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DETENTION AND ALTERNATIVES TO DETENTION IN INTERNATIONAL PROTECTION AND RETURN PROCEDURES IN BELGIUM

July 2023

Funded by the European Union

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The Belgian National Contact Point to the European Migration Network (EMN Belgium) is a multi-institutional entity composed of experts from the Immigration Office, the Office of the Commissioner General for Refugees and Stateless Persons (CGRS), Myria – the Federal Migration Centre and Fedasil – the Federal Agency for the Reception of Asylum Seekers. It is coordinated by the Federal Public Service Interior.

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The European Migration Network (EMN) is a Europe-wide network providing information on migration and asylum. The EMN consists of National Contact Points (NCPs) in the EMN Member (EU Member States except Denmark) and Observer Countries (NO, GE, MD, UA, ME, AM, RS), the European Commission and the EMN Service Provider (ICF).

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GLOSSARY OF TERMS

The definitions are taken from the EMN Glossary version 6.0[1] unless specified otherwise in footnotes.

'Absconding' refers to an action by which a person seeks to avoid administrative measures and/or legal proceedings by not remaining available to the relevant authorities or to the court.

'Adherent Policy' refers to a policy under which a wide range of possible measures can be used to strengthen the return policy.

'Alternatives to detention' refers to non-custodial measures used to monitor and/or limit the movement of third-country nationals in order to ensure compliance with international protection and return procedures.

'Applicant for international protection' is defined as a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.

'Application for international protection' is defined as a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of Directive 2011/95/EU (Recast Qualification Directive), that can be applied for separately.

'Asylum procedure': see definition for 'Procedure for international protection'.

'Beneficiary of international protection' is defined as a person who has been granted refugee status or subsidiary protection status.

'Country of origin' is the country or countries of nationality or, for stateless persons, of former habitual residence.

'Degrading treatment or punishment' refers to treatment that humiliates or debases an individual, showing a lack of respect for, or diminishing, their human dignity, or when it arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.

'**Detention'** is defined as a non-punitive administrative measure ordered by an administrative or judicial authority(ies) in order to restrict the liberty of a person through confinement so that another procedure may be implemented.

'Detention facility' is defined as a specialised facility used for the detention of third-country nationals in accordance with national law.

'Dublin procedure' is defined as the process for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. (Source: Article 1 of the Regulation 604/2013).

'Examination of an asylum application': see definition for 'Examination of an application for international protection'.

'Examination of an application for international protection': Any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with Directive 2013/32/EU (Recast Asylum Procedures Directive) and Directive 2011/95/EU (Recast Qualification Directive) except for procedures for determining the EU Member State responsible in accordance with Regulation (EU) No 604/2013 (Dublin III Regulation).

'Forced return' in the global context refers to compulsory return of an individual to the country of origin, transit or third country (i.e. country of return), based on an administrative or judicial act. In the EU context, refers to the process of going back – whether in voluntary or enforced compliance with an obligation to return to: one's country of origin; or a country of transit in accordance with EU or bilateral readmission agreements or other arrangements; or another third country, to which the third-country national concerned voluntarily decides to return and in which they will be accepted.

'Fundamental rights' are universal legal guarantees without which individuals and groups cannot secure their fundamental freedoms and human dignity and which apply equally to every human being regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status as per the legal system of a country without any conditions.

'International protection' is defined in the global context as the actions by the international community on the basis of international law, aimed at protecting the fundamental rights of a specific category of persons outside their countries of origin, who lack the national protection of their own countries and in the EU context as protection that encompasses refugee status and subsidiary protection status.

'Open return places' are places located in reception centres managed by Fedasil. Migrants are allowed to stay during 30 days at these centres in order to prepare their return.

'Procedure for international protection' refers to a set of measures described in the Directive 2013/32/EU (Recast Asylum Procedures Directive) which encompasses all necessary steps for granting and withdrawing international protection starting with making an application for international protection to the final decision in appeals procedures.

'Return' is the movement of a person going from a host country back to a country of origin, country of nationality or habitual residence usually after spending a significant period of time in the host country whether voluntary or forced, assisted or spontaneous.

'Return decision' is an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.

'Voluntary return' is the assisted or independent return to the country of origin, transit or third country, based on the free will of the returnee.

INTRODUCTION

This study focuses on the different processes and practices regarding detention and its alternatives in Belgium.

More specifically, it will answer questions such as:

- ◇ What is the Belgian policy regarding detention and its alternatives?
- ◇ How does the decision-making process regarding detention unfold?
- ◇ If an alternative is chosen, what are the alternatives to their detention or, in turn, which detention places exist?
- ◇ How are third-country nationals detained?
- ◇ What are the purposes of their detention and what are the conditions under which detention, or instead an alternative, is implemented?

In the context of migration, **detention is defined** as a "non-punitive administrative measure ordered by an administrative or judicial authority in order to restrict the liberty of a person through confinement so that another procedure may be implemented".[1] Given that detention constitutes a restriction of liberty, detention requires a legal basis and the decision to detain needs to be motivated.[2] On the contrary, for **alternatives to detention**, no common legal definition exists. For the purposes of this report, they can be defined as "non-custodial measures used to monitor and/or limit the movement of third-country nationals in advance of forced return or while deciding on the individual's right to remain in the Member State". As with detention, human rights standards apply to alternatives to detention, including, among other rights, the right to family life, the right to privacy, and the prohibition on torture and inhuman or degrading treatment or punishment.[3] Detention and alternatives to detention may only be implemented after a case-by-case evaluation, which takes individual circumstances into consideration, and where clear legal rules provide for the possibility of detention. More

1 EMN Glossary, https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en, last accessed on 29 March 2023.

2 J.N. v Staatssecretaris voor Veiligheid en Justitie, 15 February 2016, ECLI:EU:C:2016:84: "*the Court stresses that, in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary*" (par. 56) **and** "*it is apparent from point 4 of Section 3 of the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (COM(2008) 815 final), which formed the basis for Directive 2013/33, that the ground for detention relating to protection of national security and public order — like the other three grounds included in the proposal and subsequently incorporated in points (a) to (c) of the first subparagraph of Article 8(3) of the directive — is based on the Recommendation of the Committee of Ministers of the Council of Europe on measures of detention of asylum seekers of 16 April 2003 and on the United Nations High Commissioner for Refugees' (UNHCR) Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999. It is clear, in particular from points 4.1 and 4.2 of those guidelines, in the version adopted in 2012, that detention may be used only exceptionally and for a legitimate purpose and that there are three reasons which may render detention necessary in an individual case and which are generally in keeping with international law, namely public order, public health or national security. Moreover, detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose" (par. 63).*

3 Council of Europe, 'European Convention on Human Rights', 2013, https://www.echr.coe.int/documents/convention_eng.pdf, last accessed on 12 July 2021. These rights include: the right to family life (Article 2 European Convention on Human Rights (ECHR); Article 9 EU Charter; Article 12(2) 1951 Refugee Convention), the right to privacy (Article 8 ECHR), prohibition of torture (Article 3 ECHR), prohibition on inhuman or degrading treatment (Article 3 ECHR).

generally, it is clear that detention is a measure of last resort, as it interferes with the fundamental right to liberty, enshrined in Article 6 of the Charter and Article 5 of the European Convention on Human Rights (ECHR). Nonetheless, alternative measures to detention can entail different levels of coerciveness and have to be balanced against the principle of proportionality.

1

AIM AND SCOPE OF THE STUDY

Despite the legal obligation, enshrined in international, EU and national law, to implement their use, several actors in the field – including the Council of Europe,[4] the United Nations (UN)[5] and the European Union (EU)[6] – have noted that alternatives to detention remain widely underused. The main reason identified was the lack of readily available alternatives, especially in the context of return procedures (i.e., to ensure compliance with the migration procedure and to prevent absconding).

In a joint Conference 'Effective Alternatives to the Detention of Migrants' organised by the EMN and the Council of Europe, held in April 2019,[7] the lack of **empirical research** on the practical application of alternative measures, was identified as one of the main implementation challenges.

1.1 AIM

This study is a follow-up to the 2014 standalone study 'The use of detention and alternatives to detention in the context of immigration policies in Belgium' and aims to provide **an overview of the use of detention and alternatives to detention in Belgium**.

