the 2007 Reception Act, every asylum seeker has the right to reception conditions that allow him to lead a life in human dignity. Since the adoption of this law the system of reception conditions for asylum seekers has shifted completely from financial to purely material aid. This comprises accommodation, food, clothing, medical, social and psychological help, access to interpretation services and to legal representation, access to training, access to a voluntary return programme, and a small daily allowance (so-called pocket money). An asylum seeker can however also choose not to accept the offered place in a reception centre and to stay at a private address, but in that case they will not be entitled to certain parts of this material aid (such as the accommodation, food, clothing). The whole reception structure is coordinated by the Federal Agency for the Reception of Asylum Seekers (Fedasil). Also the social welfare services provided by the Public Centres for Social Welfare (PCSW - CPAS/OCMW) are a form of material aid delivered tot asylum seekers in some circumstances.<sup>141</sup>

The 19 January 2012 law brought some further modifications to the reception system, restricting access to material reception conditions in certain circumstances and introducing the concept of a so-called “return track” for asylum seekers. This is a framework for individual counselling on return, set up by Fedasil and put into practice since September 2012 that promotes voluntary return to avoid forced returns. The return track starts with informal counselling, followed by a more formal phase. The informal phase consists of providing information on possibilities of voluntary return and starts from the moment the asylum application is being registered. Within five working days after a negative first instance decision on the asylum application by the Commissioner General for Refugees and Stateless Persons (CGRS) the asylum seeker is formally offered return accompaniment. An individual project of return must be elaborated and signed by the person concerned and the Aliens Office (AO) will be informed. Until the period to introduce an appeal with the Council of Aliens Law Litigation (CALL) has elapsed or

<sup>141</sup> Article 3 Reception Act.



once a negative appeal decision is taken by the CALL, the person is transferred to a special open return place in a federal reception centre. Since the AO does not deliver a new order to leave the country anymore after a negative judgment from the CALL, but just prolongs the time period to execute the order delivered after the CGRS decision with ten days (introduced by the law of 8 May 2013), the prolongation of the right to material reception conditions will only be prolonged for this period. Until this moment every asylum seeker (whether they collaborate with voluntary return or not) are entitled to full material reception conditions, but this prolongation is renewable for two extra periods of ten days, only if the person collaborates on their return.<sup>142</sup> When the period for voluntary return as determined in the order to leave the country elapses and there is no willingness to return voluntarily, the right to reception ends and the AO can start up the procedure to forcibly return the person, including by using administrative detention. Introducing a cassation appeal with the Council of State against the CALL judgment does not prolong the right to reception conditions, but this right will be reactivated should this appeal be declared admissible.<sup>143</sup>

The legislative modifications introduced by the law of 19 January 2012 also stipulate that asylum seekers who lodge a second or subsequent asylum application can no longer benefit from the right to reception conditions, until their asylum application is taken into consideration by the CGRS.<sup>144</sup> Also the EU citizens applying for asylum and their family members will, although entitled to it, not be assigned a reception place – with the exception of Bulgarians, Romanians and Croats –, but they can challenge this before the Labour Courts. During the appeal procedure against inadmissibility decisions on subsequent asylum applications, they have no right to reception conditions neither.

In other admissibility procedures the asylum seekers concerned are not excluded from reception conditions. Applicants from safe countries of origin will have a reception place assigned to them, as will those who have a first country of asylum or a recognised refugee status in another EU country.

During the examination of the Dublin procedure by the AO, asylum seekers are entitled to a reception place. In case of an agreement with another Member State to take charge of or take back the asylum seeker this right continues until the delay to execute a decision to transfer them to the responsible member state has elapsed, even if the transfer did not take place. Following judgments of the Brussels and Liege Labour Courts, implementing the CJEU's *Cimade* judgment, according to which the authorities are under an obligation to provide a reception place until the (forced or voluntary) Dublin transfer is actually carried out,<sup>145</sup> Fedasil adapted its instructions. However, it still limits the right to reception conditions to the period until the travel documents are delivered (considering this to be the "actual transfer" the CJEU refers to), unless the asylum seeker confirms their willingness to collaborate with the transfer but cannot execute the decision yet for reasons beyond their own will.<sup>146</sup> If eventually in such cases, after the maximum time period permitted by the Dublin Regulation to transfer the asylum seeker to the responsible member state has passed, Belgium accepts its responsibility to examine the asylum application, no reception place will be assigned neither until the CGRS has decided on its admissibility since it (wrongly) considers such an application to be a subsequent asylum application.

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<sup>142</sup> Article 6/1 Reception Act and article 52/3 Aliens Act.

<sup>143</sup> Article 6 Reception Act.

<sup>144</sup> Article 4 Reception Act. See also: Fedasil Instructions of 5 October 2012 on the right of reception in case of subsequent asylum applications (not published - [Dutch](#))

<sup>145</sup> Court of Justice of the European Union, Case C-179/11, *Cimade & Gisti v. Ministre de l'Intérieur (Fr)*, Jugement of 27 Septembre 2011. e.g.: Tribunal de Travail, Bruxelles, Decision of 24 January 2013

<sup>146</sup> Fedasil Instructions of 16 October 2013 on the termination and the prolongation of the material reception conditions (not published - [http://www.kruispuntmi.be/sites/default/files/bestanden/omzendbrieven%20en%20instructies/instructie\\_eind\\_e\\_verlenging\\_materiele\\_hulp\\_20131015.pdf](http://www.kruispuntmi.be/sites/default/files/bestanden/omzendbrieven%20en%20instructies/instructie_eind_e_verlenging_materiele_hulp_20131015.pdf) (Dutch)). These internal instructions replace the Instructions of 13 July 2012, before they were eventually quashed by the Council of State (CS, judgment n° 225.673 of 3 December 2013)

During the so-called medical regularisation procedure (which is formally not part of the asylum procedure) only when the request for regularization on medical grounds is declared admissible, the applicant will be entitled to reception conditions, equal to those asylum seekers are entitled to.

In theory no material reception conditions, with the exception of medical care, are due to a person with sufficient financial resources to provide in their basic needs.<sup>147</sup> Expenses made for material aid already delivered can also be recovered in such case.<sup>148</sup> What sufficient financial resources are, how they are to be calculated and which part of them are to be contributed, is determined in a Royal Decree of 12 January 2011.<sup>149</sup> However, in practice the withdrawal of the material aid is only rarely applied, since Fedasil does not have the capacity to control and have the expenses already made effectively reimbursed.

