Questionnaire: "No asylum and then…?"

PROCEDURAL QUESTIONS

1. Which institutions decide on the application for asylum (and may approve or reject it)?

In Belgium, four institutions can be involved in the asylum procedure:

Two administrative bodies (both are services within the FPS Home Affairs)

1) The Immigration Office
2) The Office of the Commissioner General for Refugees and Stateless Persons

and two judicial bodies:

3) The Council for Alien Law Litigation
4) The Council of State

The tasks and competences of each institution will be set out below.

- **Is it the competence of administrative bodies? Is there a possibility of an appeal within the administrative proceedings?**

Immigration Office (IO)

The asylum application is normally submitted to the Immigration Office. (Art. 71/2 §2 Aliens Decree) In exceptional cases, the application can be submitted to the border control authorities (Art. 71/2, §1 Aliens Decree)[1] or the director of the penitentiary institution if the applicant is serving a criminal sentence (Art. 71/2, §2 Aliens Decree).

Upon submission of the application, there is a hearing by the Immigration Office. The asylum seeker will be asked to fill out a questionnaire and to sign a declaration regarding his identity, origin and nationality, travel route and the reasons/motives for applying for asylum, as well as the prospects of returning to the country of origin. (Art. 51/10 Aliens Act) The applicant must submit all relevant supporting documents concerning his age, background, identity, nationality, countries and places of previous stay, previous asylum applications and travel routes.

Office of the Commissioner General for Refugees and Stateless Persons (CGRS)

Subsequently, the Office of the Commissioner General for Refugees and Stateless Persons examines whether or not refugee status or subsidiary protection status can be granted. (Art.

[1] An asylum seeker that submits his application at the border, however, is not granted access to the territory. (Art. 52/3, §2 Aliens Act) Instead, he is detained and must wait at the border until a (positive) decision on the application is issued. (Art. 74/5, §1 Aliens Act) The duration of the detention is limited to – in principle - two months, and the applicant must be released if there is no timely decision on the application.

57/6, 1° Aliens Act) The CGRS can also decide to confirm the refugee status granted in a different country, or to withdraw or exclude from refugee status or subsidiary protection. (Art. 57/6, 2°-8° Aliens Act) The asylum seeker is invited for a personal interview at the CGRS at least once. (Art. 6, §1 RD 11 July 2003) A translator must be present at the interview, and the applicant can be accompanied by his attorney and in certain circumstances even by a trusted person. (Art. 13/1 RD 11 July 2003)

- **Is there a possibility of judicial review? If so, is it a competence of general/administrative/social/other specialized courts or tribunals?**

Council for Alien Law Litigation (CALL)

If the asylum application is rejected by the CGRS, the applicant has 30 days[2] to file an appeal with the Council for Alien Law Litigation. (Art. 39/57, §1 Aliens Act) The appeal has automatic suspensive effect as regards the execution of the order to leave the territory, so that the applicant cannot be removed from the territory as long as the appeal is pending. (Arts. 39/70 and 39/83 Aliens Act)

The Council of Alien Law Litigation is an administrative court, and has exclusive jurisdiction to hear appeals against individual decisions concerning the access to the territory, residence, establishment and removal of foreigners. (Art. 39/1 Aliens Act)

There are two types of procedures:

1) *Annulment*

The CALL can annul decisions based on the infringement of substantial procedural requirements, lack of competence or misuse of powers. (Art. 39/2, §2 Aliens Act)

In other words, in an action for annulment, the Council does not act as a full appellate judge. Instead, it only exercises a marginal review of the legality of the CGRS decision. In this type of procedure, the CALL can annul the decision *ex tunc* and *erga omnes*, but cannot grant refugee or subsidiary protection status, nor a right of residence.

