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Human Rights in Belgium

Asylum-seekers

2007-2008

HUMAN RIGHTS WITHOUT FRONTIERS INTERNATIONAL

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Asylum seekers

Legal framework

The Law Amending the Law of 15 December 1980 Concerning the Access to the Territory, the Stay, the Settlement and the Removal of Foreigners, was passed by the Belgian parliament on 15 September 2006,[1] introducing some important changes to the Belgian asylum system. This law became fully operational on 1 June 2007.

Firstly, concerning the issue of family reunification with a spouse, the new law raised the required age of both spouses from 18 to 21. However, the statutory age remains 18 in cases in which the marriage - or registered partnership that is equated to marriage under Belgian law - already existed prior to the arrival in Belgium of the foreigner requesting family reunification.[2]

Secondly, the new law generally requires persons wishing to move to Belgium for the purpose of family reunification to deliver proof of the fact that the person already living in Belgium is able to support him/herself and the family members. This includes proof of adequate housing, health insurance and sufficient, stable and regular income to support both him/herself and the family members for whom the family reunification is requested, in order to prevent the applicant from causing economic burdens on public governments.[3]

Thirdly, the new law introduced the system of so-called subsidiary protection which is designed to grant asylum to those people to which article 1 of the 1951 Geneva Convention does not apply and who can therefore not be granted refugee status, but who can nevertheless prove that returning to their country of origin would place them at a real risk of 'serious damage'.[4] 'Serious damage' is defined by law as (i) the death penalty or execution; (ii) torture and inhuman or degrading treatment or punishment; or (iii) serious threats to the life of a civilian as a result of arbitrary violence in the case of an international or internal armed conflict. However, under the new law the status of persons enjoying subsidiary protection, unlike the status of refugee, needs to be renewed every year for a consecutive five years before a permanent residence permit is granted.[5]

Fourthly, the new asylum law provides for institutional changes, making the *General Commissariat for Refugees and Stateless Persons* the primary decision-making body for asylum requests and introducing a new appeals body, the *Council for Alien Disputes* (*Raad voor Vreemdelingenbetwistingen, Conseil du Contentieux des Étrangers*). Concerning the latter, the UNHCR has already expressed its doubts about the adequacy of the appeals procedure, noting that the strictly written form of the procedure and the lack of investigative competencies of the *Council for Alien Disputes* seriously limits the right to defence of asylum seekers on appeal.[6]

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[1] Law of 15 September 2006 Amending the Law of 15 December 1980 Concerning the Access to the Territory, the Stay, the Settlement and the Removal of Foreigners, *Belgisch Staatsblad*, 6 October 2006.
[2] Article 6 of the Law of 15 September 2006.
[3] Ibid. However, the proof of adequate housing and health insurance is not required if the family relations already existed prior to the arrival of the foreigner on Belgian territory and if the application for family reunification is made within one year of the decision granting the foreigner refugee status.
[4] Article 26 of the Law of 15 September 2006.
[5] Ibid.
[6] UNHCR, "Nota aan de politieke partijen betreffende de bescherming van vluchtelingen, personen die de subsidiaire bescherming genieten en staatslozen in België", Brussels, 30 March 2007.

The fifth and final proposed change to the asylum law, which would have required that each asylum procedure be completed within one year, was eventually not included in the law of 15 September 2006. The absence of a clear maximum period for the asylum procedure prompted recommendations from several institutions, requesting the Belgian government to amend the asylum law in order to include the said maximum period.[7]

In 2008, the Law of 15 September 2006 was partially annulled by two decisions of the Constitutional Court of Belgium.[8] Both decisions were the result of appeals against certain articles of the Law, brought before the Constitutional Court by Belgian NGOs (*Vluchtelingenwerk Vlaanderen, Coordination et Initiatives pour et avec les Refugiés et les Etrangers, Ligue des Droits de l'Homme, etc.*) and the main Belgian lawyers associations (*Orde van Vlaamse Balies* and *Ordre des Barreaux Francophones et Germanophones*).

The first case, focusing on discrimination in certain procedural requirements of the new Law, resulted in the annulment by the Constitutional Court of two important new rules of the Law. Firstly, the new appeals procedure in front of the *Council for Alien Disputes* was found to create a not reasonably justified discrimination between asylum seekers, depending on whether their case had first been heard by the *Department of Federal Immigration Belgium* (in which case the term for appeal foreseen by law was 30 days) or by the *General Commissariat for Refugees and Stateless Persons* (in which case the term for appeal was merely 15 days).[9] Consequently, and because it deemed 15 days to be an insufficient time period to organise a defence, the Constitutional Court annulled the article in question (article 154). The second set of articles that were partially annulled (articles 39/82 and 39/85) concerned the possibility for government officials to go ahead with the execution of expulsion or deportation orders if no appeal had been brought before the *Council for Alien Disputes* within 24 hours or if the Council had not issued a decision on appeal within 72 hours. The fact that an appeal against an expulsion or deportation order could only be brought before the *Council for Alien Disputes* for the short time period of 24 hours as well as the fact that even an appeal could not prevent the actual expulsion or deportation of the defendant if no decision had been formulated by the *Council for Alien Disputes* in the brief time period of 72 hours, was deemed by the Constitutional Court to deny the defendant an effective right to appeal.[10] The Constitutional Court consequently ordered the removal of any reference to the 24-hour and 72-hour time periods in the articles in question.