More specifically, it will focus on:

- ◇ The (alternatives to) detention legal and policy framework in Belgium;
- ◇ The procedures that are related to the application of detention, or instead, to alternatives to detention;
- ◇ The legal remedies against a decision to detain and the criteria that are taken into account to decide to apply the (alternative to) detention regime;
- ◇ The different detention places, the types of alternatives to detention that exist and the institutions that are responsible for their implementation, together with their respective roles;
- ◇ Detention of vulnerable persons and the different rights and obligations that detainees have.

4 Council of Europe, 'Legal and practical aspects of effective alternatives to detention in the context of migration', Analysis of the Steering Committee for Human Rights (CDDH), 7 December 2017, https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f, last accessed on 12 July 2021. Commissioner for Human Rights, 'Human Rights Comment, High time for states to invest in alternatives to migrant detention', 31 January 2017, https://www.coe.int/en/web/commissioner/-/high-time-for-states-to-invest-in-alternatives-to-migrant-detention, last accessed on 12 July 2021. PACE, 'The alternatives to immigration detention of children', Resolution 2020 (2014), final version, § 8, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21295&lang=en, last accessed on 12 July 2021.

5 Special Rapporteur on the human rights of migrants, François Crépeau, 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau Regional study: management of the external borders of the European Union and its impact on the human rights of migrants', A/HRC/23/46, 24 April 2013, § 48, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/46, last accessed on 12 July 2021.

6 Communication on EU Return Policy, COM(2014) 199 final, p. 15, https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2014)199&lang=en, last accessed on 12 July 2021.

7 EMN and Council of Europe, Effective Alternatives to the Detention of Migrants, conference report, 4 April 2019, https://rm.coe.int/coe-eu-emn-conference-4-april-2019-conference-report/168097e8ef, last accessed on 4 October 2021.

1.2 SCOPE

Categories of third-country nationals in the study include: (i) applicants in the ordinary international protection procedure and Dublin procedure; (ii) third-country nationals who have been issued a return decision on the territory and (iii) third-country nationals who were denied access to the territory. The study focuses on detention for international protection/return purposes only and does not cover detention of third-country nationals who have committed a criminal offence. The study pays special attention to the issue of detaining and/or providing alternatives to detention for vulnerable persons such as minors, families with children, pregnant women and people with special needs. The study considers the legal and practical approaches related to detention and alternatives to detention that were available during the reporting period January 2015 – July 2022.

1.3 BEYOND THE SCOPE OF THE STUDY

The **Belgian Immigration Office** is responsible for forced return to the country of origin, forced or voluntary Dublin-transfers and voluntary return to the country of origin when requested by a third-country national who does not want to use Fedasil's services.

The **Federal Agency for Reception of Asylum Applicants (Fedasil)** is competent for assisted voluntary return. In this regard, Fedasil manages the Voluntary Return Programme and closely cooperates with the International Organisation for Migration (IOM) (and its local offices in countries of origin and destination) and Caritas International (and its network of local partner organizations in countries of origin) to assist and accompany migrants in their voluntary return and reintegration to the country of origin. Fedasil is the government agency coordinating the network of (open) reception facilities for international protection applicants, as well as specific places to accompany applicants whose international protection procedure came to an unsuccessful end, towards voluntary return.

The definition of ATD as well as non-custodial measures **are differently defined by the different institutions and organisations that work on these topics in Belgium**. According to Fedasil, voluntary return is not considered an ATD. Voluntary return is offered as an option at every moment and within all steps of the migration process, not only after receiving a return decision. Therefore, EMN Belgium has decided not to include the Belgian voluntary return programme in this study.

More information about this programme can be found at www.voluntaryreturn.be/.

Fedasil does not consider the Open Return Places, places located in reception centres managed by Fedasil where migrants are allowed to stay during 30 days in order to prepare their return, as an ATD. Therefore, this study will only focus on the coaching of the Immigration Office that takes place within the Open Return Places.

2

INTERNATIONAL AND EU FRAMEWORK

Legal sources at both European and international level agree that detention should be used as a last resort. On the international level, we distinguish the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) as important legal sources, while the EU *acquis* extensively regulates detention under the Return Directive, the Asylum Procedures Directive and the Reception Condition Directive. Furthermore, the Charter of Fundamental Rights of the European Union (EU Charter) provides further protection for people in detention.

2.1 INTERNATIONAL LEGAL FRAMEWORK

Both international and EU law guarantee and protect the **right to liberty and security** as a core component of an individual's fundamental rights.[8] Article 5(1) of the ECHR sets out the principle that "Everyone has the right to liberty and security of person", while Article 9 of the ICCPR similarly stipulates that: "[…] Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty **except** on such grounds and following such procedure as are established by law". All the measures that might have an impact on a person's human rights should be considered on a **case-by-case basis**.

Under EU law, the principles of subsidiarity, **necessity** and **proportionality** should be observed as a core part of the decision to detain a third-country national.[9] The European Court of Human Rights (ECtHR), in turn, has held that the necessity test does not apply to immigration-related detention, whether in the framework of return or preventing an unauthorised entry.[10] Nonetheless, if national law establishes a necessity requirement for such detention, and this requirement is not abided by, the ECtHR will find detention to be arbitrary and in violation of the ECHR.[11]

Furthermore, the principles of **non-arbitrariness and legality** require that the grounds for detention are **established by law**.[12] As the ECtHR has underscored in several judgments, in practice, domestic authorities shall be required to **effectively verify** and provide **evidence** on whether an alternative, less coercive measure than detention can be applied.[13] The admin-

8 Art. 5 of the ECHR and Art. 9 of the ICCPR, as well as Art. 6 of the EU Charter.
9 "(…) detention is to be used only as a last resort, when it is determined to be necessary, reasonable and proportionate to a legitimate purpose" *(par. 63,.*J.N. v Staatssecretaris voor Veiligheid en Justitie, 15 February 2016, ECLI:EU:C:2016:84).
10 ECtHR 15 November 1996, *Chahal v the United Kingdom* (GC), App No 22414/93. See also ECtHR 29 January 2008, *Saadi v United Kingdom*, App No 13229/03.
11 ECtHR 2 October 2008, *Rusu v Austria*, App No 34082/02.
12 The principles of non-arbitrariness and legality are laid down in the following international law instruments: Article 9 of the Universal Declaration of Human Rights (1948), Article 9(1) ICCPR (1966), Article 16(4) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, (1990), Parliamentary Assembly of the Council of Europe (PACE), Resolution 1707(2010), 10 Guiding Principles on detention of asylum applicants and irregular migrants, §9.1.5
13 ECtHR, 'A.B. and Others v. France', No. 11593/12, 12 July 2016, § 124, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-164678%22]}, last accessed on 4 april 2023.

istrative detention of third-country nationals can therefore only take place **in case there are no alternatives**.[14]

2.2. OVERVIEW OF THE EU ACQUIS

Weighing the severity of a detention measure against the right to liberty, legal instruments of the EU asylum and migration acquis, notably the Return Directive (EU) 2008/115 (hereafter: Return Directive), the recast Reception Conditions Directive (EU) 2013/33 (hereafter: Reception Directive) and the Dublin III Regulation, set out the grounds on which an individual can be deprived of liberty and the key legal principles and safeguards in the context of international protection and return procedures.[15] These instruments stipulate that detention is a **measure of last resort**, which may only be applied if a **less coercive measure cannot be applied effectively** and if a **legal basis for detention exists**. These directives thus encourage the use of alternatives to detention, citing the principles of necessity and proportionality to avoid arbitrary deprivation of liberty.

A. Detention and alternatives to detention in the context of return procedures

The Return Directive lays down common standards and procedures for the return of irregularly staying third-country nationals.[16] It allows EU Member States to detain an individual who has been issued with a return decision only in order to (i) **prepare their return** and/or (ii) carry out the **removal process** if the application of **less coercive measures is not sufficient**. Article 15(4) specifies that detention is only justified as long as there is a **reasonable prospect for removal,** when there is a **risk of absconding**, or the third-country national concerned **avoids or hampers the preparation of the return or the removal process**. According to Article 15(5),

14 Charter of Fundamental Rights of the European Union (EU Charter), 2012/C 326/02, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, last accessed on 12 July 2021, Articles 6, 52(3) and 53. Reception Conditions Directive (recast), Articles 8 and 11. Return Directive, Recital 16 and Article 8(1). International Covenant on Civil and Political Rights, Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, Article 9(1).