In the following cases, *only* an action for annulment of the CGRS decision can be filed (thus excluding full judicial review, see Art. 39/2, §1, *in fine* Aliens Act):

- The decision concerns the asylum application of an EU citizen
- The decision concerns an applicant that has already been recognised as a refugee or has received subsidiary protection in another EU Member State
- The asylum application is rejected on formal grounds (e.g. when the applicant does not appear for the hearing without citing valid reasons, or does not indicate an official place of residence in Belgium)

2) *Full judicial review*

As regards all other CGRS decisions, the Council for Alien Law Litigation has full jurisdiction. That means that it will subject the application to a new investigation and will judge on the merits

[2] There are a few exceptions, e.g. when the applicant is detained, in which case the time limit is 15 days.

of the case. Here, the CALL can confirm or reverse the decision, and thus grant or reject refugee or subsidiary protection status.

Finally, in full review procedures, the CALL can also annul the CGRS decision in case of substantial (and irreparable) irregularities, or if certain substantial elements are lacking so that the Council cannot decide on the confirmation or reversal of the decision without additional investigation. (Art. 39/2, §1, 2°)

Council of State (CoS)

The applicant can file an appeal in cassation against a negative CALL decision with the Council of State, and must do so within 30 days. The Council of State will not however pronounce on the merits of the case: it can only render judgment in cassation on the grounds of an infringement of the law or of substantial procedural requirements. In other words, all it does is examine whether the CALL ruling was made in accordance with the law, and therefore the CoS cannot grant refugee or subsidiary protection status.

Before it is heard by the CoS, the appeal in cassation must pass a filter procedure, during which the validity of the reasons for submitting the appeal will be examined. (Art. 20, §1 Council of State Act) The appeal will in any case not be permissible if

- the CoS has no jurisdiction to rule on it; or
- the appeal is devoid of object or manifestly inadmissible

The appeal will be permissible if

- the plea of an infringement of a substantial procedural requirement is not manifestly unfounded and the finding of a violation could actually lead to the cassation of the contested decision; or
- the CoS considers the examination of the case necessary to protect the unity/consistency of the jurisprudence

There is no legal remedy against the decision that the appeal is not permissible. If the appeal is declared permissible, the normal procedure will be initiated. If the CoS then goes on to determine that the contested decision was unlawful, it will annul the decision and return the case to the Council for Alien Law Litigation, which must make a new judgment.

The appeal in cassation is a non-suspensive appeal, so that the rejected asylum applicant can be removed from the territory while the appeal is pending.

- **In how many cases were legal remedies (i.e. appeal and/or judicial review) used against the decision rejecting the application of an asylum seeker in your country?**

Council for Alien Law Litigation:

In the last five years, according to the annual reports of the CALL,[3]

- in 2011, 9.931 appeals against a negative decision were filed with the CALL (out of 16.828 CGRS decisions taken)[4]
- in 2012, 14.556 appeals were filed (out of 19.731 CGRS decisions taken)
- in 2013, 11.699 appeals were filed (out of 18.193 CGRS decisions taken)
- in 2014, 8.172 appeals were filed (out of 18.701 CGRS decisions taken)
- in 2015, 6.092 appeals were filed (out of 16.929 CGRS decisions taken)

Council of State:

As regards the Council of State, no separate statistics for asylum cases are available.

2. Is it possible in your country to reject the application of an asylum seeker without issuing a return decision (meaning that the person concerned is not granted a right to stay, but at the same time no return procedure is launched)?

No. If the applicant has no other residence permit, the Immigration Office is under a legal obligation to issue an order to leave the territory as soon as the CGRS rejects the asylum application. (Art. 52/3, §1 Aliens Act, Art. 75, §2 Aliens Decree) The IO has no discretion in this regard.

As a result, it was traditionally that assumed the rejected asylum seeker could only challenge the negative asylum decision, and that it was not possible to file a separate action against the order to leave the territory. Such an action was deemed inadmissible based on lack of interest. However, the CALL has made clear that a separate action for annulment is possible e.g. on the grounds of Articles 3 or 8 ECHR, which can indeed prohibit the return of the applicant to his country of origin. There have been multiple cases in which the Council refused to accept the government's objection of inadmissibility because of a potential issue under Article 3 or 8 ECHR.[5] As a result, the Council has also acknowledged that the obligation to issue an order to leave the territory imposed on the Immigration Office cannot be understood as automatically applicable in all circumstances.[6]