The second case, focusing primarily on issues of discrimination in the requirements for the granting of asylum, also resulted in the annulment of two articles of the new Law. Firstly, article 6 summing up the categories of people eligible for a stay on Belgian territory of over three months in the context of family reunification, was deemed to discriminate against children born out of a polygamous marriage.[11] The discrimination was caused by the fact that only those children whose biological mother was residing on Belgian territory were allowed to enjoy the benefits of family reunification, while the other children - although their biological father was residing on Belgian territory - were denied this right. The Constitutional Court consequently annulled article 6 in as far as it differentiates between children born out of a polygamous marriage. The second article (article 10) that was annulled concerned the requirements imposed on minor children in the context of family reunification requested by their parents.[12] This article

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[7] See e.g. Kinderrechtencommissariaat, "Heen en Retour. Kinderrechten op de Vlucht", September 2007, http://www.kinderrechten.be/IUSR/documents/volwassenen/precair/KRC07_doss_heen_screen.pdf (accessed 10 October 2007).
[8] Constitutional Court, Decisions nr. 81/2008 of 27 May 2008 and nr. 95/2008 of 26 June 2008.
[9] Constitutional Court, Decision nr. 81/2008 of 27 May 2008, paras. B.45.1 - B.45.10
[10] Ibid., paras. B.67 - B.68.3 and B.73.1 - B.73.2.
[11] Constitutional Court, Decision nr. 95/2008 of 26 June 2008, paras. B.20.3 - B.25.
[12] Ibid., paras. B.32 - B.36.

was deemed by the Constitutional Court to discriminate between as refugee recognised minors, because certain requirements were dependent on the time period within which the request for family reunification was submitted. If the request had been made over one year after the recognition of the minor as refugee, the minor had to deliver proof that he/she disposed over sufficient housing to receive his/her parents and over health insurance, while similar proof was not demanded if the request had been filed within the one year time period. The reason why the Constitutional Court annulled the article in question was the fact that a minor could not be expected to be able to deliver proof of sufficient housing and health insurance.

On 12 January 2007 the Belgian parliament passed a second law bringing changes to the Belgian asylum system.[13] This law introduced several changes to the manner in which asylum seekers are received and treated in Belgium.

Firstly, the law represents a shift from financial to material assistance of asylum seekers: asylum seekers will be granted housing, medical, psychological, social and legal counselling/assistance, training and a *per diem*, but will no longer receive a monthly allowance. The second important change introduced by this law is the legal confirmation that unaccompanied minors will no longer be held in closed asylum centres but in separate so-called Observation and Orientation Centres.[14] The regime of these open centres is designed to offer the most appropriate reception of the particularly vulnerable category of unaccompanied minors.[15]

Data on asylum seekers in Belgium

In 2007, the number of asylum requests and asylum seekers in Belgium did not differ much from 2006. In 2007, 11,115 asylum requests (representing 14,015 persons) were made, compared to 11,587 (representing 14,648 persons) in 2006.[16] The top ranking countries of origin of asylum seekers were Russia (including Chechnya) and Serbia (including Kosovo), followed by Armenia, the Democratic Republic of the Congo and Slovakia. Of the 9,133 asylum requests that were decided on by the *General Commissariat for Refugees and Stateless Persons* in 2007, 1,841 resulted in the granting of refugee status and 281 in the granting of so-called subsidiary protection status, while the remaining 7,011 asylum requests were refused on different grounds.[17] The backlog of asylum requests, a major problem in the past in Belgium, continued to decline over the course of 2006 and 2007. While the backlog still amounted to more than 10,000 files on 1 January 2006, this figure declined to 6,124 cases by 1 January 2007 and continued to steadily go down over the course of 2007 to reach 4,966 by the end of the year.[18]

In 2008, 12,252 asylum requests were made in Belgium.[19] This represents an increase of 10% compared to the number of asylum requests in 2007. In 2008, the top ranking countries of origin of asylum seekers

[13] Law of 12 January 2007 concerning the reception of asylum seekers and certain other categories of foreigners, *Belgisch Staatsblad*, 7 May 2007.
[14] Article 41 of the Law of 12 January 2007.
[15] Centre for Equal Opportunities and Opposition to Racism, "Centra voor observatie en oriëntatie: op weg naar een effectieve uitweg voor de niet begeleide minderjarige vreemdelingen uit de gesloten centra?", http://www.diversiteit.be/CNTR/NL/migrations/advice_and_recommendations/niet-begeleide+minderjarigen (accessed 10 October 2007).
[16] Fedasil, "Jaarverslag 2007", p. 39, http://www.fedasil.be/home/attachment/i/15788 (accessed 13 January 2009).
[17] General Commissariat for Refugees and Stateless Persons, "Asielstatistieken. Overzicht 2007", pp. 5-6, http://www.cgvs.be/nl/binaries/Overzicht%202007_tcm127-9251.pdf (accessed 13 January 2009).
[18] General Commissariat for Refugees and Stateless Persons, "Asielstatistieken. November 2008", p. 9, http://www.cgvs.be/nl/binaries/STAT-ASIEL%2011-2008%20(internet)_tcm127-28569.pdf (accessed 13 January 2009).
[19] See http://www.fedasil.be/nl/home/asylum_year/ (accessed 13 January 2009).

were Russia (including Chechnya) and Iraq, followed by Afghanistan, Guinea, Iran, the Democratic Republic of the Congo, Serbia and Armenia.[20] In the first eleven months of 2008, 503 asylum requests were made by unaccompanied minor asylum seekers.[21] Of the 8,225 asylum requests that were decided on by the *General Commissariat for Refugees and Stateless Persons* in the first eleven months of 2008, 1,979 resulted in the granting of refugee status and 352 in the granting of so-called subsidiary protection status, while the remaining 5,894 asylum requests were refused on different grounds.[22] Worth mentioning in particular is the fact that the vast majority (60%) of all cases in which subsidiary protection status was granted, concerned Iraqi asylum seekers.[23] The backlog of asylum requests, a major problem in the past in Belgium that had continued to show improvement over the course of 2006 and 2007, exhibited signs of stagnation in 2008. Over the course of 2008, the backlog had even begun to rise again, amounting to 5,169 cases in December 2008, compared to 4,966 at the end of 2007.[24]

Reports of International Organisations

In 2008, both the UN **Committee on the Elimination of Racial Discrimination** (CERD) and the UN **Committee against Torture** (CAT) criticised the manner in which asylum seekers are being treated in Belgium.