At the end of 2012 the reception structures had sufficient places to accommodate all asylum seekers. However, in the period 2010-2012 there was a serious reception crisis in Belgium during which the network was completely saturated and asylum seekers were sent to the local PCSW's that refused and/or were not able to provide them with financial or social aid either, since they did not have the financial means to do so. In that period asylum seekers were forced to take Fedasil to the Labour Courts to get a place assigned under the condition of penalty payments. The situation was frequently reported and denounced by different NGO's, who even set up a consortium to provide emergency accommodation for the most vulnerable asylum seekers without shelter during the winter months.<sup>150</sup>

## 2. Forms and levels of material reception conditions

### Indicators:

- Amount of the financial allowance/vouchers granted to asylum seekers on 31/12/2012 (per month, in original currency and in euros): \* (there is not a fixed amount granted equally to every individual asylum seeker; in principle they are only entitled to material reception conditions, and the financial allowances (so-called pocket money) on top of this are very diverse depending on the individual situation)

The Federal Agency for the Reception of Asylum Seekers (Fedasil) is coordinating the entire reception system, including its material aid distribution. In principle, since 2007, all asylum seekers are entitled to material aid only, irrespective of the kind of reception accommodation they are assigned to (see below). This comprises accommodation, food, clothing, medical, social and psychological help, access to interpretation services and to legal representation, access to training, access to a voluntary return programme, and a small daily allowance (so-called pocket money) and the social welfare services provided for by the Public Centres for Social Welfare (PCSW - CPAS/OCMW).<sup>151</sup>

During the first four months - in practice this may amount to eight or nine months - an asylum seeker is assigned to a collective reception centre where material aid is distributed. All asylum seekers who reside in such type of accommodation receive a fixed daily amount (pocket money) in cash.<sup>152</sup> Adults and accompanied children from 12 years on who attend school receive 7.40 € a day, younger

<sup>147</sup> Article 35/2 Reception Act.

<sup>148</sup> Article 35/1 Reception Act.

<sup>149</sup> Koninklijk besluit van 12 januari 2011 betreffende de toekenning van materiële hulp aan asielzoekers die beroepsinkomsten hebben uit een activiteit als werknemer / Arrêté royal de 12 janvier 2011 relatif à l'octroi de l'aide matérielle aux demandeurs d'asile bénéficiant de revenus professionnels liés à une activité de travailleur salarié; (in [Dutch](#)) / (in [French](#)).

<sup>150</sup> See for example CIRÉ, press release 27 September 2011, <http://www.cire.be/presse/communiqués-de-presse/594-communication-du-27-septembre-2011-accueil-des-demandeurs-dasile-le-gouvernement-a-failli-10-000-a-ses-responsabilités>; Vluchtelingenwerk Vlaanderen, [press release](#), 19 October 2011; The consortium '[SOS Accueil / SOS Opvang](#)' was an association of 8 different NGO's: Caritas International, 15 December 2011.

<sup>151</sup> Article 3 Reception Act.

<sup>152</sup> Article 34 Reception Act.

accompanied children and children 12 years of age or older who do not attend school receive 4.50 € a day, and unaccompanied children receive 5.40 € a day.

In a second phase, after four months, a transfer can be applied for to an individual accommodation structure.<sup>153</sup> Asylum seekers in this kind of accommodation all receive a weekly amount in cash or in food vouchers, to provide in their material needs autonomously. The amounts vary according to the family composition and the internal organisation of accommodation: for an adult (or an unaccompanied child) between 42 € (in Local Reception Initiatives<sup>154</sup> that provide for hot meals collectively) and 69 € (in those Local Reception Initiatives that do not provide hot meals), increased with an amount per additional adult (33-49 €) or child (12-33 €, depending also on the age of the child) in the family and an extra allowance for single-parent families (6-8 €). Since these local reception initiatives have a lot of autonomy as regards the way they are organised, they can choose if and how they distribute material aid themselves. This means that exceptionally asylum seekers might receive a financial allowance that equals the social welfare benefit (called 'social integration') for nationals, diminished with the rent for the flat or house they are accommodated in and expenses. Also, in theory, if all reception structures would be completely saturated and no place can be assigned to an asylum seeker, they can present themselves directly to the local PCSW and obtain the full amount of the financial social welfare allowance. These amounts are per person per month: 534.23 € (cohabitant), 801.34 € (single person) or 1068.45 € (person with a family at charge).<sup>155</sup>

As there is no centralised database, it is not possible for Fedasil to keep track of asylum seekers throughout the period they are in the reception network. The most recent sample test indicated an average length of stay in the reception network of 13 months. Fedasil is convinced that recent measures such as the accelerated and prioritized examination of asylum applications, the exclusion of reception accommodation for asylum seekers lodging a subsequent asylum application before their application is taken into consideration, have shortened this period already. Most families get a transfer after four to six months to a reception structure providing individual accommodation, but for some profiles, in particular single men, this can take up to eight months or more.

Once a final negative asylum decision has been taken and the delay for executing the order to leave the country has elapsed, the right to reception conditions ends. Some humanitarian and other circumstances in which a prolongation of the right to reception conditions can be applied for with Fedasil are determined in the law: to end the school year; during the last two months of pregnancy until two months after giving birth; when a family reunification procedure with a Belgian child has been started up; when it is impossible for the person to return to their country of origin for reasons beyond their own will, for serious medical reasons; or whenever respect for human dignity demands it.<sup>156</sup> Fedasil has adopted internal instructions about how to end the accommodation in the reception structures in practice.<sup>157</sup>

After a decision granting a protection status, the person concerned can stay for a maximum of two more months in the reception place.

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<sup>153</sup> Article 12 Reception Act.

<sup>154</sup> Local Reception Initiatives are reception structures for asylum seekers set up by PCSW – see below, types of accommodation.

<sup>155</sup> Article 14 Law on social integration; Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie / Loi de 26 mai 2002 concernant le droit à l'intégration sociale (Law of 26 May 2002 on the right to social integration); (in [Dutch](#)) / (in [French](#)).

<sup>156</sup> Article 6 and 7 Reception Act.

<sup>157</sup> Instructions of 16 October 2013 on the termination and the prolongation of the material reception conditions. The instructions determine that the decision of the AO on the prolongation of the time period to execute the order to leave the country precedes over the Fedasil decisions on the prolongation of the reception.