[3] Retrieved from the website of the Council for Alien Law Litigation.
[4] Note however that an appeal against a decision taken in late 2011 could also have been filed in early 2012. The same applies *mutatis mutandis* for all other figures given.
[5] Council for Alien Law Litigation 5 April 2013, no. 100.506; 3 October 2013, no. 111.283; 19 December 2013, no. 119.003; 31 March 2014, no. 121.869; 31 March 2014, no. 121.870.
[6] Council of State 26 August 2010, no. 206.948; Council for Alien Law Litigation, 4 February 2013, no. 96.569; 3 October 2013, no. 111.283

If the order to leave the territory has become enforceable,[7] it is moreover possible to submit an application for the suspension of the order. (Art. 39/82 Aliens Act) The suspension of the order can be granted on two conditions (Art. 39/82, §2):

- serious arguments are put forward that could justify the annulment of the order
- the immediate execution of the order could cause a serious disadvantage that is difficult to repair

The submission of a request to suspend the order does not in and of itself have suspensive effect: such is only obtained once the judgment (ordering the suspension) has been pronounced.

Therefore, the law also provides an action for suspension in *extremely urgent necessity*, which is different from the ordinary action for suspension in two main ways. First, the Council can hear and pronounce on the case extremely fast (normally within 48 hours[8]), including at night or during the weekend. It can even pronounce on the case without hearing the parties, if the urgency of the matter does not allow for their convocation. Secondly, during the time-limit to submit the action in *extremely urgent necessity*, and pending the action, the alien cannot be removed from the territory without his consent. (Art. 39/83 Aliens Act)

Because of the latter, the action in *extremely urgent necessity* clearly offers more protection than the ordinary action for suspension. However, it can only be submitted if the execution of the order is imminent, and if the applicant has not yet filed an ordinary action for suspension. (Art. 39/82, §4 Aliens Act) The time limit for submission is 10 days after the notification of the order, or 5 days if it concerns a second (or third, …) removal order. (Art. 39/57, §1 Aliens Act)

Non-accompanied minors

Special guarantees exist for non-accompanied minors. Before issuing an order to leave the territory to a non-accompanied minor, the IO must take into consideration all proposals for durable solutions from the guardian, as well as take into account the best interests of the child. (Art. 74/16, §1 Aliens Act)

The IO must moreover ensure that appropriate[9] reception and care is guaranteed in the country of return, either by a parent, a family member, a guardian or by a (non-)governmental agency. (Art. 74/16, §2 Aliens Act) To this end, the IO must make sure that

- there is no risk of human smuggling or trafficking, and;
- the family situation is of such nature that the minor can be included in it again, and that the return to the family is desirable and appropriate considering the capacity of the family to support, nourish and protect the child, *or* that the reception structure in the agency is appropriate and that it is in the best interest of the child to be placed in that structure upon his return

[7] I.e. if the appeal at the Council for Alien Law Litigation has been rejected. The order issued after the negative decision of the CGRS will not be executable, because the appeal at the CALL has suspensive effect (Art. 39/70 Aliens Act, cfr. *supra* question 1)
[8] Or within 5 days if the execution of the removal order is not planned within the first 8 days.
[9] Meaning: adapted to the child's needs – depending on age and degree of independence.

3. What is the regular duration of the period for voluntary departure of a rejected asylum seeker in your country?

In principle, the return order issued after a negative CGRS decision determines a time limit of 30 days to leave the territory voluntarily.

For aliens that do not have authorisation to stay longer than 3 months, a time limit of 7 to 30 days can be granted. (Art. 74/14, §1 Aliens Act) Asylum seekers fall within the latter category,[10] but the practice appears to be to grant them the full 30 days.

If the CALL confirms the CGRS's negative decision, the time limit will be extended with 10 days. After that, two more 10-day-extensions can be granted if the alien cooperates sufficiently with the return process. (Art. 52/3, §1 Aliens Act)

During the time limit for voluntary departure, the alien is not legally staying on the territory. The time limit only implies that no coercive measures can be used to enforce the removal, not that the alien has a right to stay. Once the time limit for voluntary departure has lapsed, coercive measures can be used to execute the removal order. (Art. 74/15 Aliens Act)

4. Which criteria are used to shorten/prolong the duration of the period for voluntary departure of a rejected asylum seeker in your country?