The CERD shares the concerns of the European Court of Human Rights (see ECHR judgment of 24 January 2008, discussed below) about the detention of asylum-seekers, the conditions of such detention, and the lack of non-custodial measures applicable to them.[25] The Committee also expresses concerns about the fact that police forces continue, in certain cases, to use excessive force during expulsion of non-citizens.[26]

The CAT from its part starts out by noting with satisfaction the steps taken by Belgium to improve the situation of unaccompanied minors, *inter alia* through the establishment within the *Department of Federal Immigration Belgium* of a separate unit, responsible for the processing of asylum requests made by unaccompanied minors, and through the creation of centres specialised in their reception.[27] However, the Committee also expresses its concerns over various aspects of the asylum system in Belgium. Firstly, the Committee is preoccupied with the deficiencies present in the appeals procedure available to asylum seekers in closed detention centres. The Committee finds that the Belgian system does not offer an effective appeal to asylum seekers being held in closed detention centres, taking into account such factors as (i) the difficulties in obtaining proof experienced by asylum seekers held in closed detention centres, (ii) the short time periods available to appeal against an expulsion or deportation order and the fact that such appeals do not suspend the actual extradition, deportation or expulsion throughout the entire appeals procedure, and (iii) the fact that the deposition of an appeal is

[20] General Commissariat for Refugees and Stateless Persons, "Asielstatistieken. November 2008", p. 4, http://www.cgvs.be/nl/binaries/STAT-ASIEL%2011-2008%20(internet)_tcm127-28569.pdf (accessed 13 January 2009).
[21] Ibid., p. 3 (figure for January until November 2008).
[22] Ibid., p. 7.
[23] Ibid., p. 8.
[24] Ibid., p. 9.
[25] Committee on the Elimination of Racial Discrimination, "Consideration of reports submitted by states parties under article 9 of the Convention. Concluding observations of the Committee on the Elimination of Racial Discrimination. Belgium", para. 17, 11 April 2008, CERD/C/BEL/CO/15.
[26] Ibid., para. 18.
[27] Comité contre la Torture, "Examen des rapports présentés par les états parties en application de l'article 19 de la Convention. Observations finales du Comité contre la torture. Belgique", para. 7, 21 November 2008, CAT/C/BEL/CO/2.

virtually impossible once the expulsion has taken place.[28] The Committee furthermore deeply regrets the fact that, despite the partial annulment by the Constitutional Court of articles 39/82 and 39/85 of the Law of 15 September 2008 (see p. 2, para. 3), the practice of article 39/82, allowing only 24 hours to launch an appeal against an expulsion or deportation order, had been maintained up until 30 June 2008.[29] The CAT finally also expresses its preoccupation with the fact that information supplied by non-governmental organisations indicates that Belgium does not live up to its obligation to follow expulsed or deported persons in order to guarantee them fair proceedings in their home country as well as protect them from death and torture and inhuman or degrading treatment.[30]

Primary Issues in 2007

Conditions in closed detention centres

Médecins Sans Frontières (MSF) issued a comprehensive report in 2007 on the conditions in closed detention centres for asylum seekers in Belgium. The report depicts children suffering from psychological problems – including depression, bed watering, anxiety and even suicidal tendencies – due to their 'imprisonment' in closed detention centres, which are far from a natural environment for children to be brought up in: the children are deprived of contacts with other children of their own age and of education, both of which are necessary for their development.

MSF moreover reports on the presence in the visited closed asylum centres of nearly a dozen pregnant women and seriously ill people, including nine people infected with AIDS – but also people suffering from other diseases such as diabetes – for which no proper medical treatment can be provided in such facilities. The report concludes that the conditions in closed detention centres in Belgium are terrible, with nearly all the visited asylum seekers suffering from psychosomatic problems such as headaches, sleeping problems and loss of appetite, mainly due to stress. In coming to this conclusion, the MSF report confirms the opinion of the UNHCR, which stated in a March 2007 letter to the Belgian political parties that "*the detention of asylum seekers is not desirable in any case, especially when it concerns vulnerable persons such as children, unaccompanied minors or people requiring medical or psychological care.* [...] *[D]etention must, in principle, be avoided* (translation by the author)".[31]

Minor asylum seekers

With regard to the treatment of minor asylum seekers under the Belgian asylum system, a differentiation needs to be made between unaccompanied and accompanied minors.

Unaccompanied minors

In 2007, 422 unaccompanied children were hosted in federal centres, Red Cross centres and by local organisations and institutions.[32]

On 12 October 2006, the European Court of Human Rights (ECtHR) held that Belgium had violated articles 3 and 8 of the European Convention on Human Rights (ECHR) for the way its authorities had

[28] Ibid., para. 8.
[29] Ibid., para. 9.
[30] Ibid., para. 10.
[31] UNHCR, "Nota aan de politieke partijen betreffende de bescherming van vluchtelingen, personen die de subsidiaire bescherming genieten en staatslozen in België", Brussels, 30 March 2007.
[32] See http://www.fedasil.be/fr/home/table2/ (Accessed 6 February 2008)

treated the detention and deportation of an unaccompanied minor from the Democratic Republic of Congo (DRC).[33]

- The case concerned Pulcherie Mubilanzila Mayekaa, a Congolese woman who had applied for asylum in Canada and wanted her five-year-old daughter Tabitha, who was still living in the DRC, to join her there. Tabitha flew by plane to Canada through Brussels, Belgium, accompanied by her uncle. However, at the Brussels airport, officials apprehended Tabitha and took her to a closed detention facility on the grounds that she was not allowed to enter Belgian territory and because she was not accompanied by her parents. Tabitha was detained at the centre for two months before she was deported back to the DRC. Only hours after the plane had taken off, Belgian authorities received information from the Canadian embassy that the mother had been granted refugee status and permanent residence in Canada and was consequently entitled to family reunification with her daughter. Therefore, the Belgian authorities should not have deported Tabitha without awaiting the decision in her mother's asylum procedure in Canada. Moreover, although Tabitha should have been accompanied by a professional adult during the return flight to the DRC, and met by a family member upon arrival in DRC, she had to travel alone and no one met her at the airport upon arrival, due to insufficient attempts by Belgian authorities to assure the presence of a relative there. As a result, Tabitha had to wait several hours at the airport before accommodation was improvised for her by a DRC government official.