### 3. Types of accommodation

#### Indicators:

- Number of places in all the reception centres (both permanent and for first arrivals): 23988 (31 December 2012) - 23790 (1 March 2013)
- Number of places in private accommodation: 11310 (31 December 2012)
- Are there instances of asylum seekers not having access to reception accommodation because of a shortage of places?  Yes  No
- What is, if available, the average length of stay of asylum seekers in the reception centres? 13 months (last sample test)
- Are unaccompanied children ever accommodated with adults in practice?  Yes  No

By the end of December 2012 the asylum reception network, all different types of accommodation taken together, had a total capacity of 23.989 individual places, of which 21.382 (89,13%) were occupied.

To manage the network of reception centres in an efficient and coordinated way, in 2001 the federal government created a Federal Agency for the Reception of Asylum Seekers (Fedasil), which falls under the competence of the Secretary of State for Migration and Integration since the end of 2011. Fedasil is in charge of the management and coordination of the network, which includes collective and individual reception places, in addition to other competencies such as coordinating the voluntary return programs, the observation and orientation of unaccompanied children and the integration of reception facilities in the municipalities.<sup>158</sup>

The practical organisation is done in partnership between government bodies, NGOs and private partners.<sup>159</sup> The partners include the Flemish and the Francophone Red Cross, Flemish Refugee Action (Vluchtelingenwerk Vlaanderen), Ciré and the Public Centres for Social Welfare (PCSW - OCMW/CPAS). Through their specialised PCSW's, local authorities play an important role in the reception of asylum seekers in so-called Local Reception Initiatives (LRI - LOI/ILA): with 9.298 places at the end of 2012 they are actually the biggest provider of accommodation, which can be collective (centre) or individual (a house) reception facilities.<sup>160</sup> Both Red Cross sections together have a capacity of about 6.000 places and Fedasil provides some 4.750 places in collective centres.

The saturation of the reception centres for asylum seekers started in 2008, and continued throughout 2009, 2010 and 2011. The year 2011 was characterized by a further substantial increase of the number of asylum seekers. More than 32.000 persons applied for asylum in Belgium, an increase of more than 25% compared with 2010. Despite the sharp increase in newly created asylum accommodation (more than 7.300 places were created between 2009 and the end of 2011), several thousands of asylum seekers could not be provided with a place in a reception facility between 2009 and the first months of 2012. The government implemented several measures to address the on-going reception crisis and the increasing influx of asylum seekers. By the end of 2012 the reception crisis seemed to be structurally under control – but this is provided that the influx of asylum seekers does not start to increase drastically again.

The reception crisis has triggered the creation of a whole range of different types of emergency accommodation with limited social assistance, legally provided for in such situations for a maximum of ten days.<sup>161</sup> Many persons were sheltered in hotels, also children, up until 1200 at a certain moment in 2011, many for much longer than ten days, even months or more than a year for some of them.

<sup>158</sup> Article 56 Reception Act.

<sup>159</sup> Article 62 Reception Act.

<sup>160</sup> Article 64 Reception Act.

<sup>161</sup> Article 18 Reception Act.

Emergency centres were opened also. At the end of 2012 still 1.361 such emergency places were made available, although occupied for only about 60% and they are rapidly being closed one by one now.

The EU Reception Directive has never been transposed into the Belgian legislation with regard to the accommodation of asylum seekers in closed centres. Asylum seekers at the border are held in closed collective centres at the border or on the territory. Families with children are not detained anymore and are accommodated in housing units on the territory (without legally having entered it). If the asylum procedure takes longer than the maximum allowed detention period (two months), they must be transferred to the normal reception structures.

The law provides for accommodation to be adapted to the individual situation, but in practice places are assigned according to availability.<sup>162</sup> Since the pressure on the network has diminished, it should be easier to assign asylum seekers to the most appropriate place. There are a number of specialised centres for single women with children and for persons with psychological problems.

Unaccompanied children should in principle also be accommodated in specialised reception facilities and this is organized in three phases: first in a centre for observation and orientation, then in an adapted collective reception structure and finally in an adapted individual structure.<sup>163</sup> These places should be separated from reception facilities for adults, but this has not always been possible during the reception crisis. Unaccompanied children have also been accommodated in hotels, but never had to share sleeping rooms with adults.<sup>164</sup> By the end of 2012 there were 1.310 places specifically reserved and arranged for unaccompanied children in total, all different types of reception structures for unaccompanied children taken together. On 31 December 2012 1.177 (89.85%) of the 1.310 places were occupied. By the end of 2012 no unaccompanied child was still accommodated in a hotel.

#### 4. Reduction or withdrawal of reception conditions

##### Indicators:

- Does the legislation provide for the possibility to reduce material reception conditions?  
 Yes       No
- Does the legislation provide for the possibility to withdraw material reception conditions?  
 Yes       No

The law provides for some situations in which reception conditions and material aid can be refused or withdrawn or even recovered from the asylum seeker.

As a sanction for having seriously violated the internal code of conduct of a reception centre, the right to reception can be suspended during a month or other limitations can be imposed.<sup>165</sup> This measure has been taken for fourteen persons in total during 2012. Also the assignment of a reception place might be withdrawn and refused if such a place has been abandoned by the asylum seeker.<sup>166</sup>

According to the Reception Act it is also possible to refuse, withdraw or reduce reception rights or even claim compensation if the asylum seeker has financial resources themselves.<sup>167</sup> Until now, in practice

<sup>162</sup> Articles 22 and 36 Reception Act.

<sup>163</sup> Article 41 Reception Act.

<sup>164</sup> Following a collective complaint concerning the treatment of children during the reception crisis the Belgian State has recently been found to be in violation of Article 17 of the European Social Charter of 1961 by the European Committee of Social Rights of the Council of Europe: [Collective Complaint 98/2013](#), 13 February 2013.

<sup>165</sup> Article 45 Reception Act.

<sup>166</sup> Article 4 Reception Act.

<sup>167</sup> Article 35/1 and 35/2 Reception Act.

only the withdrawal of the reception place assigned to the asylum seeker has been decided in case of a proven sufficient and sufficiently stable income. An arrangement for demanding a contribution of an asylum seeker with such income is planned to be put in practice.

EU citizens applying for asylum in Belgium, with the exception of Romanians, Bulgarians and Croats, are also not accommodated by Fedasil anymore. However, there is no legal basis for such practice in the law, on the contrary, they are legally entitled to a reception place also.

## 5. Access to reception centres by third parties

### Indicators:

- Do family members, legal advisers, UNHCR and/or NGOs have access to reception centres?  
 Yes       with limitations       No

Except for the legal provision that access to first and second line legal assistance should be guaranteed, there are no specificities as to the access to the reception structures by lawyers or family members/relatives, NGOs or UNHCR.<sup>168</sup> In practice access does not seem to be problematic, but only few lawyers go visit asylum seekers in the centres themselves. Asylum seekers are entitled to public transport tickets to meet with their lawyer at the lawyer's office.