Mandatory prolongation

The time limit for voluntary departure *will* be extended if the alien provides proof to the Immigration Office that the departure cannot be carried out within the given time limit. (Art. 74/14, §1 Aliens Act) To obtain that extension, the applicant must submit a motivated request to the IO.

Optional prolongation

The time limit *can* be extended if necessary, taking into account the specific circumstances of the applicant's situation. Elements that can be taken into consideration include the duration of the stay, the school attendance of the applicant's children, the finalisation of the organisation of the voluntary departure, the applicant's family or other social relationships, … This is not an exhaustive list, so other grounds can be put forward as well. (Art. 74/14, §1 Aliens Act)

To obtain an extension, the applicant must submit a motivated request to the Immigration Office.

Shortening of the regular time limit

In the following cases, the time limit for voluntary departure will be set at less than 7 days or even no period at all (Art. 74/14, §3 Aliens Act):

1. There is a risk of absconding
2. The alien has not complied with the imposed preventive measure (to prevent absconding, cfr. *infra* question 21)
3. The alien is a risk to public order or national security

[10] See Art. 74 Aliens Decree; Council of State 26 August 1996, no. 61.171.

4. The alien did not comply with a prior order to leave the territory within the prescribed time limit
5. The right to stay on the territory was terminated on grounds of fraud (e.g. the use of falsified identification documents, marriage/adoption of convenience)
6. The alien has submitted more than two applications for asylum, unless there are new elements in the application

Article 3 of the EU Return Directive defines the risk of absconding as meaning 'the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond'. The Aliens Act, by contrast, defines it as 'the fact that a third-country national who is the subject of return procedures poses a present and real risk to abscond. For that purpose, the Minister or the IO must base its evaluation on objective and serious elements'. (Art. 1, 11° Aliens Act)

The Belgian law does not therefore not specify what the criteria to determine whether a risk of absconding exists actually *are.* They are listed in the *travaux préparatoires*, but not in the actual text of the article. As a result, the CALL has already annulled a decision not to grant a period for voluntary departure taken on the basis of a risk of absconding.[11] In the view of the Council, the order violated the authorities' obligation to state reasons, as it failed to motivate which objective legal criteria were applied to establish that risk.

5. What are the grounds for removal of a rejected asylum seeker from the territory of your country (e.g. risk of absconding, risk to public security, no compliance with period for voluntary departure)?

The grounds to issue an order to leave the territory to an alien are listed in Art. 7, 1° - 12 of the Aliens Act. The Belgian authorities *can* issue such an order in the following cases:

1. When the alien's behaviour is considered a (potential) threat to public order or national security (Art. 7,3°)
2. When the alien is considered by the Minister to be a (potential) threat to the international relations of Belgium (or of another Schengen state) (Art. 7, 4°)
3. When the alien does not have sufficient means of subsistence (both for the intended duration of stay and for the return) and is not able to acquire such means legally (Art. 7,6°)
4. When the alien is affected by one of the diseases listed in the annex to the Aliens Act (Art. 7,7°)
5. When the alien exercises a professional activity (as a self-employed person or in subordination) without having the required authorisation (Art. 7,8°)
6. When the alien is transferred to the Belgian authorities by a different state in application of an international agreement, with a view to the removal of that person from that state (Art. 7,9°)

[11] Council for Alien Law Litigation, 3 July 2014, no. 126.698.