In the above-mentioned case, the ECtHR found Belgium in violation of article 3 of the ECHR (prohibition of torture and other cruel, inhuman or degrading treatment) and article 8 (right to family life). According to the court, Tabitha's two month detention in a centre that was designed for adults, without proper counselling and educational assistance, and Belgium's failure to provide adequate preparation, supervision and safeguards for her deportation, both amounted to inhuman treatment. The fact that Belgian authorities did not await the message from the Canadian government concerning her mother's refugee status only aggravated the situation.

In addition, the ECtHR cited violation of article 8 (right to family life) since the Belgian government had failed to facilitate family reunification to an unaccompanied minor in a very vulnerable situation, and had deported the girl without ensuring that Tabitha would be looked after upon arrival in Kinshasa.

Since Tabitha's case, Belgian legislation concerning the detention and deportation of unaccompanied minors has been amended. The Programme Law of 24 December 2002, a circulation letter of 15 September 2005 and the aforementioned law of 12 January 2007 have significantly improved the situation for unaccompanied minors, up to a point where these children are actually provided better protection under the law than accompanied minors.

Accompanied minors

In 2007, the situation of accompanied minors remained highly problematic in Belgium. Especially the continued detention of accompanied minors in closed asylum centres is a major problem. In 2006, the most recent year for which complete statistics are available, 766 children were being detained in closed detention centres, while awaiting their deportation.[34] During the summer of 2007, one specific case of detention of an accompanied minor in a closed detention centre garnered massive media attention.[35]

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[33] European Court of Human Rights, case of *Mubilanzila Mayeka and Kaniki Mitunga v.* Belgium, application no. 13178/03, 12 October 2006.
[34] *De Standaard*, "Doorbraak door Angelica", 31 July 2007.
[35] See e.g. *De Standaard* of 24, 25, 30 and 31 July 2007.

- Angelica, an eleven-year-old girl from Ecuador, was detained in a closed centre along with her mother for one month, awaiting their scheduled deportation. They were arrested on 30 June 2007 for staying in the country illegally since 2003 and subsequently taken to the closed detention centre 127 bis in Steenokkerzeel. The authorities were so negligent of their situation that they even forgot that the mother and the daughter were due to appear in court to defend their case. In the meantime, the mother's lawyer indicated that the situation of Angelica was troubling and that she was showing signs of depression. Their lawyer later reported of ill-treatment of Angelica's mother by the police. She had reportedly been pinned to the ground with a knee on her chest, as a result of which she bore bruises on her knees and chest and marks of cuffs on her wrists and ankles. Eventually, the Brussels court ordered Angelica's and her mother's release from the closed detention centre, but upheld the decision to deport them. However, in December, the *Department of Federal Immigration Belgium* decided to regularise their situation.

Angelica and her mother were reasonably lucky in the sense that due to the massive media attention, support by NGOs and pressure by the Ecuadorian government, they were released relatively quickly in comparison to other asylum seekers, some of whom spend several months with their children in closed detention centres.

Primary Issues in 2008

Regularisation

In 2008, one of the major discussion points on asylum, and the underlying source of many other problems and issues, was the regularisation dossier. Following the federal elections of June 2007, discussions were held within the newly formed Belgian government to find a sustainable solution for the approximately 100,000 *sans-papiers* (undocumented people) residing in Belgium,[36] many of whom have been living in the country for years and have been fully integrated into Belgian society. As a result of the discussion, agreement was reached on 18 March 2008 to start up a process of regularisation. However, the exact criteria clarifying the conditions for regularisation needed to be drawn up in a circular letter by the Minister for Asylum and Migration (a newly formed post within the Belgian government), Ms. Annemie Turtelboom. Due to continued discussion between the political parties within the Belgian government (certain supporting a general regularisation wave, others strongly opposing anything going beyond individual regularisation criteria), the deadline for the drawing up of this circular letter was not respected on three separate occasions, in May, July and October of 2008.[37] The result is a total lack of clarity and complete uncertainty, specifically for processed and refused asylum seekers who have often been in Belgium for several years and wish to make use of a possible regularisation procedure, but cannot because the circular letter introducing the exact criteria for regularisation is not in place.

As a direct result of the serious delays in the introduction of the circular letter, various related issues and problems arose in 2008. For instance, several families who had been fully processed and had been refused asylum (*e.g.* a Slovak family with six children, following a four-year procedure) could not apply for regularisation, but they could also not stay in the reception centres for asylum seekers.[38] Consequently, they were put on the street. Another example is the negative consequences for effective access to justice

[36] *De Standaard*, "De sans-papier is niet geduldig", 27 December 2008.
[37] *De Standaard*, "Er is echt gespeeld met mensenlevens", 27 December 2008.
[38] Vluchtelingenwerk Vlaanderen, "Door getalm omzendbrief regularisatie belanden afgewezen asielzoekers op straat", 29 May 2008, http://www.vluchtelingenwerk.be/actueel/omzendbrief-regularisatie.php (accessed 13 January 2008).

for refused asylum seekers. Belgian lawyers' associations warned that they could no longer correctly advise their clients about their chances of regularisation, due to the lack of clear criteria on the matter.[39]