15 Directive (EU) 2013/33 of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive (recast)), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033, last accessed on 5 July 2021, Articles 8 and 11. Directive (EU) 2008/115 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF, last accessed on 12 July 2021, Recital 16 and Article 8(1). Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), recital 20 and Article 28.

16 It should be noted that Ireland does not participate in the Return Directive. Furthermore, the Return Directive specifies that it does not apply to certain categories of third-country nationals: (…) third-country nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council" (…) "third-country nationals and their family members, whatever their nationality, who, under agreements between the Union and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens" (Article 3(1) Return Directive jcto. Article 2(5) Schengen Borders Code).

each EU Member State shall set a limited period of detention, which **may not exceed six months**. Article 15(6) also allows EU Member States to **extend detention for an additional 12 months**, based on either a lack of cooperation by the person concerned or delays in obtaining documents from a third country. Recital 16 of the Return Directive states that "detention for the purpose of removal should be limited and subject to the principle of proportionality concerning the means used and objectives pursued. Detention is justified only [...] if the application of less coercive measures would not be sufficient."[17] Notwithstanding that it requires the application of less coercive measures, the Return Directive does not explicitly oblige EU Member States to establish national rules on alternatives to detention, nor does it provide examples of alternative measures. Article 7(3) of the Return Directive, within the context of voluntary return, lists specific measures that could be imposed on a third-country national benefiting from a period of voluntary departure to avoid the **risk of absconding**, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents, or the obligation to stay at a specific place. However, these measures cannot be considered alternatives to detention, as defined in the study, given that during the period of voluntary return, no grounds for detention exist (see 1.3). In its proposal for a recast Return Directive, the European Commission proposed a list of criteria to assess the risk of absconding.[18] The new Pact on Migration and Asylum did not withdraw its proposal to revise the Return Directive.

B. Detention and alternatives to detention in the context of international protection procedures

Before subjecting applicants of international protection to detention, the Reception Directive requires EU Member States to first consider whether alternatives are available and can be applied. Recital 15 provides that "applicants [of international protection] may be detained only under very **clearly**

17 C-61/11 PPU - El Dridi of the Court of Justice of the European Union (CJEU) relates to the interpretation of Articles 15 and 16 of the Return Directive. The court specifically concluded that such articles must be interpreted as precluding Member State legislation that provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that they remain without valid grounds on the territory of that State, contrary to an order to leave that territory within a given period.

18 Article 6 of the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A0634%3AFIN, last accessed on 12 August 2021. The following criteria are proposed: lack of documentation proving the identity; lack of residence, fixed abode or reliable address; lack of financial resources; illegal entry into the territory of the Member States; unauthorised movement to the territory of another Member State; explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive; being subject of a return decision issued by another Member State; non-compliance with a return decision, including with an obligation to return within the period for voluntary departure; non-compliance with the requirement of Article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay; not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7; existence of conviction for a criminal offence, including for a serious criminal offence in another Member State; ongoing criminal investigations and proceedings; using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law; opposing violently or fraudulently the return procedures; not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3); not complying with an existing entry ban.

defined exceptional circumstances laid down in this Directive and subject to the principles of **necessity** and **proportionality** with regard both to the **manner** and the **purpose** of such detention". These criteria are further laid down in Article 8(2) of the Directive, which specifies that detention may only happen after an individual assessment of each case and only if the detention complies with the principles of necessity and subsidiarity. Under Article 8(4), moreover, EU Member States are to ensure that they lay down in national law the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place.

The same directive further exhaustively[19] lists the reasons that may justify the detention of a third-country national, if other less coercive alternative measures cannot be effectively applied after a case-by-case evaluation.[20] The grounds are the following:[21]

1. To determine the identity or nationality of the person;
2. To determine the elements of the application for international protection that could not be obtained in the absence of detention (in particular, if there is a risk of absconding);
3. To decide, in the context of an international protection procedure, on the applicant's right to enter the territory;
4. In the framework of a return procedure when the Member State concerned can substantiate on the basis of objective criteria that there are reasonable grounds to believe that the person tries to delay or frustrate the return by introducing an application;
5. For the protection of national security or public order;
6. In the framework of a procedure for the determination of the Member State responsible for the application for international protection.

Additionally, Article 26 of the recast Asylum Procedures Directive (EU) 2013/32[22] specifies that it is unlawful to detain a person solely for the reason that they have lodged an application for international protection.

Furthermore, Article 9 of the Reception Directive guarantees several procedural rights. These include inter alia that an applicant shall only **be detained for as short a period as possible** and only insofar as one of the

19 Reception Conditions Directive (recast), Article 8(3).
20 Reception Conditions Directive (recast), Article 8(2).
21 For a critical comment on these criteria, see UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), pp. 16-22, https://www.refworld.org/pdfid/5541d4f24.pdf, last accessed on 11 October 2022.
22 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (Asylum Procedures Directive (recast)), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032, last accessed on 12 July 2021.

above-listed grounds for detention applies; that a **speedy judicial review** of the lawfulness of detention is to be conducted; that applicants shall be **informed in writing** in a language they understand, or can be reasonably presumed to understand, of the reasons for their detention, of the procedures for challenging their detention and of the **possibility to request free legal representation**. Article 9 also establishes a **right to access legal representation** and provides for the **regular review of the detention at reasonable time periods**. The Reception Conditions Directive regulates the conditions in detention facilities, such as **access to fresh air and communication with lawyers, non-governmental organisations (NGOs) and family members**.[23],[24]

In cases where another EU Member State is responsible for an individual's application for international protection, a **Dublin transfer request** is issued on the basis of the Regulation (EU) 604/2013 (hereafter: Dublin III Regulation).[25] Under the Dublin III Regulation, a person may be detained for the purpose of facilitating their transfer from the Member State where they present a "**significant risk of absconding**".[26] Article 28 states that "Member States may detain the person concerned to secure transfer procedures following this regulation, based on an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively".[27] The Dublin III Regulation clarifies that EU Member States shall not hold a person in detention for the sole reason that they are subject to a Dublin procedure.[28]

In the case of *Al Chodor* (C-528/15), the Court of Justice of the European Union clarified that the national discretion left to the national authorities in the interpretation of a "significant risk of absconding" under Article 28(2), read in conjunction with Article 2(n) of the Dublin III Regulation, should be **exercised within a framework of certain predetermined limits.** Accordingly, it is essential that the criteria which define the existence of such a risk, which constitute the basis for detention, **are defined clearly by an act which is binding and foreseeable in its application**" and (…) "only a provision **of general application** could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness".[29]

23 Article 10, recast Reception Conditions Directive.
24 Royal Decree of 2 August 2002 laying down the regime and operating rules applicable to places situated on Belgian territory, managed by the Immigration Office, where a foreigner is detained, placed at the disposal of the government or kept, in application of the provisions cited in Article 74/8, § 1, of the Act of 15 December 1980 on the access to the territory, the stay, the establishment and the removal of foreigners, accessible via https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=18-08-01&numac=2018031606, last accessed on 15 June 2023.
25 Chapter VI Dublin III Regulation.
26 Article 28, Dublin Regulation (EU) 604/2013.
27 Article 28(2), Dublin Regulation (EU) 604/2013.
28 Article 28(1) Dublin Regulation (EU) 604/2013.
29 Par. 42-43 case C-528/15, Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor, 15 March 2017.

3

BELGIAN POLICY FRAMEWORK

3.1. INSTITUTIONAL FRAMEWORK

The **Secretary of State for Migration and Asylum** is responsible for the entry, residence and, consequently, removal of foreign nationals from the territory. The **Immigration Office** is the responsible government administration for the implementation of forced[30] return policies.

The Immigration Office is composed of the central services located in Brussels, the immigration detention facilities on the national territory and at the national airport, the family units and the ICAM (Individual Case Management) Offices. Additionally, coaches of the Immigration Office are deployed in the open return centers (see definition). For persons who do not fulfill the conditions to enter the territory, the immigration detention facilities are fictitiously considered as extra-territorial.