7. When the alien must be transferred to the authorities of a different state in the application of an international agreement (Art. 7,10°)

The authorities *must* issue an order to leave the territory if:

1. The alien is staying on the territory without the required documents, i.e. a valid passport or ID document and visa/ residence permit (Art. 7,1°) (i.e. the alien has no (more) right to stay)
2. The alien is staying on the territory longer than 3 months, or longer than the period granted in the visa/residence permit (Art. 7,2°) (i.e. the alien has no (more) right to stay)
3. When there is an alert on the applicant for the purposes to refuse entry in the Schengen area (Art. 7,5°)
4. When the alien was removed from the Belgian territory less than 10 years ago, and the measure was not suspended or lifted (Art. 7,11°)
5. When there is a re-entry ban against the alien (that has not been suspended or lifted) (Art. 7,12°)

The second category is an application of Article 6,1 of the EU Return Directive, which provides that Member States must issue a return decision to any third-country national staying illegally on their territory. Therefore, the rejection of the asylum application is *as such* ground for removal - unless the applicant has a different type of residence permit, which is exceptional. In most cases, the rejected asylum seeker will no longer have a legal title to stay on the territory once the application has been rejected, so that a return decision must be issued.

The rejected applicant can be forcibly removed from the territory once the time limit for voluntary departure has expired. (Art. 74/14, §2 Aliens Act)

6. What are the grounds for the postponement of removal of a rejected asylum seeker from the territory of your country? Could acceptance of other family members play a role?

Mandatory postponement

The removal of a rejected asylum seeker *will* temporarily be postponed if the removal would expose the alien to a violation of the *non-refoulement* principle (Art. 74/17, §1 Aliens Act). Article 74/17 specifies that this postponement is *temporary*, but it is self-evident that the reason a person cannot be removed will not always be temporary in nature, so that the postponement can *de facto* become permanent.

Optional postponement

The removal of a rejected applicant *can* temporarily be postponed based on the specific circumstances of the case. (Art. 74/17, §2 Aliens Act) The following factors are taken into consideration:

- the physical and mental condition of the applicant
- technical reasons, such as the lack of means of transport, or the lack of identification of the applicant

During the postponement, the Immigration Office can designate a place of stay for the time that is necessary to execute the removal. Measures to prevent absconding can also be taken.

7. Which options do rejected asylum seekers have in order to be regularized in your country?

Two main regularisation options exist in Belgian law: authorisation to stay on humanitarian grounds (Art. 9bis Aliens Act) and authorisation to stay on medical grounds (Art. 9ter Aliens Act).

Authorisation to stay on humanitarian grounds (other than medical)

Art. 9bis Aliens Act provides an exception to the rule that requests for authorisation to stay longer than 3 months must be submitted *abroad*, namely at the Belgian diplomatic or consular services.[12] In exceptional circumstances, the alien can submit a request for authorisation to the mayor of the place he's staying, who must communicate it to the IO. (Art. 9bis Aliens Act).

The IO will grant the authorisation to stay if two conditions are fulfilled:

1) *There must be exceptional circumstances to justify that the request is submitted in Belgium (admissibility)*

The 'exceptional circumstances' invoked must relate to the reasons it was impossible or at least very difficult for the alien to the request authorisation at the Belgian diplomatic or consular services *before* coming to Belgium, or to temporarily return to the country of origin for that purpose. The exceptional circumstances do therefore not relate to the reasons invoked to obtain a right to stay. The burden of proof to demonstrate the existence of exceptional circumstances is on the applicant.

An asylum seeker waiting for a decision on his application can invoke the fact that he cannot return to his country of origin during the asylum procedure. Pending the procedure, therefore, it will be relatively easy to establish exceptional circumstances. This is no longer the case for an asylum seeker whose application has been rejected, yet he can try to invoke circumstances relating to family life and school going children,[13] statelessness, imprisonment, … Financial concerns cannot amount to exceptional circumstances, as the applicant can make use of IOM support.

[12] Art. 9 Aliens Act.
[13] Although the case-law is divided on this point.

2) <u>The grounds must be sufficient to justify a right to stay (merits)</u>

Whether or not the authorisation to stay will be granted depends on a case-by-case analysis. The text of Art. 9bis does not list any criteria to grant or refuse the authorisation, so that, in principle, anything can be invoked as a substantive ground.[14] The Immigration Office thus has full discretion, as long as it motivates its decision.

Because no substantive criteria are listed in the law, throughout the years several circulars and ministerial instructions have tried to create transparency and legal certainty precisely by introducing criteria. These included e.g. the unreasonably long duration of an asylum procedure, pressing humanitarian situations, or sustainable local embedding.