In a reaction to the persistent legal insecurity, the *sans-papiers* who had been given hope of regularisation on 18 March 2008 took refuge in various forms of extreme action, the only means they considered to be left to let their voices be heard. Over the course of 2008, several cases of *sans-papiers* climbing in cranes and staying there for weeks, organising mass hunger strikes that nearly led to fatalities, and occupying private and public property, were reported in the Belgian media. Specifically worth mentioning in this context is the fact that the responsible minister did not always react in a coherent manner to these actions. For instance, two separate groups of hunger strikers were treated in a completely different manner. A first group was granted a residence permit of three months for medical reasons, but without the right to work, while the second group was given a residence permit of nine months which included the right to work.[40] In reaction to this case, the federal ombudsman publicly confirmed that groups of hunger strikers had clearly been treated in an unequal manner by Minister Turtelboom. [41] He also called for the introduction within a reasonable term of a circular letter containing clear criteria for regularisation for "humanitarian reasons".[42] Minister Turtelboom has since then rectified the situation by clearly indicating the uniform benefits which might be granted to asylum seekers on hunger strike.[43] However, the circular letter itself was still not in force by the end of 2008.

Overpopulation

In 2008, the Belgian network for the reception of asylum seekers was confronted with a shortage of places and lacked the necessary means to receive hundreds of them appropriately. Over the course of the year, both the large reception centres and the small scale reception structures struggled to keep up with the demand for places. The shortages were not as much the result of an increase in asylum requests, but more of the ineffective flow out of large reception centres (for instance, recognised refugees should leave the centres, but could not immediately do so because the average search period for private housing lasted several months).[44] In a reaction to increasing capacity problems, the Minister for Asylum and Migration stated that "[t]here are 1,800 people residing in asylum centres who already have papers",[45] insinuating that these people have no right to be there and are the cause of the overpopulation. However, apart from the fact that the actual figure at the time was 949,[46] the minister failed to mention that they are allowed to stay in the centres for an additional two months, due to the existing problems in finding private housing.[47]

In October 2008, the reception network eventually reached its capacity limit and additional asylum seekers could not be received properly: 60 percent of all the reception centres had an occupation rate of over 100 percent.[48] For instance, on 27 October 2008, *Fedasil* (the Federal agency responsible for the reception of asylum seekers in Belgium) received requests for the placement of 180 asylum seekers, while

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[39] *De Standaard*, "Advocaten smeken om criteria regularisatie", 11 September 2008.
[40] *De Standaard*, "De sans-papier is niet geduldig", 27 December 2008.
[41] *De Standaard*, "Ombudsman tikt Turtelboom op de vingers", 13 November 2008.
[42] Ibid.
[43] Ibid.; *De Standaard*, "Ongelijke behandeling is rechtgetrokken", 13 November 2008. The benefits are a three month residence permit for medical reasons, when the full recovery of the asylum seeker is required *prior* to expulsion or deportation.
[44] *Vluchtelingenwerk Vlaanderen*, "Nieuw opvangsysteem voor asielzoekers blijft sputteren. Ook kleinschalige opvangplaatsen van Vluchtelingenwerk Vlaanderen stilaan volzet", 30 April 2008, http://www.vluchtelingenwerk.be/actueel/kleinschalige-opvang.php (accessed 13 January 2008).
[45] *De Standaard*, "Turtelboom: "Helft hoort niet thuis in asielcentra"", 4 November 2008.
[46] *De Standaard*, "Fedasil: "Niemand zit hier onterecht", 4 November 2008.
[47] Ibid.
[48] *De Standaard*, "166 plaatsen tekort voor vluchtelingen en daklozen", 28 October 2008.

there were only 14 places available.[49] For weeks on end, *Fedasil* had no choice but to leave asylum seekers alone in the streets or find alternative solutions, for instance by placing them in homeless shelters. However, this proved not to be a sustainable solution (the homeless shelters eventually reached their capacity as well and had to refuse new homeless people).[50] Finally, after several weeks of serious shortages, the NGOs *Vluchtelingenwerk Vlaanderen* and *Coordination et Initiatives pour et avec les Réfugiés et les Etrangers (CIRÉ)* increased their pressure on the Belgian authorities. They requested a court decision ordering the Belgian state to pay a penalty of € 1,000 per day per asylum seeker who had not been properly housed. Minister for Social Integration, Ms. Marie Arena, then created 500 emergency places[51] and decided that 500 to 1,200 asylum seekers should leave their current housing and find a new one. In compensation, they were promised the payment of an amount corresponding to the *leefloon* ('poverty wage', minimum guaranteed income in Belgium).[52]

The most recent figures released by *Fedasil* offer an insight into the current capacity and occupation rate of the reception network. These figures show that while the entire network has a capacity of 15,876 places, 15,804 persons were residing in asylum centres on 1 December 2008, leaving a mere 184 places available.[53] This represents an occupation rate of 99% as compared to a rate of 88.7% in the same period in 2007.[54] The figures also show that, on 1 December 2008, the capacity for unaccompanied minor asylum seekers amounted to 516 places, of which 501 were being occupied.[55] Both figures clearly indicate that the situation is still dire and that the slightest problem could once again overload the network.

Closed detention centres

In October 2008, a delegation of the *Committee of Civil Liberties, Justice and Home Affairs (LIBE)* of the European Parliament[56] visited three of the six closed detention centres in Belgium, namely the INAD located in the transit zone of Brussels Airport, centre 127, and centre 127 bis.[57]

In a first general part of their report, the LIBE experts point out that the average period spent in closed detention centres by asylum seekers has increased since the entry into force in June 2007 of the new Law of 15 September 2006. This is due to the fact that now the entire procedure (and not just the admissibility

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[49] Ibid.

[50] *De Standaard*, "Asielzoeker tussen twee ministers", 4 November 2008; *De Standaard*, "Asielzoekers moeten woning verlaten maar krijgen leefloon", 27 November 2008.