3.2. OVERVIEW OF THE NATIONAL SITUATION

In October 2008, following Belgian case law[31], a project to allow an alternative to the detention of families with minors was launched. Families were henceforth housed in **open, community-based facilities**, the so called '**family-units**'. From 2010 on, families confined at the border, could also be housed in these family-units. In these cases, the family units were considered 'facilities at the border'.

In June 2011, a new department within the Immigration Office was created, which was responsible for the follow-up of migrants that received an Order to Leave the Territory: **SEFOR** (Sensitisation, Follow-up and Return). Additionally, in January 2012, the Immigration Office introduced **return coaching** for residents in the Open Return Places.[32]

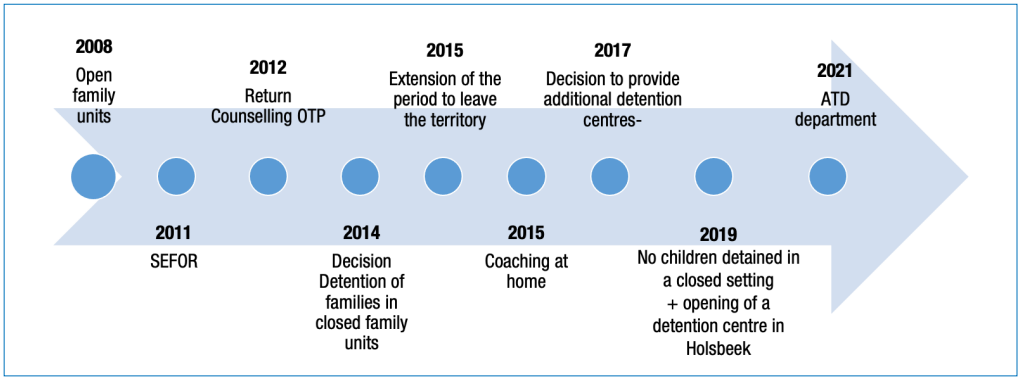
In 2011, Article 74/9 of the Immigration Act was amended. The purpose of this amendment was to prohibit the "detention of children in closed centers". However, this article, still left the *de facto* possibility to detain families with minor children, for as short a period as possible, in closed centers that must be adapted to the family's need.

Pursuant to this legal basis, in October 2014, the Belgian government coalition announced its plan to build a new detention centre to detain migrant children with their families in so called '**closed family units'**, which fulfilled the requirement of being "adapted to children's needs". On 2 August 2018,

30 In general, the Belgian Immigration Office is responsible for forced return to the country of origin, forced or voluntary Dublin-transfers and voluntary return to the country of origin when requested by a third-country national who does not want to use Fedasil's services.
31 Council of State, judgment no.188.705, 10 December 2008.
32 Open return places are located in reception centres managed by Fedasil. Migrants are allowed to stay during 30 days at these centres in order to prepare their return.

a new Royal Decree established the rules that governed the operation of the closed family units.[33] As a result, on 11 August 2018, the new closed family units set up on the territory of the closed centre '127bis' became operational. Between 11 August 2018 and 4 April 2019, nine families with minor children (20 in total) in irregular stay were detained while awaiting their return.[34] Nonetheless, even before the opening of these units, families stayed at the Caricole detention centre awaiting a transfer from/to an open family unit or in view of a removal. In 2017, it concerned 90 families with 130 children, in 2018, 130 families with 203 children and in 2019, 86 families with 151 children. These stays did not, in principle, exceed 24 hours.[35]

On 4 April 2019, the Council of State partially suspended the implementation of the Royal Decree that regulated the closed family units.[36] As a result, irregularly staying families with minor children could, in principle, no longer be detained in a closed setting and were, in practice, no longer detained in the closed family units on the site of the closed centre '127bis'.



Since 2015, a person who wants to return may, in preparation of their return, ask for an **extension of the period to leave the territory**. An extension can be granted if it is shown that steps are being taken towards voluntary return.In addition, in 2015, the so-called **coaching at home** was introduced whereby families with children in irregular stay, residing at a private address, are coached by the Immigration Office in several steps towards return.

33 Royal Decree amending the Royal Decree of 2 August 2002 laying down the regime and operating rules applicable to places situated on Belgian territory, managed by the Immigration Office, where a foreigner is detained, placed at the disposal of the government or kept, in application of the provisions cited in Article 74/8, § 1, of the Act of 15 December 1980 on the access to the territory, the stay, the establishment and the removal of foreigners, accessible via https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=18-08-01&numac=2018031606, last accessed 16 June 2023.

34 Between August 2018 and April 2019, 9 families (with 20 children in total) were detained in the closed units. Of these 9 families, 6 were detained for more than 14 days, 4 of which were detained for more than 24 days, and of the latter group, one was detained for more than 54 days (with a 4-day break in the return home). Myria, Retour, détention et éloignement des étrangers en Belgique : Un regard sur le monitoring des éloignements, Myriadoc 11, July 2021, https://www.myria.be/fr/publications/myriadoc-11-retour-detention-et-eloignement, page 33, last accessed on 20 June 2023.

35 In 2017 90 families with 130 children stayed at the Caricole detention centre, in 2018, 130 families with 203 children and in 2019, 86 families with 151 children. https://www.myria.be/files/Advies_wetsvoorstel_55_0892.001.pdf

36 Council of State, judgement 244.190 of 4 April 2019 http://www.raadvst-consetat.be/arr.php?nr=244190

On 14 May 2017, the Council of Ministers approved a '**Master Plan Detention Centres**' which envisaged an increase of the capacity of the closed centres from 600 to 1066 places in 2020. The Master Plan involved the creation of new closed centres and the expansion of the occupancy capacity in existing centres. In 2019, an open reception centre (Holsbeek) was turned into a closed centre for women. Although the current government coalition[37] confirmed the creation of additional places through the construction of new detention centres, at the time of writing of this study, it yet remains unclear when these constructions will be completed and how many of the initially proposed places will effectively be created.

On 1 June 2021, the Immigration Office established **a new department 'Alternatives to Detention (ATD)'**. The department is responsible for the development and implementation of alternatives to detention. In October 2021, the department opened its first office as part of the Individual Case Management (ICAM) coaching trajectory, whereby ICAM coaches assist persons in irregular stay towards a long-term solution, either a legal stay in Belgium or a return.

3.3 DETENTION AND ALTERNATIVES TO DETENTION UNDER THE CURRENT GOVERNMENT

Under the current government, the then Secretary of State for Asylum and Migration, presented his policy note to the Parliament on 18 November 2020[38] in which he emphasised the pursuit of an '**adherent policy'**. He defined this policy as a policy under which a wide range of possible measures can be used to strengthen the return policy and claimed to prioritise the full implementation of the obligation under EU law to develop and apply less coercive detention measures **that result in return.** To this end, the then Secretary of State aimed to

- (i) examine the feasibility of the development of various possible alternatives to detention (including return homes, regular administrative and/or police controls, house arrest, bail and electronic surveillance);
- (ii) develop the necessary regulations to ensure the practical application of alternatives to detention;
- (iii) expand practices that are already in use and are deployable on a larger scale and potentially valuable (e.g. prolongation of the period granted to leave the territory, coaching at home); and

37 2020
38 Chamber of Representatives, Policy Note on Asylum and Migration, 4 November 2020, available in Dutch and French, available at: https://bit.ly/3sJdgMd.

- ◇ (iv) actively seek the development of other possible alternatives and their practical implementation.

Subsequently, in 2020, a first internal analysis of alternatives to detention was conducted by the Immigration Office[39] which was subject to further research into feasibility, costs and effectiveness at the time of writing this study.

Notwithstanding the coalition's explicit commitment to prioritising voluntary return and its desire to seek to expand the use of alternatives to detention, **detention** – as an exceptional measure of last resort – **remains the final component of the Belgian return policy for those not voluntarily complying with an order to leave the territory**.

The current government agreed, as a **matter of principle** and as explicitly mentioned by the then Secretary of State in his General Policy Note of 4 November 2020, that **minors** would no longer be detained in closed centres. However, Article 74/9 of the Immigration Act still allows the existence of such centres.