On 9 December 2009,[15] the latest version of the instruction was annulled by the CoS because it discarded the admissibility requirement of 'exceptional circumstances'. Aliens that met one of the criteria were indeed granted authorisation automatically, without having to demonstrate exceptional circumstances, and the CoS emphasised that a ministerial instruction is not allowed to revoke a condition in the law. Yet the annulment of the instruction did not end the application of the criteria it contained. As a result, on 5 October 2011[16] the CoS ruled that the criteria of the annulled instructions (quite evidently) cannot be used as a binding norm. Other facts and other considerations must also be taken into consideration, and a request cannot be rejected just because it does not meet the criteria of the annulled instruction. Otherwise, the instruction would be adding a requirement to the law.

As a result, from November 2011 onwards, the IO started to motivate its decisions by simply stating that the criteria - invoked by the applicants - were no longer applicable. Yet such decisions may not meet the threshold of the 'obligation to state reasons'. The case-law implies that 'not meeting the criteria' is in and of itself not sufficient ground for refusing the authorisation. It obviously does not prohibit that someone who *does* meet the old criteria is granted a positive decision. This indeed still falls within the discretion of the Immigration Office, and the opposite would be an unjustified restriction of that discretion. As a result, 'the criteria no longer apply' cannot be a sufficient motivation for refusing to grant the authorisation to someone who meets the old criteria.

[14] However, for a rejected asylum seeker, the reasons that were invoked in the asylum application cannot count as substantive grounds to obtain an authorisation to stay. (Art.9bis, §2, 1°-2° Aliens Act) The Immigration Office is bound by the authority of res judicata of the CALL judgment that determined that the applicant is not a refugee nor worthy of subsidiary protection.

[15] Council of State 9 December 2009, no. 198.769.

[16] Council of State 5 October 2011, no. 215.571.This was repeated in later judgments, e.g. Council of State 24 January 2012, no. 217.532.

Authorisation to stay on medical grounds

The medical regularisation procedure of Art. 9ter Aliens Act is intended to authorise seriously ill aliens to stay on the territory if their removal would have unacceptable humanitarian consequences. There are two scenarios in which the authorisation can be granted:

1) *The disease constitutes a present and real risk for the life or physical integrity.*

   If the alien suffers from a disease that constitutes in and of itself a real risk for his life or physical integrity, he will not be removed, even if adequate medical treatment is available in the country of origin.

2) *The disease constitutes a real risk of an inhuman or degrading treatment because of a lack of adequate treatment in the country of origin.*

   In the second scenario, the risk of an inhuman or degrading treatment stems from the lack of adequate treatment in the country of origin or residence. 'Adequate treatment' does not only refer to the availability of the necessary medical infrastructure and medication, but also to the possibility for the alien to access those, taking into account *inter alia* his financial means.

Contrary to Art. 9bis, Art. 9ter does *not* require the existence of exceptional circumstances, and the authorisation request can also be submitted to the Immigration Office directly. What's similar is that the IO has the discretionary power to grant or refuse the authorisation to stay, but remains subject to the obligation to state reasons.

The IO must moreover await the advice of an official doctor before deciding on the application. The official doctor examines and drafts an advice on:

- the risk the diseases poses to (i) life or physical integrity, or to (ii) an inhuman or degrading treatment
- the availability and accessibility of treatment in the country of origin/residence
- the degree of severity of the disease and the required treatment

The doctor is completely independent in drawing up his advice, and may examine the alien and seek advice from other experts if he considers this necessary. The application may be rejected if the alien does not appear for the examination without stating valid reasons (Art. 9ter, §1/1 Aliens Act) It can also be declared inadmissible if the doctor determines that the disease manifestly does not correspond to a disease that could be ground for a positive decision. (Art. 9ter, §3, 4°)

- **Has there recently been a regularization policy for those staying on the territory illegally (have no right to stay)?**

Since the mid 2000s, there have been no more collective regularisation policies.[17] The website of the Immigration Office is very straightforward in this regard: ''regularization remains an exceptional measure, under which the decision is made on an individual basis. The agreement

[17] Notwithstanding, of course, the two individual regularisation procedures discussed above.

no longer provides for collective regularization. This means that the Belgian Immigration Office will not consider any request for collective regularization in the coming years.”