[51] Ibid.

[52] *De Standaard*, "Asielzoekers moeten woning verlaten maar krijgen leefloon", 27 November 2008. Because these measures have addressed the problem, in the sense that no newly arriving asylum seekers are left on the streets anymore, the NGOs mentioned have withdrawn their request for a penalty (see: CIRÉ, "Acceuil des demandeurs d'asile: Retrait de la plainte contre l'État belge mais la crise continue", 21 November 2008, http://www.cire.irisnet.be/ressources/presse/2008-11-21.html (accessed 13 January 2008). However, the decision to force 500 to 1,200 asylum seekers to leave their current housing has been deeply criticised.

[53] See http://www.fedasil.be/home/table1/ (accessed 13 January 2009). Note that the remainder of places is not equal to the difference of the capacity and the number of people occupying places. However, these are the correct figures as given by *Fedasil*.

[54] Fedasil, "Jaarverslag 2007", p. 43, http://www.fedasil.be/home/attachment/i/15788 (accessed 13 January 2009).

[55] See http://www.fedasil.be/nl/home/table2/ (accessed 13 January 2009).

[56] Committee on Civil Liberties, Justice and Home Affairs, "Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a Delegation from the Committee on Civil Liberties, Justice and Home Affairs (LIBE)", 29 October 2008, http://www.europarl.europa.eu/activities/committees/publicationsCom.do;jsessionid=55351093DC8AFBB4E283D72A6C1BD11F.node2?language=EN&body=LIBE (accessed 13 January 2009).

[57] Ibid., p. 1. For a detailed description of the conditions within each closed detention centre visited, see pages 9 to 14 of the report.

phase as previously) may take place whilst in detention.[58] This is contrary to international law and established international jurisprudence, which define liberty as the rule and detention as the exception in asylum cases. The report also clarifies that the theoretical maximum period to be spent in a closed detention centre is limited to five months by law, but in practice there exists no maximum period since the launching of an appeal procedure initiates a new limit of an additional five months.[59] As a result, the report states, some people have already spent over one year consecutively in different closed detention centres.[60] The report furthermore rightly points out a problem in the manner in which the *Department of Federal Immigration Belgium* keeps statistics on average times spent in closed detention centres. The problem is due to the fact that the *Department of Federal Immigration Belgium* calculates average detention times per centre and not per individual asylum seeker, thus underestimating both the time spent in detention by the large group of asylum seekers who have been transferred repeatedly between different centres as well as the average detention time per asylum seeker.[61]

In a second part, the report focuses on various problematic issues related to closed detention centres, such as the practice of arresting asylum seekers. The *Department of Federal Immigration Belgium* has in the past called in asylum seekers for administrative reasons, for instance the completion of a file, only to arrest the asylum seeker once he/she arrived at the Department and take him/her to a detention centre, without their having been any indication that this was the actual purpose of the request to come to the Department.[62] The report also confirms the recurrent medical and psychological problems occurring in closed detention centres, particularly emphasising the lack of independence of the staff, as they are officially members of the detention centre's management.[63] The report furthermore finds that the visited detention centres are in a dilapidated state and look like prisons with their guards, barb wire, limited options for exercise and a disciplinary system that goes as far as isolation.[64] Contact with the outside world is also severely limited. Asylum seekers are allowed to make outgoing phone calls by buying credit but are only allowed to receive incoming calls from their lawyer.[65] Moreover, visits by family and friends are not allowed in detention centres located near an airport, nor are visits by NGOs in INAD.[66] The report finally also warns against pressure and violence surrounding deportations and criticises the lack of accountability due to virtually non-existent external control and limited internal control (*e.g.* no video surveillance).[67]

In 2008, access to **juridical assistance** and an effective right to appeal remained problematic for asylum seekers detained in closed detention centres. The report of the *Committee of Civil Liberties, Justice and Home Affairs* of the European Parliament refers to the lack of coherence concerning the different procedures applied to many detained asylum seekers in closed detention centres and to the lack of

[58] Ibid., p. 3.
[59] Ibid.
[60] Ibid., p. 7.
[61] Ibid., p. 3-4. The report gives the following example : "A detainee who has spent two months in the '127' centre, then three months in the '127 bis' centre and 24 hours at 'INAD' before deportation will thus appear in the statistics three times. For the administration, this person will not be someone who has spent more than five months in detention. Quite the contrary, in statistical terms, it will refer to three individuals whose periods of detention will appear, by centre, as being two months, three months and 24 hours respectively. Paradoxically, this detainee – who will have spent five months in detention centres – will enable the administration to lower the statistics on lengths of detention considerably."
[62] Ibid, p. 7.
[63] Ibid., p. 8.
[64] Ibid.
[65] Ibid.
[66] Ibid., pp. 8-9.
[67] Ibid., p. 8.

information at their disposal about their rights and possible legal assistance.[68] The report gives examples such as the general absence of interpreters in the centres and the fact that an appeal procedure against an expulsion or deportation order can only suspend the execution of the order if it is launched within 24 hours. However, in some centres (*e.g.* 127 bis) the appointment of a *pro deo* lawyer can take up to three or four days, which automatically deprives the detainee of an effective right to appeal.[69] A network of Belgian NGOs also released a report on the matter, in which various deficiencies in the system of juridical assistance in closed detention centres are highlighted.[70] For example, the lack of independence of the personnel continuously complicates the situation. Detained asylum seekers depend on the staff of the centre for all their actions, including the appointment of and information exchange with a lawyer, while this personnel is not neutral.[71] They are simultaneously - in the terminology of the *Department of Federal Immigration Belgium* - "civil servants charged with the repatriation" as well as key figures in the system of juridical assistance.[72] There exists a clear contradiction between these two functions, which has a negative effect on detainees' access to juridical assistance.