In his second policy note of 3 November 2021[40], the then Secretary of State reiterated his wish for an adherent policy and intended to examine **the legal possibilities** to materialise it (e.g., to provide a legal basis for the obligation to cooperate).

Furthermore, at the time of writing, **targeted trajectories** are being developed. The Belgian government focused on; (i) the local presence of the migration authorities through the development of a network of ICAM offices; (ii) a new ICAM procedure with intensive and persistent coaching and directed at an expanded target group and in cooperation with civil society, (iii) the recruitment of more than 100 coaches (see 6.2 C).

Finally, the implementation of the adherent policy has an infrastructural component. The assessment of the impact of the implementation of alternatives to detention in terms of infrastructural needs led to the optimalisation of the Masterplan Closed Centres[41]. The **Integrated Return Infrastructure Plan** aims at (i) establishing ICAM-bureaus in leading cities; (ii) increasing the number of family units; and (iii) increasing capacity and liveability in the closed centres. In March 2022, the current coalition announced the construction of four new closed centres bringing detention capacity to 1 145 in 2030.[42]

39 Final Report Bossuyt, https://www.myria.be/files/Rapport_final_Bossuyt.pdf , last accessed on 19 June 2023.
40 Chamber of Representatives, Policy Note on asylum and migration, 3 November 2021, available in Dutch and French, www.dekamer.be/flwb/pdf/55/2294/55k2294022.pdf, last accessed on 19 June 2023.
41 Approved by the Council of Ministers in May 2017. The plan provides for a large extension of the existing return capacity and the creation of three new detention centres.
42 België bouwt vier nieuwe centra voor gedwongen terugkeer, 23 March 2022, https://www.tijd.be/politiek-economie/belgie/federaal/belgie-bouwt-vier-nieuwe-centra-voor-gedwongen-terugkeer/10375552.html, last accessed on 19 June 2023.

4

DETENTION

Contrary to some EU Member States, in Belgium the decision to detain is **an administrative decision**. This implies that both the decision to refuse entry or to refuse the right to stay and the decision to detain is taken by an administrative authority. In the case of penal detention, it is the task of a judge to decide on the possible detention of an individual. As for the duration of detention, some people remain detained in closed centres for several months, sometimes even more than a year.[43]

The Immigration Office manages six detention centres where individuals who are refused entry to the territory at the border on the one hand and individuals who have been ordered to leave the territory on the other, are held pending their removal.

Caricole, located in Steenokkerzeel, not far from Brussels National airport, has a capacity of 114 people. There are three male-only centres: **the Repatriation Centre 127bis**, located in Steenokkerzeel, the **Centre for illegals Merkplas** and **the Centre for illegals Vottem**, with a respective capacity for 120, 142 and 119 individuals. The latter has a separate wing for people who require individualised follow-up. The **Centre for illegals Holsbeek** is a female-only centre with a current capacity of 28 places, with a maximum capacity of 50 places. It opened in May 2019 in a building that was previously an open return centre. The **Centre for illegals Bruges** can take up to 112 people and contains a separate wing for men and women.

Belgian law provides for the existence of other closed centres for foreigners who are refused entry to the territory at the regional airports, which are Schengen border posts: Bierset (Liège airport), Gosselies (Brussels South Charleroi Airport), Deurne (Antwerp Airport), Ostend (Ostend Bruges International Airport) and Wevelgem (Kortrijk Wevelgem International Airport). However, these five centres have not been used since 2012.

43 Myria, Nota over het eindverslag van de Commissie voor de evaluatie van het beleid inzake de vrijwillige terugkeer en de gedwongen verwijdering van vreemdelingen (Commissie-Bossuyt) November 2021, https://www.myria.be/files/Nota_Myria_eindverslag_Bossuyt.pdf, last accessed on 31 August 2022, pages 24-25.

The numbers of detainees per year are as follows:[44]

	2019		2020		2021	
	Average number of detainees	Occupancy rate	Average number of detainees	Occupancy rate	Average number of detainees	Occupancy rate
Caricole	99.2	92%	40	58%	35	100%
Repatra-tion Centre 127bis	67.8	86%	41	57%	40.8	68%
Bruges	83.4	80%	37.9	69%	21.7	51.5%
Merksplas	136.8	94%	70.5	82%	54.9	76%
Vottem	109.8	92%	50.4	72%	39	63.9%
Holsbeek	21.8	78%	10.7	63%	18.2	99.1%
Total	519	89%	251	68%	209.6	76.4%

In Belgium, a third-country national may be:

1. detained **on the territory**:
    - ◇ In the context of a return procedure for third-country nationals who have been issued a return decision.
    - ◇ In the context of international protection procedures.

2. detained **at the border:**
    - ◇ For third-country nationals who are detected at the border and do not fulfil the entry conditions.[42]
    - ◇ For third-country nationals who are detected at the border, do not fulfil the entry conditions and submit an application for international protection.

44 Immigration office, yearly report, 2021, https://dofi.ibz.be/sites/default/files/2022-08/2021%20Activiteitenverslag%20DVZ.pdf, last accessed on 19 June 2023, page 74.

4.1 ESTABLISHING THE GROUNDS FOR DETENTION AND ITS INSTRUMENTS

A. ON THE TERRITORY

(I) In return procedures

Third-country nationals who do not (or no longer) fulfil the conditions for legal residence in Belgium may receive an **Order to Leave the Territory** from the Immigration Office or the Secretary of State. When they receive an Order to Leave the Territory, third-country nationals must leave the territory voluntarily, if not, the administration may proceed to forcibly remove them. The period of voluntary return falls outside of the scope of this study (see 1.3).

In the case of **unaccompanied minors**, the law only refers to a 'Return Order' issued to the guardian of the minor.[45] This Order can, *de facto*, only be implemented if the minor agrees to return voluntarily. Indeed, Article 74/19 of the Immigration Act prohibits the detention of unaccompanied minors in detention centres. Nonetheless, in some cases unaccompanied minors may be detained (see 5.1).

The return order is only issued to unaccompanied minors, as accompanied minors follow the administrative situation of the accompanying adults: if the adult receives an Order to Leave the Territory, this implies that the minor child must abide by the Order to Leave the Territory as well.

Third-country nationals can be **intercepted by the police** under various circumstances, such as on public transport, on the highway, during a traffic control, on the occasion of a social inspection, … The police can call on the assistance of the Immigration Office for coordinated interception actions. In that case, the Immigration Office can check the files *on site*, help with the administration or hear the third-country national if required.

Usually, the police brings the third-country national, who is suspected of residing irregularly on the territory, to the police station. There, a search will be carried out and the third-country national will be registered in the register of deprivations of liberty. Within 24 hours after the administrative detention by the police, the Immigration Office must take a decision on the situation of the third-country national. After this period, the third-country

45 Article 61/18 Immigration Act.

national must be released by the police, unless the Immigration Office decides to detain. The Immigration Office must check whether this person is already known by the authorities, whether they have legal residence and whether an Assisted Voluntary Return and Reintegration (AVRR) or international protection procedure, or any other procedure is pending.

Every month, the Immigration Office publishes statistics on interceptions[46] of third-country nationals and disaggregates them on the basis, amongst others, of the decisions taken.

In 2021, 26 317 interceptions were registered. These resulted in 7 880 Orders to Leave the Territory and 5 114 reaffirmations of previous Orders to Leave the Territory.[47] 1 017 individuals were subsequently detained.

In 2020, 24 389 interceptions resulted in 7 324 Orders to Leave the Territory and 5 004 reaffirmations of previous Orders. 1 179 individuals were detained. In 2019, 34 692 interceptions resulted in 10 187 Orders, while 6 963 previous Orders were reaffirmed. 4 957 were detained.

Year	Total number of interceptions	Decisions taken		
		Order to leave the Territory	Reaffirmations	Detention
2021	26 317	7 880	5 114	1 017
2020	24 389	7 324	5 004	1 179
2019	34 693	10 188	6 963	4 957

EU Citizens and their family members

The detention of EU-citizens and their family members is governed by Art. 44septies of the Immigration Act, which states that if reasons of public order, national security or public health so require (and unless other less coercive measures can be applied effectively), they may, with a view to ensuring the implementation of the expulsion measure, be detained for the time strictly necessary for the implementation of the measure, without the duration of detention exceeding two months. Even though the article provides for an extension of up to eight months, this provision has been found incompatible with EU law. Therefore, this article may be revised in the future.