SECURITY

19. Can rejected asylum seekers be detained as a consequence of rejection in your country? If so, what are the criteria for imposing detention and what is the maximum length of detention for rejected asylum seekers?

Detention after, or as a consequence of, the rejection of an application is possible in the following two scenarios.[18]

First, Art. 74/6, §1 Aliens Act and Art. 75, §3 of the Aliens Decree determine that an alien can be detained if the rejection of his asylum application was based on one of the grounds mentioned in art. 52, which mainly concern

- the fraudulent nature of the application
- the manifestly unfounded nature of the application (because it does not relate to the criteria mentioned in Art. 1, A(2) of the Refugee Convention or those relating to subsidiary protection in Art. 48/4 of the Aliens Act, or because the applicant does not offer any elements to substantiate the claim)
- the failure to appear for the hearing without citing valid reasons

In those cases it is possible to detain the alien if the IO considers the detention necessary to guarantee the effective removal from the territory.

Secondly, and more important in practice, detention can also be possible where the order to leave the territory was issued without period for voluntary departure[19] (Art. 7 and 74/14, §3 Aliens Act), or after that period has expired (Art. 27, §3 Aliens Act). In those cases, detention will be allowed for the time that is strictly necessary for the execution of the order to leave the territory, in particular when there is a risk of absconding or when the applicant is evading or obstructing the preparation of the return procedure, and on the condition that no other sufficient but less coercive measures can effectively be applied.

In both cases, in principle the maximum duration of the detention is two months. (Arts. 74/6,§2 and 29 Aliens Act). The detention can however be extended with additional periods of two months, if the following 3 conditions are fulfilled:

- the necessary steps for the removal of the alien were initiated within seven days after the start of detention
- these steps are being continued with the required diligence
- the effective removal is still possible within a reasonable time

[18] Arts. 8bis §4, 51/5 §1, 52/4, 54 §2 and 74/6 §1bis Aliens Act set out the grounds on which an asylum seeker can be detained while his asylum application is still pending.
[19] Cfr. *supra* question 4, for the scenarios in which that is possible.

The last condition implies that the alien must be released immediately if there is no reasonable prospect of removal.

If these conditions are met, the detention can be extended up to a maximum of (in principle) 5 months. Upon expiry of those 5 months, however, the detention can still be extended if it is necessary for the protection of the public order or national security. In that case, the maximum duration is 8 months.

The same terms do not necessarily apply if the alien (physically) resists the removal from the territory and is therefore not removed within the statutory time limit. It is settled case-law of the Court of Cassation that the IO is not bound by the prescribed periods 'if the removal was made impossible solely because of the alien's own attitude and unlawful resistance'.[20] In such a case, according to the Court, the IO can take a *new* decision to detain the alien (as opposed to an extension of the existing detention), for which a new time limit applies. Essentially, this is an application of the *force majeure* principle.

20. What are the basic conditions that must be respected in relation to the detention of rejected asylum seekers in your country (e.g. specialised facilities or prisons, special provisions for the detention of minors, health care, social benefits in cash or in kind)?

The minimum detention conditions are set out in the 'Royal Decree of 2 August 2002 determining the regime and regulations to be applied in the places on the Belgian territory managed by the Immigration Office 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'.

Specialised facilities

Art. 4 of the RD stipulates that (rejected) asylum seekers must be detained in specialised facilities, separate from ordinary prisoners.

Legal assistance

A detainee has the right to legal assistance (Art. 62 RD). He has the right to contact his lawyer every day between 8 AM and 10 PM, either by phone (Art. 63 RD) or in person at the centre. (Art. 64 RD) The correspondence between the detainee and his lawyer cannot be subjected to control by the director of the centre. (Art. 21/1 RD) The lawyer must be notified at least 48 hours before a first attempt to remove the detainee from the territory, unless the latter refuses this. (Art. 62 RD)

Individual right of complaint

Each detainee has a right of complaint regarding the application of the Royal Decree (Arts. 130 to 134 RD). The submission of a complaint does not suspend the (execution) of a removal measure taken vis-à-vis the detainee (Art. 134 RD).