## 6. Addressing special reception needs of vulnerable persons

### Indicators:

- Is there an assessment of special reception needs of vulnerable persons in practice?  Yes  No

A legal mechanism is put in place to assess specific needs of vulnerable persons in reception facilities. Within thirty calendar days after having been assigned a reception place, the individual situation of the asylum seeker should be examined to determine if the accommodation is adapted to their personal needs. Particular attention has to be paid to signs of vulnerability that are not immediately detectable.<sup>169</sup>

The law enumerates as vulnerable persons: children, unaccompanied children, single parents with children, pregnant women, persons with a handicap, victims of human trafficking, violence or torture and elderly.<sup>170</sup>

Except for the specialised centres for unaccompanied children and some centres for single women with children and persons with psychological problems, no such adapted accommodation is available in practice, not even for serious medical cases.

## 7. Provision of information

The Reception Act requires Fedasil to provide the asylum seeker with an information brochure on the rights and obligations of the asylum seekers as well as on the competent authorities and organisations that can provide medical, social and legal assistance, in a language he understands.<sup>171</sup> The brochure 'Asylum in Belgium' currently distributed is available in eleven different languages<sup>172</sup> and in a DVD

<sup>168</sup> Article 33 Reception Act.

<sup>169</sup> Article 22 Reception Act.

<sup>170</sup> Article 36 Reception Act.

<sup>171</sup> Article 14 Reception Act.



version. As to the specific rights and obligations concerning the reception conditions, the asylum seeker also receives a copy of the internal rules of conduct (also available in 11 languages). The Agency also ensures that the asylum seeker accommodated in one of the reception structures has access to the interpretation and translation services to exercise their rights and obligations.<sup>173</sup> The brochure is actually distributed at the dispatching at the Aliens Office (where asylum seekers are directed to after they have lodged their asylum application), before being assigned to a particular reception place.

This written information, although handed over to every asylum seeker, is not always very adequate or sufficient in practice, since some asylum seekers need it to be communicated to them in person or have it repeated several times.

## 8. Freedom of movement

Asylum seekers who stay in an open reception centre enjoy freedom of movement on the national territory fully as long as they are not detained.

## B. Employment and education

### 1. Access to the labour market

#### Indicators:

- Does the legislation allow for access to the labour market for asylum seekers?  Yes  No
- If applicable, what is the time limit after which asylum seekers can access the labour market 6 months
- Are there restrictions to access employment in practice?  Yes  No

The framework legislation on employment conditions falls under the competency of the federal government. The implementation of this legislation is to a large extent part of the competence of the regional authorities, which includes among others the granting of work permits to third country nationals. Conditions to be allowed to work are determined by the federal legislator in the Law of 30 April 1999 regarding the employment of foreign workers and its implementing Royal Decrees.<sup>174</sup> Depending on the type of working permit that is applied for, the place of residence of the employer or of the employee will be decisive to determine which regional authority (Flanders, Wallonia, Brussels-Capital or the German-speaking community) is competent for granting the permit. In December 2013, the Federal Parliament has adopted the so-called sixth state reform legislative package, transferring a range of competences from the level of the federal legislator to the communities and the regions, among which also the competence to legislate (and not only implement legislation) on working permits for foreigners, that was transferred to the regions.<sup>175</sup> Only once new regional parliaments are in place after the May 2014 elections, they will be allowed to execute this competence – as long as they don't use this competence, the old federal legislation stays the applicable law.

Since 2010 asylum seekers who fulfil certain criteria are allowed to work with a work permit card C. It concerns asylum seekers who have not yet received a first instance decision in their asylum case within

<sup>172</sup> Dutch, French, English, Albanian, Serbo-Croatian, Russian, Arabic, Pashtu, Pharsi, Peul and Lingala. Available on the website of [Fedasil](#) and of the CGRS.

<sup>173</sup> Article 15 Reception Act.

<sup>174</sup> Loi de 30 avril 1999 relative à l'occupation des travailleurs étrangers / Wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers (law of 30 April 1999 concerning employment of foreign workers); (in [French](#)) / (in [Dutch](#)).

<sup>175</sup> Belgian Chamber of Representatives, [Bill of the Special Law concerning the Sixth Reform of the State](#), 13 December 2013, Article 22.



six months following the registration of their asylum application. These asylum seekers can work until a decision is taken by the Commissioner General for Refugees and Stateless Persons (CGRS), or in case of an appeal, until a decision has been notified by the Council of Aliens Law Litigation (CALL). Such a permit cannot be applied for anymore during the appeal procedure before the CALL if the procedure at the CGRS did not last for longer than six months.<sup>176</sup>

The work permit C allows the asylum seeker to do whatever job in paid employment for whatever employer, and is valid for 12 months and renewable.<sup>177</sup> The permit automatically is no longer valid once the asylum procedure has ended with a final negative decision by the GCRS or the CALL. In principle the employer is supposed to check on the residence status of their employees, but in practice employment is tolerated by the social inspection authorities until the date of validity mentioned on the working permit has expired.

Asylum seekers are also eligible for self-employed labour under the condition that they apply for a professional card. Only small scale and risk free projects will be admitted. For the time being asylum seekers are not allowed to do voluntary work, but they are entitled to perform certain community services (maintenance, cleaning) within their reception centre as a way to increase their pocket money.

Adult asylum seekers who have access to the labour market can register as job-seekers at the regional Offices for Employment and are then entitled to a free assistance programme and vocational training.

In practice finding a job is very difficult while in the asylum procedure because of the provisional and uncertain residence status, the in most cases very limited knowledge of the national languages, the fact that many foreign diplomas are not considered equivalent to national diplomas and a high discrimination on the labour market.

## 2. Access to education

### *Indicators:*

- Does the legislation provide for access to education for asylum seeking children?  Yes  No
- Are children able to access education in practice?  Yes  No

School attendance is mandatory for all children under eighteen in Belgium, irrespective of their residence status. Classes with adapted course packages and teaching methods, the so-called “bridging classes” (in the French speaking Community schools) and “reception classes” (in the Flemish Community schools), are organised for children of newly arrived migrants and asylum seekers. Those children are later integrated in regular classes once they are considered ready for it. Some of the bigger collective reception centres organise education within the centre itself, but most asylum-seeking children are integrated in local schools.