(See: C-718/19,22 June 2021, ECLI:EU:C:2021:505)

46 Immigration Office, National Statistics, https://dofi.ibz.be/nl/figures/removals/interceptions/nationale-statistieken , last accessed on 19 June 2023.
47 Immigration Office, Yearly report 2021, https://dofi.ibz.be/sites/default/files/2022-08/2021%20Activiteitenverslag%20DVZ.pdf, last accessed on 29 March 2023.

(II) In international protection procedures

Article 74/6 of the Immigration Act prescribes the **general rules that govern the possibility of detention** of a third-country national in an international protection procedure. This regime is subject to three limitations. First, a third-country national may never be detained on the sole grounds they have applied for international protection. Second, detention is explicitly subsidiary to the provision that *no other less coercive measure can effectively be applied*. Finally, the third-country national may only be detained for as long as is strictly necessary for the reasons mentioned hereafter.

Therefore, an applicant for international protection may only be detained:

- ◇ to establish or verify the identity or nationality of the applicant; or
- ◇ to determine the elements on which the application for international protection is based, which could not be obtained if the applicant were not detained, in particular when there is a risk of the applicant absconding; or
- ◇ when the applicant is kept in the framework of a return procedure, to prepare for the return and/or to proceed with the removal, and when it can be demonstrated, on the basis of objective criteria, such as the fact that the applicant has already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that the applicant has lodged the application for international protection for the sole purpose of delaying or preventing the execution of the return decision; or
- ◇ when the protection of national security or public order so requires.

If a third-country national is **intercepted on the territory** and turns out to be irregularly staying on the territory, they may still apply for international protection. In practice, the third-country national must declare that they want to make an application for international protection.

The Dublin procedure

When a third-country national lodges a first or subsequent application for international protection at the border or on the Belgian territory, the Immigration Office determines the State responsible for examining the application.

To this end, when, on the basis of an individual assessment, there is **a significant risk** of the person **absconding**, and only insofar as the detention is **proportionate** and **no other less coercive measures can be effectively applied**, the third-country national may be detained in a specific place for **the time necessary to determine the State responsible** for examining the application for international protection, without the duration of detention exceeding six weeks.[48] A third-country national may not be detained for the sole reason that they are involved in a Dublin procedure.

Under EU Regulations, Article 28(3) Dublin III requires that "detention shall be for **as short a period as possible** and shall be for **no longer than the time reasonably necessary** to fulfil the required administrative procedures **with due diligence** until the transfer under this regulation is carried out".

According to Article 51/5 Immigration Act, the period of detention for the purpose of **determining the Member State responsible** will depend on the time needed for this purpose and may be up to a maximum of six weeks.

Detention for the purpose of **carrying out the transfer** may also take place for the time necessary for this purpose and may not exceed six weeks from the date of acceptance of the transfer by the other EU Member State. If the transfer is not carried out within the six-week period, the person may no longer be detained on that ground. This period is in addition to the period for determining the EU Member State responsible. The time limit is therefore a maximum of two times six weeks.

The period of detention is **automatically suspended during the period for appealing** against the transfer decision and during the extreme urgency appeal procedure. This means that if the Council of Alien Law Litigation rejects the extreme urgency appeal, there is a legal extension of the detention period by another six weeks.[49] The Federal Migration Centre, Myria (hereafter: Myria) has criticised the national transposition of Article 28 Dublin III, stating that the national law lacks certain guarantees that Article 28 provides for, such as the reference to a detention that is *as short as possible* and needs to be subject to administrative procedures carried out *with due diligence*.[50]

48 Article 51/5 Immigration Act.
49 Article 51/5 §1 Immigration Act.
50 Myria, Note à l'àttention de là Commission de l'Interieur, des Affàires ge ne ràles et de là Fonction publique: Projet de Loi du 22 juin 2017 modifiant la loi du 15/12/1980 Modifications en matière d'éloignements et detention, 4 July 2017, p. 14.

The risk of absconding

Stakeholders such as the UNHCR and Myria have highlighted that some of **the criteria laid out in Directive 2013/33/EU**, notably the first and second criteria, should, on the national level, have additional safeguards or be further elaborated upon to restrict the scope of the possible detention grounds:

With regard to the hypothesis of **establishing or verifying the identity or nationality** of an applicant, the UNHCR underlines that while, under this hypothesis, detention can be envisaged for a limited period of time, specific safeguards for stateless persons must be guaranteed to prevent their indefinite detention.

Regarding the **risk of absconding**, they highlighted that clear criteria must be established as to assert the existence of such risk, thereby avoiding arbitrary detention. Furthermore, they stress that elements must be taken into account in assessing the need for such detention, such as family or community ties, willingness to provide information on the essential elements of the application.(51)

Regarding the implementation of the **risk of absconding on the national level**. Several actors, amongst which Myria, have welcomed an introduction of a definition of the 'risk of absconding' on the national level.(52) However, Myria further underlined that the criteria remain very general, are not always defined with sufficient precision and cover a large number of situations, which could lead to arbitrary detention.(53) The definition of 'risk of absconding', and the criticism on its implementation, is applicable to **procedures at the borders**, **return procedures**, **international protection procedures** and **Dublin procedures**.

51 *Ibid.* page 9 and UN High Commissioner for Refugees (UNHCR), UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), April 2015, available at: https://www.refworld.org/docid/5541d4f24.html, last accessed on 26 August 2022

52 Article 1,11° *jcto.* 1(2) Immigration Act.

53 Myria, Note à l'àttention de là Commission de l'Interieur, des Affàires ge ne ràles et de là Fonction publique: Projet de Loi du 22 juin 2017 modifiant la loi du 15/12/1980 Modifications en matière d'éloignements et detention, 4 July 2017, p. 4-5, https://www.myria.be/files/20170704_Myria_avis_projet_de_loi_Transposition_Detention_eloignement.pdf, last accessed on 26 August 2022.

B. AT THE BORDER

Belgium has 13 extra Schengen border crossings: six sea borders, six air borders and one land border (the Eurostar Brussels-South). The Federal police controls the border and checks whether persons entering the territory fulfil the entry conditions.

Article 74/5 of the Immigration Act lays out **the procedure at the border and its modalities.** If the third-country national does not fulfill the entry conditions, in practice they receive a '**decision of refusal of entry'** (*Dutch: beslissing van terugdrijving, French: décision de refoulement*) they may be detained without entering the territory. Contrary to situation of a third-country national who has entered the territory, a third-country national at the border, will be detained before having entered the Belgian territory and falls outside of the scope of the Return Directive. According to Article 74/5 §5 Immigration Act, the decision of refusal of entry has the same legal value as an Order to Leave the Territory.

Detention at the border requires an individual analysis of the situation of the third-country national and an equivalent individualised motivation of the detention decision. This means that the reasoning should not be stereotypical and should set out the legal and factual elements which, considering the concrete circumstances, justify the detention.[54]

The third-country national who tries to enter Belgium without fulfilling the conditions of the Schengen Border Code and Article 3 of the Immigration Act, and who wants to apply for international protection must submit their **application for international protection**, without delay, to the authorities responsible for border control (in this case, the Immigration Office's border inspection). The general rules that govern the possibility of detention of a third-country national in an international protection procedure as prescribed in Article 74/6 of the Immigration Act are also applicable in the procedure at the border. Therefore, an applicant who does not fulfill the conditions to enter the territory may be detained **at the border** – pending the authorisation to enter Belgium – or can be expelled from the territory. In practice, in case the third-country national is not allowed to enter the territory, they receive a 'decision of refusal of entry'. The decision to detain at the border must be individually and duly motivated.[55]

Once the application has been submitted, the Immigration Office's border inspection issues a 'certificate of declaration' to the applicant and transmits the application to the Immigration Office for registration. Subsequently, the Office of the Commissioner General for Refugees and Stateless Persons

54 Court of Cassation, 29 April 2020, no. P. 20.0378.F.
55 Court of Cassation., 29 April 2020, nr. P. 20.0378.F.

(CGRS) will analyse whether the applicant is in need of international protection. It can decide to declare the application inadmissible or it can decide to grant or refuse international protection. Additionally, the CGRS can decide to further examine the application, in which case the third-country national is admitted to the territory. If the CGRS has not taken a decision four weeks after the application was made, the Secretary of State or the Immigration Office must grant the third-country national access to the territory.(56) However, even if the third-country national is granted access to the territory, they may be detained on the territory.