Minor asylum seekers

In the beginning of 2008, accompanied minors continued to be held in closed detention centres, in conditions that are not suitable for children. The report of the *Committee of Civil Liberties, Justice and Home Affairs* of the European Parliament refers to this situation as particularly problematic in light of the lack of privacy in the centres, where children sleep in the same room with adults who are not their family members.[73]

Despite repeated calls by NGOs to put an end to the detention of minors in closed centres, the Minister for Asylum and Migration initially did not seem inclined to change her policy. On the contrary, in response to a question from a Senator, the Minister stated in front of the Senate that "detaining children does according to me not constitute a violation of the Convention on the Rights of the Child or the European Convention on Human Rights".[74] She also confirmed that at the time of her statement (April 2008) 16 accompanied minors were being held in closed detention centres.[75] NGOs reacted disappointedly to the Minister's statement, since article 37 of the Convention on the Rights of the Child only allows detention

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[68] Committee on Civil Liberties, Justice and Home Affairs, "Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a Delegation from the Committee on Civil Liberties, Justice and Home Affairs (LIBE)", 29 October 2008, p. 7, http://www.europarl.europa.eu/activities/committees/publicationsCom.do;jsessionid=55351093DC8AFBB4E283D72A6C1BD11F.node2?language=EN&body=LIBE (accessed 13 January 2009).

[69] Ibid. Note that the Belgian Constitutional Court has partially annulled the article foreseeing in the short time period of 24 hours (see above, p. 2, para. 3).

[70] Aide aux Personnes Déplacées, Caritas International - België, Coordination et Initiatives pour Réfugies et Étrangers (CIRÉ), a.o., "Recht op recht in de gesloten centra", http://www.vluchtelingenwerk.be/bestanden/executive-summary-nl.pdf (accessed 13 January 2009). For the French version of the text, see http://www.cire.irisnet.be/ressources/rapports/aide-juridique-synthese.pdf (accessed 13 January 2009).

[71] Ibid., p. 4.

[72] Ibid.

[73] Committee on Civil Liberties, Justice and Home Affairs, "Report on a visit to closed detention centres for asylum seekers and immigrants in Belgium by a Delegation from the Committee on Civil Liberties, Justice and Home Affairs (LIBE)", 29 October 2008, p. 12, http://www.europarl.europa.eu/activities/committees/publicationsCom.do;jsessionid=55351093DC8AFBB4E283D72A6C1BD11F.node2?language=EN&body=LIBE (accessed 13 January 2009).

[74] Belgian Senate, Plenary Hearing of 17 April 2009, available through http://www.senate.be/www/?MIval=/index_senate&MENUID=24110&LANG=nl or at http://www.vluchtelingenwerk.be/bestanden/parl-vr-2008-04-17-Freya-Piryns.pdf (accessed 13 January 2009).

[75] Ibid.

of children as a last resort and only for the shortest possible duration. However, in Belgium the practice of placing accompanied minor asylum seekers in closed detention centres is systematic, even for long periods of time (five months not being an exception).[76] Therefore, the Belgian practice does violate the Convention, contrary to what the Minister claimed.

As a result of continuous calls for the abolition of detention of minors in closed detention centres, the Minister for Asylum and Migration eventually put a partial end to this practice by introducing a system of 'coaching' of asylum seekers with minor children. In this system, operational in Belgium since October 2008, rejected asylum seekers are no longer detained in closed detention centres but instead stay in a private residence, where they remain under the control and guidance of a coach until their voluntary return or expulsion.[77] Consequently, the Minister claims that no minors have been held in a closed detention centre since October 2008.[78] However, since the system is only applicable to asylum seekers whose request for asylum has been refused, it cannot cover all asylum seekers with minor children. When an asylum request is still being processed, a minor child can still be faced with detention in a closed detention centre. Moreover, the system of coaching as implemented in Belgium is being criticised on the ground that it is only introduced at a point where the asylum seeker does not have any chance left to be granted asylum and knows he will have to leave the country.[79] NGOs have expressed fears that desperate asylum seekers could use the opportunity of living in private housing instead of being detained in closed centres to avoid expulsion and that this would result in a stronger call for detention in closed centres.[80] These NGOs therefore stress the need to implement the coaching system from the start of the asylum procedure for it to be effective.[81]

Asylum procedure: Belgium convicted

In January 2008, the European Court of Human Rights (ECtHR) convicted Belgium in the case of *Riab and Idiab v. Belgium* for having put two Palestinians whose asylum request had been refused, in the transit zone of Brussels Airport, although various national court decisions had demanded their release.[82]

- The two Palestinian men arrived in Belgium in December 2002, immediately requested asylum and were transferred to centre 127. After examination of their dossier the *Department of Federal Immigration Belgium* and the *General Commissariat for Refugees and Stateless Persons* rejected their request, subsequent to which the *Chambre de Conseil* (judicial organ in charge of deciding on matters of detention) of Brussels ordered their release. However, instead of being released, the two men were taken to the transit zone of the Brussels Airport, a zone from which they were not free to leave. Following an urgent appeal, the President of the Court of First Instance of Brussels

[76] De Beweging van Kinderen zonder Papieren, UNICEF België, Amnesty International Vlaanderen, a.o., "Opsluiting van kinderen in gesloten centra wel strijdig met IVRK", http://www.kinderrechten.be/IUSR/documents/volwassenen/persberichten/persberichten2008/16_04_08_Opsluiting_gesloten_centra_wel_strijdig_IVRK.pdf (accessed 13 January 2009); Vluchtelingenwerk Vlaanderen, "Volgens Minister van Migratie en Asiel Annemie Turtelboom is kinderen opsluiten niet in strijd met de kinderrechten", 30 April 2008, http://www.vluchtelingenwerk.be/actueel/opsluiting-kinderen.php (accessed 13 January 2009).
[77] Vluchtelingenwerk Vlaanderen, "Minister Turtelboom bevestigt engagement om kinderen niet langer op te sluiten", 30 July 2008, http://www.vluchtelingenwerk.be/archief/nieuwsitem.php?n=377&r=1#VNEWS-377box (accessed 15 January 2009); *De Standaard*, "Turtelboom waagt gok", 24 October 2008.
[78] *De Standaard*, "Er is echt gespeeld met mensenlevens", 27 December 2009.
[79] *De Standaard*, "Turtelboom waagt gok", 24 October 2008.
[80] Ibid.
[81] Ibid.
[82] European Court of Human Rights, Judgment in the case of *Riad et Idiab c. Belgique*, 24 January 2008.