In practice the capacity of some local schools is not always sufficient to absorb all asylum-seeking children entitled to it. Also transfers of families to another reception centre or to a so-called “open return place”, after having received a negative decision, might entail a move to another (sometimes even linguistic) part of the country, which can have a negative impact on the continuity in education for the children.

In reception centres for asylum seekers, all residents can take part in activities that encourage integration and knowledge of the host country. Also they have the right to attend professional training

<sup>176</sup> Article 17 Royal Decree Foreign Workers.

<sup>177</sup> Article 3 Royal Decree Foreign Workers.

and education courses.<sup>178</sup> The regional offices for Employment organise professional training for asylum seekers who are allowed to work with the purpose of assisting them in finding a job. Also they can enrol in adults' education courses for which a certain level of knowledge of one of the national languages is required, but not all regions equally take charge of the subscription fees and transport costs.

### C. Health care

#### Indicators:

- Is access to emergency health care for asylum seekers guaranteed in national legislation?  
 Yes       No
- In practice, do asylum seekers have adequate access to health care?  
 Yes       with limitations       No
- Is specialised treatment for victims of torture or traumatised asylum seekers available in practice?  
 Yes       Yes, to a limited extent       No

The material aid an asylum seeker is entitled to also includes the right to medical care necessary to live a life in human dignity.<sup>179</sup> This entails all the types of health care enumerated in a list of medical interventions that are taken charge of financially by the National Institute for Health and Disability Insurance (the so-called RIZIV/INAMI-nomenclature). For asylum seekers some exceptions have been explicitly made for interventions not considered to be necessary for a life in human dignity, but also they are entitled to certain interventions that are considered to be necessary for such a life although not enlisted in the nomenclature.<sup>180</sup>

In general medical costs, as for Belgian nationals, will have to be paid first by the asylum seeker, who is later reimbursed. However, in collective reception centres, asylum seekers do not have to pay themselves first, as this is taken care of by the reception centre. However, in those centres asylum seekers normally do not have a free choice of medical doctor (unless they are willing to pay the cost of another doctor of their choice themselves). In that case a nurse at the centre will decide whether or not they should get a consultation with the physician. Asylum seekers, unlike nationals, do not have to pay a so-called "franchise patient fee",<sup>181</sup> unless they would have a professional income or receive a financial allowance.

There are services specialised in the mental health of migrants, but they are not able to cope with the demand. Public centres for mental health care are open to asylum seekers and have adapted rates, but are mostly lacking the specific expertise. Those centres that have this kind of asylum related expertise have to work with waiting lists. In Wallonia there is a specialised Red Cross reception centre for traumatised young asylum seekers, but also this centre has a waiting list.

<sup>178</sup> Article 35 Reception Act.

<sup>179</sup> Article 23 Reception Act.

<sup>180</sup> Article 24 Reception Act and Royal Decree of 9 April 2007.

<sup>181</sup> "Remgeld/ticket modérateur", which is under the Belgian health care system the amount of the medical cost the patient needs to pay without being reimbursed for it by the health insurance.

### A. General

#### Indicators:

- Total number of asylum seekers detained in the previous year (including those detained in the course of the asylum procedure and those who applied for asylum from detention) 1935 (estimation based on a conservative calculation from the numbers in the annual report of the Aliens Office – see specified below)
- Number of asylum seekers detained or an estimation at the end of the previous year (specify if it is an estimation): \* (idem)
- Number of detention centres: 5/6
- Total capacity: 535 (2011)

No final and unambiguous numbers on detention of asylum seekers are made publicly available by the Aliens Office (AO). Data are published in its annual report, but are not always sufficiently clear to distinguish between asylum seekers and other detained foreign nationals or between persons detained after applying for asylum or applying after detention. So double countings are difficult to avoid.

The following information can be deduced from the 2012 annual report: 111 asylum seekers were detained on a variety of grounds after having applied for asylum on the territory (down from 509 in 2011), including 60 awaiting a Dublin decision (sharp decrease from 385 in 2011) and 27 after a subsequent application (decrease from 99 in 2011); and 858 asylum seekers under the Dublin provisions, awaiting the Dublin transfer, after an agreement has been reached with another EU member state to take back or take charge of the person (862 in 2011). A total of 538 asylum applications were lodged at the border (711 in 2011). Another 429 asylum applications were introduced in detention centres or prisons (not at the border, but after having been detained while not formally being an asylum seeker) (increase from only 286 in 2011).<sup>182</sup> A conservative calculation – counting the asylum seekers detained after applying, those applying in detention, those applying at the border and those awaiting the execution of a Dublin decision), brings the total of asylum seekers in detention for 2012 to 1935.

Until recently Belgium had a total of six detention centres (commonly referred to as 'closed centres'): the Centre for 'Inadmissible' Aliens, in the Brussels Airport transit zone (INAD); Transit centre 127 (TC127) and Repatriation Centre 127bis (RC127bis), both near Brussels Airport; and three Centres for Illegal Aliens: located in Bruges (CIB), in Merksplas (near Antwerp, CIM) and in Vottem (near Liege, CIV). In May 2012 the INAD centre and TC127 were replaced by a new centre called the 'Caricole', also situated near Brussels Airport. In addition to the INAD centre in the Caricole building, there are also some smaller INAD centres in the five regional airports that are Schengen border posts.

In 2012 the overall capacity of the closed centres was of 516 places (535 in 2011). In total 6.797 individuals were detained for the first time (down from 7034 in 2011) - a number including asylum seekers, but mostly foreign nationals lacking a legal residence status (the numbers do not distinguish between the different categories), of whom 5.320 have been removed from the territory (or 78,3% as compared to- 5256 or 74,7% in 2011) and 1108 released for various reasons (down from 1452 in 2011), among others having obtained refugee or subsidiary protection status, and 28 escaped (18 in 2011). The daily average population of all closed centres taken together was 475 in 2012 (458 in 2011). The capacity of the centres is never completely used, since places are to be kept free for potential transfers from prisons or for persons detained by the police or social inspection services.<sup>183</sup>

<sup>182</sup> Aliens Office, Activities report 2012, (in [French](#) and in [Dutch](#)).