The **Committee against Torture highlighted the Belgian detention practices at the border** in its concluding observations on the fourth periodic report of Belgium, considering that "although the State party explained that minors and their families are not detained at the border, the Committee remains concerned that almost all other applicants for international protection are detained, under Article 74/5 of the Aliens Act, and that this practice is accepted by the Constitutional Court, which considers it necessary for effective border control (decision of 25 February 2021)".(57)

Other stakeholders, such as the Federal Migration Centre Myria and Nansen Refugee, have also highlighted these practices.(58) More specifically, they underline that Article 74/5 does not sufficiently address the requirement that an applicant of international protection should only be detained as an ultimate resort and that detainees at the border cannot rely on alternatives to detention.

4.2 DECISION-MAKING PROCESS ON DETENTION

In practice, when an **Order to Leave the Territory** is issued, the order will be transmitted to the Immigration Office's Unit 'Follow-up of Order to Leave the Territory', which will then decide whether to apply the detention regime, the alternatives to detention regime or to not apply any regime. As a general rule, a minority of decisions result in detention. Most third-country nationals receive an order to leave the country, without a specific regime

56 Article 57/6/4 Immigration Act.
57 Committee against Torture, Concluding observations on the fourth periodic report of Belgium, par. 29.
58 See amongst others: Myria, MyriaDoc #8 Retour, détention et éloignement des étrangers en Belgique 2018, pp. 26-27 ; Myria, La migration en chiffres et en droits, 2016, p. 235 and Nansen Refugee vzw/asbl, Vulnérabilités en détention: Procédure à la frontière, procédure accélérée, visioconférence, January 2021, https://nansen-refugee.be/wp-content/uploads/2021/01/4.-Vulne%CC%81rabilite%CC%81s-en-de%CC%81tention-IV.-Proce%CC%81dure-frontie%CC%80re.pdf , last accessed on 19 June 2023.

applicable. If reasons of national security and public order so require, or a serious risk of absconding exists, detention is considered at the stage of issuance of the Order to Leave the Territory.

However, it is generally only after the third-country national was not returned after the deadline mentioned on the Order to Leave the Territory (30 days) ends that detention is considered.

If the person **resides irregularly on the territory and was intercepted**, the Immigration Office will consider issuing a return decision, and, if needed, proceed with a forced return. In order to thoroughly justify this decision, the third-country national will be interviewed by the police (regarding their medical condition, their family life and the risk of a violation of Article 3 ECHR in case of return). The report of the hearing is then sent by the police to the Immigration Office.

The detention with a view to (forced) return is only allowed on the basis of public order, risk of absconding(59) or failure to comply with an Order to Leave the Territory. The Immigration Office may also decide to release the detained person, even if the detention is based on one of the above-mentioned reasons. This can be, for example, for medical reasons.

Finally, even if detention is legally possible, the Immigration Office must **balance a number of parameters, such as the number of places available in the detention centres**, and their priorities (i.e, border cases, public order, removability). The decision to detain is sent to the police who notifies the decision to the third-country national. In case of detention in a detention centre, the police will transport the third-country national to the detention centre.

Third-country nationals in an ordinary international protection procedure are in most cases not detained. In practice, only applicants suspected of having committed acts against public order (or convicted), or of posing a risk to national security are in certain cases detained. Non-cooperation to identification (e.g., refusal to have fingerprints taken) may also lead to detention.

59 See Section 4.1: the risk of absconding is interpreted very broadly. Stakeholders have underlined that this may lead to systemic arbitrary detention.

Criteria used in the decision-making process

When a decision to detain, or instead to apply an alternative to detention, is made, **several criteria are taken into accoun**t.[60]

The Immigration Office considers the **suitability** of the alternative compared to the needs of the individual case. This is the case for families with minor children for example, who can reside in family units.

Another criterion that is considered is the **cost-effectiveness** of the detention and the **availability of places** in the detention centres. Furthermore, the Immigration Office takes elements such as nationality into account to assess whether the third-country national has a **high chance of returning**. If the chance is high, they are more likely to be detained and removed.

Importantly, the Immigration Offices not only takes into account the level of the risk of absconding but is also guided in the process by the Belgian legislator who has laid-out the **criteria to assess the risk of absconding**.[61]

Finally, the Immigration Office considers the vulnerability of the third-country national and the impact on human rights. However, these considerations will be further discussed in chapter 5.

60 In addition to the general criteria per category mentioned in the previous chapter

61 Article. 1, §1 11°, §2 and Article 1 § 2 Immigration Act. The law also specifies that "*The risk of absconding must be current and genuine. It shall be determined after individual examination and on the basis of one or more of the following facts, taking into account all the circumstances specific to each case*". "

1° after having entered irregularly, or during their irregular stay, the person in question has not submitted a residence application, or has not submitted an application for international protection within the period provided for by the law;

2° the person in question has used false or misleading information or false or falsified documents in the context of the procedure for international protection, residency, return or refoulement, or has committed fraud or used other illegal means;

3° the person in question does not cooperate or has not cooperated in contacts with the authorities responsible for implementing and/or ensuring compliance with the regulations regarding entry into the territory, residency, settlement, and expulsion of foreign nationals;

4° the person in question has made it clear that not to intend to comply with one of the following measures or has already not complied with one of these measures:

a) a transfer, return or refoulement measure;

b) an entry ban which is neither lifted nor suspended;

c) a less coercive measure than a custodial measure designed to ensure their transfer, return or refoulement, irrespective of whether it is a custodial measure or any other measure;

d) a measure restricting their freedom intended to safeguard public order or national security;

e) a measure taken by another Member State which is equivalent to the measures referred to in (a), (b), (c) or (d);

5° the person in question is subject to an entry ban in Belgium and/or in another Member State which has not been lifted or suspended;

6° the person in question has submitted a new application for residency, or a new application for international protection immediately after having been the subject of a decision refusing entry or residency, or a decision terminating their residency, or immediately after having been the subject of a refoulement or return decision;

7° while being questioned in relation to this point, the person in question has concealed the fact that fingerprints have already been given in another country bound by the European regulations on determining the country responsible for examining an application for international protection, after having made an application for international protection;

8° the person in question has submitted several applications for international protection and/or applications for residency in Belgium or in one or other Member State which have resulted in a negative decision or which have not resulted in the issuance of a residence permit;

9° while being questioned in relation to this point, the person in question has concealed the fact that he has already submitted an application for international protection in another country bound by the European regulations on determining the country responsible for examining an application for international protection;

10° the person in question has declared, or his file shows, that he came to Belgium for purposes other than those for which he submitted an application for international protection or an application for a residence permit;

11° the person in question is subject to a fine because they have submitted a manifestly unlawful appeal at the Council for Alien Law Litigation

'Article 3 and Article 8 ECHR' within the Immigration Office

In his general Policy Note of 4 November 2020, the former Secretary of State for Asylum and Migration stated that the assessment of the risk of violation of Article 3 of the ECHR upon return must be brought into line with European case law in order to avoid future convictions by Belgium. To this end, the Immigration Office set up a cell of three employees (two French-speaking and one Dutch-speaking) in mid-2020 to deal specifically with the application of Article 3 and Article 8 of the ECHR in the context of return.

The cell has the following mandate:

- To analyse the case law at national and international level in relation to the justification of Articles 3 and 8 of the ECHR in return decisions;
- To monitor the return decisions of third-country nationals in detention centres. This verification relies mainly (but not exclusively) on the statements of the person concerned of the right to be heard and takes into account the objective situation in the country of destination and the elements in the administrative file;
- To support the justification of return decisions, by researching information concerning the situation in a country or with more general questions on Articles 3 and 8 of the ECHR;
- To conduct interviews with the third-country nationals in closed centres, either with a view to establishing their nationality in order to evaluate the risk of violation of Article 3 in case of return, or with a view to obtaining additional information on the dangers invoked by the person;
- To sensitise staff from the Immigration Office on the importance of Articles 3 and 8 of the ECHR in their daily work. A syllabus and training course are at their disposal. For example, a 'right to be heard' checklist was made available to the detention centres so that hearing rights would be administered according to the requirements of the law and the case law;
- Motivation keys were prepared to assist departments in making their decisions.