> again ordered their release.[83] Instead of respecting this decision, the Belgian authorities devised a strategy in order to be able to arrest the two Palestinians once more. Upon their exit out of the transit zone, the two men were immediately stopped and searched by the police. Since they did not have any valid residence permit on them, they were sent to the closed detention centre of Merksplas, where they remained until their expulsion to Lebanon in March 2003.[84]

The ECtHR convicted Belgium for violations of articles 3 (prohibition of torture and inhuman or degrading treatment) and 5 (right to liberty and security) of the European Convention on Human Rights.

In finding a violation of article 5, the Court argued that the Belgian authorities had on two separate occasions willingly circumvented the court decisions ordering the release of the two Palestinians.[85] The Court moreover found that the detention in the transit zone for an undetermined period of time, without being based in law or on a judicial decision, and with only limited possibilities for judicial control in light of the difficulties of establishing contact with the outside world, violated the right to juridical security, a right implicitly part of the Convention.[86]

In finding a violation of article 3, the Court argued that the Belgian authorities - having placed the two men under detention - carried the full responsibility to guarantee that this detention would take place under conditions compatible with respect for human dignity.[87] By detaining them for over ten days in the transit zone, an area designed for a stay of maximum a few days, the Palestinians were inflicted feelings of isolation from the outside world, loneliness and humiliation, while the authorities did not preoccupy themselves at all with their situation or their access to essential goods.[88] The Court was of the opinion that this treatment by the Belgian authorities amounted to inhuman and degrading treatment.[89]

In an important judgment of 14 February 2008, the Court of Appeal of Brussels sentenced the Belgian state to the payment of indemnities in the amount of € 6,250 to an Iraqi asylum seeker, for the excessively lengthy duration of his asylum procedure.[90] In this case the asylum procedure had dragged on for seven years, three of which were spent awaiting a definitive decision by the *General Commissariat for Refugees and Stateless Persons* that should have been released within a month.

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[83] Later on, the Court of Appeal of Brussels, the Human Rights Committee of the United Nations and the College of Federal Ombudsmen, would come to a similar conclusions on the legality of a continued detention of the two men.
[84] Ibid., paras. 7-52.
[85] Ibid., paras. 76-80.
[86] Ibid., para. 78.
[87] Ibid., para. 103.
[88] Ibid., paras. 103-107.
[89] Ibid., para. 110.
[90] Court of Appeal of Brussels, case of *L'État belge c. X*, 14 February 2008. The full text of the decision can be found at http://www.vluchtelingenwerk.be/bestanden/Efugee/veroordeling_lange_asielprocedure.pdf (accessed 13 January 2009).

Human Rights Without Frontiers recommends that

Belgium

Regularisation

- **introduce**, as a matter of urgency, a circular letter indicating in clear terms the exact criteria that will be used in regularisation procedures;

Overpopulation

- **find** durable solutions to prevent overpopulation in the reception network for asylum seekers;

Closed detention centres

- **adopt** all measures possible to use non-custodial alternatives for asylum seekers and to ensure that, if detention is used as a final resort, it is for the shortest time possible and under conditions that meet international standards;

- **gather** and publish data on length of detention at closed detention centres per detainee and not only per centre;

- **stop** the practice of moving refused asylum seekers to the transit zone at Brussels Airport, since INAD is not a centre fit to hold people for such purposes;

- **provide** regular access to all closed detention centres (including INAD) for NGOs, in order to guarantee an external control and to provide all asylum seekers access to necessary juridical assistance;

- **allow** family members to visit asylum seekers in all closed detention centres, including those located in or near airports;

- **ensure** the complete independence of medical practitioners and psychologists working in the centres, by severing their ties to the management of the centre;

- **create** an independent organ in each closed detention centre to facilitate and guarantee asylum seekers' access to effective juridical assistance;

- **ensure** that each asylum seeker is informed upon arrival in the centre about his rights (including the right to free juridical assistance) and the procedures available to him;

Minor asylum seekers

- **put** a permanent halt to the detention of accompanied minors in closed detention centres by for instance extending the 'coaching' system to the entire asylum procedure;

- **accelerate** efforts undertaken to provide appropriate assistance, reception and specialised guidance to unaccompanied minor asylum seekers.

Right to appeal

- **take** all necessary measures to guarantee equal access to an effective right to appeal for all asylum seekers as requested by various judgments of the Constitutional Court;
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- **take** all necessary measures to ensure refused asylum seekers an effective right to appeal in Belgium against their deportation or expulsion order by extending the period of appeal (currently 24 hours) and by suspending the execution of the deportation for the duration of the appeal procedure;

Follow up of the deportation

- **improve** its system of follow-up of the deportations as requested by the CAT in order to ensure that extradited, deported or expulsed individuals will not face a serious risk of being subjected to the death penalty, to torture or to inhuman or degrading treatment or punishment in the country to which they are sent.

Human Rights Without Frontiers International **(HRWF Int'l) is a non-governmental organization with an objective to promote democracy, the rule of law and human rights in a global perspective. HRWF Int'l has branches in Belgium, China, Nepal, Bhutan and the US. and cooperates with associate member organizations in Armenia, Bulgaria, Georgia, Iraq, Japan, Russia, etc.**

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See our report "Human Rights in Belgium 2008": http://www.hrwf.net