<sup>183</sup> Aliens Office, Activities Report 2012, ibidem

## B. Grounds for detention

### Indicators:

- In practice, are most asylum seekers detained
  - o on the territory:  Yes  No
  - o at the border:  Yes  No
- Are asylum seekers detained in practice during the Dublin procedure?  
 Frequently  Rarely  Never
- Are asylum seekers detained during a regular procedure in practice?  
 Frequently  Rarely  Never
- Are unaccompanied asylum-seeking children detained in practice?  
 Frequently  Rarely  Never
  - o If frequently or rarely, are they only detained in border/transit zones?  Yes  No
- Are asylum seeking children in families detained in practice?  Frequently  Rarely  Never
- What is the maximum detention period set in the legislation (inc extensions): 5 months (8 months for public order or national security reasons)
- In practice, how long in average are asylum seekers detained? \* (no specific data for asylum seekers are made available; only the average length of overall detention (incl. non asylum seekers) per centre is published in AO's annual report - see below)

The Aliens Act provides for a range of grounds to detain asylum seekers, most of these being added with the substantial modifications to the law in 2007. It is the Aliens Office's (AO) competence to decide on the administrative detention of foreign nationals.

At the border asylum seekers without travel documents are automatically detained.<sup>184</sup> On the territory in principle asylum seekers are not detained, but a lot of exceptions are provided for in the law and applied in practice. There are about fifteen situations in which a foreign national can be detained immediately after they apply for asylum and before any decision on the application has been made. This includes the following grounds:<sup>185</sup>

- the introduction of a subsequent application,
- presumptions of fraud,
- not respecting a duty to report at a certain reception centre,
- not having applied for asylum immediately upon arrival at the border,
- non collaboration with the identification procedures,
- having applied for asylum in another country before or being in the possession of a travel document to another country, etc.

Asylum seekers can also be detained during the Dublin procedure if there are indications that another EU Member State might be responsible for handling his asylum claim, but before their responsibility has been accepted by that state.<sup>186</sup> Also asylum seekers who are considered to be a threat to public order or national security<sup>187</sup> or who have served a sentence or been placed at the disposal of the government<sup>188</sup> are detained during their asylum procedure.

<sup>184</sup> Article 74/5 Aliens Act.

<sup>185</sup> For the full list of grounds, see Articles 74/6 and 52/3 Aliens Act.

<sup>186</sup> Article 51/5 Aliens Act.

<sup>187</sup> Article 52/4 Aliens Act.

<sup>188</sup> Article 74/8 Aliens Act.

Families with minor children who claim asylum at the border are explicitly excluded from detention in a closed centre and are placed in facilities adapted to the needs of such families.<sup>189</sup> Following the *Muskhadzhiyeva* judgment<sup>190</sup> and pending the *Kanagaratnam* case,<sup>191</sup> the then Secretary of State decided that from 1 October 2009 onwards families with children, arriving at the border and not removable within 48 hours after arrival, should also be accommodated in a family unit. These family or housing units are individual houses or apartments provided for a temporary stay. Legally these persons are not considered to have entered the territory and are in detention, but in practice these families have a certain liberty of movement, under the control of a so-called “return coach”.<sup>192</sup> Children are able to go to school and adults can go out if they get permission to do so.<sup>193</sup> At the moment there are four housing sites, with a total of nineteen housing units and 115 beds. In 2012, of the 153 families (485 persons in total – 137 and 463 in 2011) that resided in one of the units, only 50% was formally stopped at the border (60% in 2011). 20% was eventually ‘released’, of whom only twelve families obtained protection status (still 22 in 2011); 49% returned and only 25% escaped. The average length of stay in those units was only 23 calendar days. This alternative to detention has been broadly recognised as a good practice, also by NGO’s.<sup>194</sup>

The detention of unaccompanied children is also explicitly prohibited by law.<sup>195</sup> Since the entry into force of the Reception Act of 12 January 2007 unaccompanied children are in principle no longer placed in detention centres. When they arrive at the border, they are assigned to a so-called “Observation and Orientation Centre” (OOC) for unaccompanied children.<sup>196</sup> These centres are not closed centres but they are “secured”. A Royal Decree of 9 April 2007 explicits the functioning of such a center. Specific measures are taken to protect and accompany the children. During their stay of maximum fifteen days, their contacts are subjected to special surveillance. The first seven days of their stay they are not allowed to have any contact with the outside world other than with their lawyer and their guardian. The modalities of the visits, outside activities, telephone conversation and correspondence are strictly determined in the house rules. When a child is absent for more than 24 hours or whenever extremely vulnerable children (younger than thirteen years, children with psychological problems or victims of human trafficking) is absent without informing the staff, the police and the guardian or the Guardianship Service are alerted.<sup>197</sup> This only applies to those unaccompanied children with regard to

<sup>189</sup> Article 74/9 Aliens Act. This provision still allows for a limited detention of the family in case they do not respect the conditions they accepted in a mutual agreement with the AO (§3, al. 4), but this seems not to be applied in practice at all.

<sup>190</sup> European Court of Human Rights, *Muskhadzhiyeva and Others v Belgium*, Application no. 41442/07, Judgment of 19 January 2010 (French only). In this case the Court found a violation Articles 3 and 5 §1 ECHR because of the administrative detention for one month of a Chechen woman and her four small children who had applied for asylum in Belgium while waiting to be expelled to Poland, the country through which they had travelled to Belgium.

<sup>191</sup> European Court of Human Rights, *Kanagaratnam and Others v Belgium*, Application no. 15297/09, Judgment of 13 December 2011 (French only). In this case the Court would later find a violation of Article 3 and 5§1 ECHR because of the detention of a Sri Lankan asylum seeking (who was eventually recognised as a refugee) mother with three underage children for more than three months.

<sup>192</sup> Return coaches are staff members of the Aliens office that assist the families concerned during their stay in the family unit. For further information see Vluchtelingenwerk Vlaanderen a.o., *An Alternative to detention of families with children. Open housing units and coaches for families with children as an alternative to forced removal from a closed centre: review after one year of operation*, December 2009.

<sup>193</sup> Royal Decree of 30 April 2010.

<sup>194</sup> Vluchtelingenwerk Vlaanderen, Unicef, Amnesty International, JRS, et al., [An Alternative to Detention of Families with Children](#), December 2009.

Platform Minerus en Exil, ‘Unités d’habitation ouverte, ‘coaches’ pour les familles avec enfants mineurs, comme alternative à l’enfermement, October 2012 (in French) : <http://www.cire.be/thematiques/enfermement-et-expulsions/792-les-ong-evaluent-le-fonctionnement-des-maisons-de-retour>

Also: SCHOCKAERT, ‘[Alternatives to detention: open family units in Belgium](#)’ in FMR n°44, September 2013.

<sup>195</sup> Article 74/19 Aliens Act.

<sup>196</sup> Article 40 Reception Act.