[20] See inter alia Cass. 29 May 1990; 22 January 1997; 28 September 1999; 27 November 2002; 31 March 2004; 6 February 2007. It must be added that the position of the Court of Cassation is strongly criticised in the literature, and also appears to be at odds with the Art. 15 §6 of the EU Return Directive (as it only allows for the *prolongation* of the detention on the basis of a lack of cooperation, not the *renewal*).

Health care

The detainee has the right to all healthcare that his state of health requires. (Art. 53 RD) Each detention centre has its own medical doctor, but the alien may consult a(n) (external) doctor of his choosing at his own expense. At the advice of the doctor of the centre, the alien may also be transferred to a specialised medical centre if necessary. (Art. 55-56 RD)

If the doctor considers the detention to be seriously detrimental to the physical or mental health of the alien, or if he has medical objections against the removal, he must notify this to the director of the centre. In turn, the Director-General of the Immigration Office is notified, who can decide to suspend the detention or the execution of the removal order. The Director-General is obliged to consult a second doctor if he refuses to suspend the measure. If the second doctor confirms the advice of the first one, the Director-General is obliged to suspend anyway. If the second doctor does not confirm, a third doctor must be consulted, and then the same rule applies (i.e. if he confirms the first advice, suspension is again mandatory). (Art. 61 RD)

Social benefits (in cash or in kind)

Art. 74/8 §4 Aliens Act provides that detainees can be allowed to work in the centres. The modalities thereto must be determined in a Royal Decree, yet so far no such Decree has been adopted, so the provision cannot be applied.

Detention of minors

The detention of *non-accompanied minors* is prohibited by Art. 74/19 Aliens Act.

Art. 74/9 of the Aliens Act determines that *families with minor children* can only be detained in centres where the facilities are adapted to the needs of the children. The family has the option to stay in their own home,[21] and if that is not possible, they will be assigned to a family unit, which is an individual house or apartment. Legally, people staying in a family unit are in detention, but in practice they have quite some freedom of movement under the supervision of a 'return coach'. The conditions the family needs to comply with will be set out in an agreement with the Immigration Office, and only if they don't respect these conditions and no other less coercive measures can effectively be applied, can they be detained in an ordinary detention centre (that must be adapted to the needs of the children).

[21] On the condition that none of the family members are signalled in the Schengen States, or considered to be a threat to international relations of Belgium or another Schengen State, or to the public order or national security.

21. Does your country impose restrictive measures on rejected asylum seekers as an alternative to detention (e.g. requiring regular reporting to authorities, ordering to take up accommodation in premises specified by the authorities, obligation to surrender passports and documents)? In which cases and what is the maximum length for imposing these restrictions?

According to Art. 74/14, §2, a rejected asylum seeker can be obliged to fulfil certain preventive measures during the time limit for voluntary departure to prevent absconding. Art. 110quaterdecies of the Aliens Decree specifies that these measures can include

- the obligation to regularly report to the authorities
- the obligation to deposit a financial guarantee
- the obligation to provide a copy of ID documents

Moreover, Art. 7 Aliens Act stipulates that, in those cases where the time limit for voluntary departure can be set at 7 days or less,[22] the IO can appoint a place of stay for the time necessary to execute the order to leave the territory. That also applies to those aliens whose removal has been postponed based on the specific circumstances of the case (Art. 74/17, §2, cfr. *supra).*

Nele Verbrugghe

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Aliens Act = Law of 15 December 1980 relating to the access to the territory, residence, establishment and removal of foreigners

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Council of State Act = Coordinated Laws on the Council of State of 12 January 1973

RD 11 July 2003 = Royal Decree of 11 July 2003 concerning the functioning and the procedure before the Commissioner-General for Refugees and Stateless Persons

Return Directive = Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

[22] Art .74/14, §3 Aliens Act, cfr. *supra* question 4.