<sup>197</sup> Articles 10 and 11 Royal Decree of 9 April 2007 determining the regime and functioning rules of the Centres for Observation and Orientation of Unaccompanied Minors ([Koninklijk besluit van 9 april 2007 tot vastlegging](#)

whom no doubts were raised about the fact that they are below 18 years of age and are identified as such by the Guardianship service (see above). Also this OOC is legally considered to be a detention centre at the border, which means that the unaccompanied child has not formally entered the territory yet. Within fifteen calendar days the AO has to find a durable solution for the child, which may include return after an asylum application has been refused. Otherwise access to the territory has to be formally granted. In case doubts were raised with regard to the real age of the self-declared unaccompanied child they may be kept in detention for the time necessary to assess their age through a medical test, that in principle must be concluded within three calendar days, which can be prolonged with another three days. In the majority of cases this time period has not been respected. When the individual appears to be a child, they should be transferred to an OOC within 24 hours. In 2011 at the border 56 foreign nationals declared to be under eighteen years of age. For 32 of them doubts about this age were raised and after the medical age test 20 of them appeared to be older than eighteen. Of the 36 persons identified as unaccompanied children only 9 applied for asylum.

No other vulnerable categories of asylum seekers are excluded from detention by law.

The law provides for a maximum of two months detention period for asylum seekers, extended with fifteen calendar days in case an appeal is lodged. If a final negative asylum decision has been made before that period has passed and the decision to expel or order to leave the country has become enforceable, and the necessary steps are taken by the AO to effectively execute that decision within a reasonable time, the detention can be prolonged for another two months, with an absolute maximum of five months – extendable to eight months for reasons of public order or national security.<sup>198</sup> For detainees who are in the Dublin procedure the detention can only last for one month, extendable with another month.<sup>199</sup> Belgium has recently been condemned more than once by the ECHR for exceeding this maximum time period of Dublin detention, mostly because the asylum keeper is kept in detention during the cassation appeal procedure, lodged by the AO against a decision of the Court of Appeal that ordered their release (see below under Judicial review section).<sup>200</sup>

Besides these legal conditions, there are no legal restrictions or guidelines as to the assessment of the necessity of the detention and possible alternatives. The EU Asylum Procedures and Reception Directives are not considered to be applicable on detention situations.

While in detention, the asylum procedure has to be handled in the same accelerated manner as is applicable in border procedures: a decision must be taken within two months or fifteen days in first instance,<sup>201</sup> the appeal must be lodged within fifteen calendar days after the first instance decision and within maximum fourteen working days a decision must be taken on the appeal by the Council of Aliens Law Litigation (CALL) (see above, section Asylum Procedures- border procedures).<sup>202</sup> The delays to be respected by the authorities are considered to be of internal order, so there is no sanction when they are not respected. However, in practice they are mostly respected.

In 2011 the average overall detention period per closed centre was as followed: 2.4 days at the INAD; 21.7 days at the TC127; 23.9 days at the RC127bis; 32 days at the CIB; 32.4 days at the CIM; and 30.3 days at the CIV. These numbers include all types of migrant detentions, so no conclusions on the specific detention periods for asylum seekers can be made out of this.

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[van het stelsel en de werkingsregels voor de centra voor observatie en oriëntatie voor niet-begeleide minderjarige vreemdelingen / Arrêté royal du 9 avril 2007 déterminant le régime et les règles de fonctionnement applicables aux centres d'observation et d'orientation pour les mineurs étrangers non accompagnés\)](#)

<sup>198</sup> Articles 74/5 and 74/6 Aliens Act.

<sup>199</sup> Article 51/5 Aliens Act.

<sup>200</sup> European Court of Human Rights, cases of *Firoz Muneer v. Belgium* (n° 56005/10), 11 April 2013, and *M.D. v. Belgium* n° 56028/10, 13 November 2013.

<sup>201</sup> Articles 52 and 52/2 Aliens Act.

<sup>202</sup> Articles 39/57 and 39/77 Aliens Act.



## C. Detention conditions

### Indicators:

- Does the law allow to detain asylum seekers in prisons for the purpose of the asylum procedure (i.e. not as a result of criminal charges)?  Yes  No
- If so, are asylum seekers ever detained in practice in prisons for the purpose of the asylum procedures?  Yes  No
- Do detainees have access to health care in practice?  Yes  No
  - o If yes, is it limited to emergency health care?  Yes  No
- Is access to detention centres allowed to
  - o Lawyers:  Yes  Yes, but with some limitations  No
  - o NGOs:  Yes  Yes, but with some limitations  No
  - o UNHCR:  Yes  Yes, but with some limitations  No

Asylum seekers are detained in specialised facilities and are not detained with ordinary prisoners.<sup>203</sup> The Criminal Procedures Act, as well as the Aliens Act provide for a strict separation of persons illegally entering or residing on the territory and criminal offenders or suspects.<sup>204</sup> They can be detained with other third country nationals and the same assistance is given to them as to illegal migrants in detention centres.

So far the Reception Conditions Directive has not been transposed as to its application in the context of detention. The Royal Decree of 2 August 2002 on the closed centres provides for the legal regime and internal organisational guidelines.

Access to health care is legally determined to “what the state of health demands”.<sup>205</sup> In practice persons detained may have difficulties in accessing and obtaining sufficient medical care, as was made clear by the European Court of Human Rights in the case of *Yoh-Ekale Mwanje v. Belgium*, in which the Court found that Belgium violated Article 3 European Convention on Human Rights for not providing the necessary medical care.<sup>206</sup> At the same time, the quality of the health care available depends a lot on the medical infrastructure and individual doctor in the centre; in some cases it might even be better than the one dispensed at some open reception centres.

In detention centres asylum seekers do have access to open air spaces. In some centres they are allowed to get out in open air during day time whenever they want. In other centres this is strictly regulated. A minimum of two hours exercise outside is to be provided for.<sup>207</sup>

Detention facilities have separated rooms or wings for families and single women. Children until the age of eighteen are not detained in closed centres anymore and while residing in a return housing unit they all have to be enrolled in a school in the neighbourhood.

<sup>203</sup> Article 4 Royal Decree on Closed Centres, referring to Article 74/5 and 74/6

<sup>204</sup> Article 609 Criminal Procedures Act and Article 74/8 Aliens Act. This last provision only allows for a criminal offender who has served his sentence to be kept in prison for an additional seven days, as long as he is separated from the common prisoners.

<sup>205</sup> Article 52-61/1 Royal Decree on Closed Centres.

<sup>206</sup> European Court of Human Rights, *Yoh-Ekale Mwanje v Belgium*, Application No 10486/10, Judgment of 20 December 2011. Not the threatened deportation at an advanced stage of her HIV infection to Cameroon, her country of origin, without certainty that the appropriate medical treatment would be available was considered in itself to constitute a violation of Article 3 ECHR, but the delay in determining the appropriate treatment for the detainee at that advanced stage of her HIV infection, was considered to be a degrading and inhuman treatment.

<sup>207</sup> Article 82 Royal Decree Closed Centres.



Lawyers always have access to their client in detention.<sup>208</sup> Also UNHCR has the right to access, as do the Children's Rights Commissioner, the national Centre for Equal Rights and supranational human rights institutions.<sup>209</sup> NGO's need to get permission from the Aliens Office (AO) directing manager in advance to get access to the detention centres.<sup>210</sup> In general an individualised accreditation is issued for specific persons who conduct these visits for an NGO, as is the case for employees of the Jesuit Refugee Service, Caritas International and the Belgian Refugee Council (CBAR-BCHV)

There has been a rather limited number of publications about the situation in the closed centres in Belgium. The most important ones are the 2010 Report of the Committee for Prevention of Torture following its visit to Belgium, the 2009 Report of Commissioner for Human Rights of the Council of Europe Hammarberg following his visit to Belgium, a 2008 Report of the LIBE Committee of the European Parliament following a delegation's visit to the closed centres and the 2009 Report of the Belgian Federal Ombudsman investigating the functioning of the closed centres in general and evaluating the access to medical aid in particular.<sup>211</sup>

#### D. Judicial Review of the detention order

##### Indicators:

- Is there an automatic review of the lawfulness of detention?  Yes  No

National legislation does provide for judicial review of the lawfulness of detention. No habeas corpus writ is automatically brought before a judge when an asylum seeker is being detained, but they can every month lodge a request to be set free with the Council Chamber of the Criminal Court.<sup>212</sup> The Council Chamber has to decide within five working days, and if this time limit is not respected, the asylum seeker has to be released from detention.<sup>213</sup> An appeal can be lodged against the decision of the Council Chamber before the "Indictment Chamber at the Court of Appeal" (*Kamer van Inbeschuldigingstelling*), within 24 hours. Against his final decision a purely judicial appeal can be introduced at the Court of Cassation.

When the AO decides to prolong the detention for another month after having spent already four months in detention, an automatic review by the Council Chamber of the Criminal Court takes place.<sup>214</sup>

The judicial review remains very restrictive in scope. Only the legality of the detention can be examined, not the appropriateness or proportionality of it. This means that only the accuracy of the factual motifs

<sup>208</sup> Article 64 Royal Decree Closed Centres.

<sup>209</sup> Article 44 Royal Decree Closed Centres.

<sup>210</sup> Article 45 Royal Decree Closed Centres.

<sup>211</sup> CPT, Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants du 28 septembre au 7 octobre 2009 ([CPT report](#) to the government of Belgium on the visit to Belgium from 28 September to 7 October 2009), Strasbourg, 23 juillet 2010; ECommHR, Rapport du Commissaire aux droits de l'homme du Conseil de l'Europe, Thomas HAMMARBERG faisant suite à sa visite en Belgique du 15-19 décembre 2008 ([Report](#) of the Commissioner for Human Rights, Thomas Hammerberg on his visit to Belgium from 15 to 19 December 2008), Strasbourg, 17 juin 2009; Parlement Européen, Rapport de la délégation de la commission LIBE sur la visite aux centres fermés pour demandeurs d'asile et immigrés de Belgique (European Parliament, [Report](#) of the delegation of the LIBE Committee on the visit to closed centres for asylum seekers and immigrants in Belgium), Rapporteur Giusto CATANIA, 28 mai 2008 ; Médiateur fédéral, Investigation sur le fonctionnement des centres fermés gérés par l'Office des Etrangers, et Rapport d'Evaluation Sois Médicaux dans les centres fermés en Belgique (Ombudsman, Investigation on the functioning of the closed centres managed by the Aliens Office and Evaluation Report medical case in the closed centres in Belgium), June 2009, in [French](#) / in [Dutch](#).

<sup>212</sup> Article 71 Aliens Act.

<sup>213</sup> Article 72 Aliens Act.

<sup>214</sup> Article 74 Aliens Act.

of the detention decision can be scrutinised: whether they are based on manifest misinterpretations or factual errors or not. The logic behind this is that the competence to decide on the removal of the foreigner, and as such on the appropriate measures to execute such a decision, lays with the AO (and the CALL), not with the criminal courts. Of course the limits of what is legality of a decision and what is not are almost arbitrary and the Court of Cassation itself is ambiguous about its interpretation in its own jurisprudence, by including the conformity with the Returns Directive or the ECHR. The Council or Indictment Chambers have even sometimes considered the principle of proportionality itself to be a part of the legality of a decision. The fact that the person detained is an asylum seeker is generally not taken into consideration as an argument to limit the use of detention. The procedure before the courts is determined in the Law on the Provisional Custody that applies in criminal law proceedings.<sup>215</sup>

In practice the time limits set in the law are respected, unless an appeal at the Court of Cassation is introduced against a judgment ordering release by the Court of Appeal. Since this cassation appeal suspends the detention period and it is not commonly treated within a reasonable time period, the detention period can exceed the legal maximum. This practice has been found by the European Court of Human Rights to be a violation of Article 5§4 of the ECHR.<sup>216</sup>

## E. Legal assistance

### Indicators:

- Does the law provide for access to free legal assistance for the review of detention?  
 Yes       No
- Do asylum seekers have effective access to free legal assistance in practice?     Yes     No

The law provides for access to free legal assistance for the judicial review of the detention decision. Free legal assistance is provided for in the Judicial Code in the same way as for the other asylum related procedures. A rebuttable presumption applies that the person detained has no financial means to pay for legal assistance (see above – section legal assistance under regular asylum procedure).

In practice, asylum seekers are often referred to inexperienced lawyers. The system organised by the law does not offer sufficient means to enable lawyers to specialise themselves in migration and asylum law. This creates a structural shortage of qualified legal aid.

<sup>215</sup> Wet van 20 juli 1990 betreffende de voorlopige hechtenis / Loi de 20 juillet 1990 relative à la détention préventive (Law of 20 July 1990 concerning pre-trial detention; (in [Dutch](#)) / (in [French](#))).

<sup>216</sup> European Court of Human Rights, cases of *Firoz Muneer v. Belgium* (n° 56005/10), 11 April 2013, and *M.D. v. Belgium* n° 56028/10, 13 November 2013.