In 2021, the cell analysed 207 judgments and 1 131 files, 24 of which were decisions to set a limit for return. Furthermore, it responded to seven questions for general advice and to 21 questions to look at an individual file. Additionally, it wrote three internal thematic notes and conducted eight interviews. Finally, it established 22 questionnaires regarding the nationality of a person.

Source: Immigration Office, Yearly Statistical Report 2021, pages 65 and 66.

4.3 DURATION OF THE DETENTION

A. ON THE TERRITORY

Article 7 of the Immigration Act states that unless other adequate, but less coercive measures, can be applied effectively, the third-country national may be detained for the time strictly necessary **for the execution of the Order to Leave the Territory**. This is the case in particular when there is a risk of absconding or when the third-country national is evading or obstructing the preparation of return or removal procedure. In principle, the duration of detention varies according to the circumstances, but an initial period of two months cannot be exceeded.(62)

However, the Secretary of State or the Immigration Office may decide to **extend the initial detention** with an additional two months under certain, cumulative but limited circumstances.

More specifically, they may decide to extend when:

- ◇ The third-country national is the subject of an enforceable measure to be forcibly returned; and
- ◇ The necessary steps to remove the foreign national were taken within seven working days from the forcible return measure, if continuing with the required care; and
- ◇ The effective removal is still possible within a reasonable period.

After the two-month extension, the detention can be **further extended with one month** (reaching maximum five months). However, this decision can only be taken by the Secretary of State. Furthermore, where it is necessary for the protection of public order or national security, the detention period may be extended by one month at a time after the expiry of the five-month period. In this case, the total period of detention may not exceed **eight months**.

When the third-country national opposes their return or the attempt to return fails because the third-country national **refuses to board**, the Immigration Office may take a new decision to detain. This new decision may replace the previous detention title. This effectively means that third-country nationals in return procedures may be detained up to 18 months.(63)

As mentioned above, the **international protection regime** is subject to three limitations. First, a third-country national may never be detained on the sole grounds that they have applied for international protection. Second, detention is explicitly subsidiary to the provision that no other less coercive

62 Article 7 Immigration Act.
63 Article 15 of the Return Directive prohibits detention for a period longer than 18 months.

measure can effectively be applied. Finally, the third-country national may only be detained for as long as is strictly necessary for the reasons mentioned in 4.1.

Article 74/6 Immigration Act prescribes that the period of detention **may not exceed two months**. Where the protection of national security or public order so requires, the Secretary of State or the Immigration Office **may extend the detention by a period of two months**. After an extension, the decision may only be taken by the Secretary of State, and the detention of the third-country national may be extended for one month at a time, but the total duration of detention may **not exceed six months**. Under limited circumstances, the detention period may be automatically suspended.

B. AT THE BORDER

For migrants **who are detected at the border and do not fulfil the entry conditions**, Article 74/5 Immigration Act states that an initial period of two months cannot be exceeded. A third-country national at the border will be detained before having entered the Belgian territory and falls outside of the scope of the Return Directive.

In practice, in case the third-country national is not allowed to enter the territory, they receive a **'decision of refusal of entry'**.

Nonetheless, the Secretary of State or the Immigration Office may decide to extend the detention first with two months and afterwards with one month (reaching a maximum of five months), when:

- ◇ The third-country national is the subject of an enforceable measure to be forcibly returned; and
- ◇ The necessary steps to remove the foreign national were taken within seven working days from the forcible return measure, if continuing with the required care and the effective removal is still possible within a reasonable period.

After the first extension, the decision can only be taken by the Secretary of State. In cases where it is considered necessary for the protection of public order or national security, the detention of the foreign national may, after the expiry of the five-month period, be extended for one month at a time. The total period of detention may not exceed eight months.[64]

64 Article 74/5 Immigration Act.

Myria recommends that the individual assessment of the need for detention, the availability of less coercive measures, and the requirement that detention is only possible for the shortest time and for as long as the grounds for detention are applicable, should also be incorporated into Article 74/5, as is already partly the case in Article 74/6 of the Immigration Act.(65)

The **Immigration Office notes** that in the case of less coercive measures at the border, the measures must be proven effective, as Belgium must comply with EU regulations on effective border management (Schengen acquis).

When the third-country national **opposes their return** or the attempt to return fails because the third-country national refuses to board, the Immigration Office may take a new decision to detain. This new decision may replace the previous detention title. This effectively means that third-country national in return procedures may be detained up to 18 months.(66)

4.4 APPEAL PROCEDURES

A. APPEALING THE DECISION TO DETAIN

Council Chamber (Dutch: Raadkamer, French: Chambre du conseil)

The third-country national who is the subject of a measure depriving them of their liberty may lodge a request for release from detention with the investigating chamber of the First Instance Tribunal.(67)

In principle, a new appeal against the detention decision may be lodged every month. The one-month period starts from the last order or judgement of the Council Chamber upholding the detention. The Council Chamber must render its decision within five days, fault of which, the detained third-country national is released. **After the second extension**, the Secretary of State must ex officio ask whether the decision to extend is legal.

More generally, the Council Chamber may only verify the legality of the measures of deprivation of liberty or expulsion from the territory. It may not express an opinion on the appropriateness or expediency of the deprivation of liberty.(68)

65 Myria, Note à l'àttention de là Commission de l'Interieur, des Affàires ge ne ràles et de là Fonction publique: Projet de Loi du 22 juin 2017 modifiant la loi du 15/12/1980 Modifications en matière d'éloignements et detention, 4 July 2017, p. 11.
66 Article 15 of the Return Directive prohibits detention for a period longer than 18 months.
67 Article 71 Immigration Act.
68 Article. 72, second limb Immigration Act. Nonetheless, see "Supervision undertaken by a judicial authority dealing with an application for extension of the detention of a third-country national must permit that authority to decide, on a case by

Lodging a request for release does not automatically suspend the execution of the expulsion measure.

Indictments Chamber (Dutch: Kamer van inbeschuldigingstelling; French: Chambre des mises en accusation)[69]

An appeal against an order of the Council Chamber can be lodged within 24 hours of its notification, at the Indictments Chamber of the Court of Appeal. The appeal does not have suspensive effect. In case of a negative decision from the Council Chamber, the third-country national and their representative may lodge an appeal. However, in case the Council Chamber orders the release of the third-country national, the Public Prosecutor's Office and the Immigration Office may lodge an appeal with the Indictments Chamber within 24 hours of the order of the Council Chamber. In the latter case, the execution of an expulsion measure is suspended until after the judgement of the Indictments chamber.

The Secretary of State may also lodge an appeal against the order of the Council Chamber when the Secretary is under the obligation to ask for a legality review by the Council Chamber, i.e., after a second extension of a decision of deprivation of liberty.

Court of Cassation (Dutch: Hof van Cassatie, French: Cour de Cassation)

A cassation appeal against a decision of the judicial authority maintaining or ordering the deprivation of liberty within 15 days of its notification can be lodged with the Court of Cassation. The appeal does not have suspensive effect.

Apart from the third-country national and their representative, the public prosecutor at the Appeal Court may also lodge an appeal with the Court of Cassation.

The Secretary of State may lodge a cassation appeal against a decision to release, when they are under the obligation to ask for a legality review by the Council Chamber, i.e., in case of a second extension of a decision of deprivation of liberty.

Complaint mechanisms

A complaint can be lodged with a complaints commission about the application of the Royal Decree of 2 August 2002 on the regime or measures on the

case basis, on the merits of whether the detention of the third- country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person concerned should be released, that authority thus having power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it, as well as any facts, evidence and observations which may be submitted to the judicial authority in the course of the proceedings." CJEU, 5 June 2014, Mahdi, C-146/14 PPU, EU:C:2014:1320, §64.

69 Article. 72, third limb Immigration Act *jcto.* Art. 30 Law on Temporary Custody.

operations applicable to detention centres, which includes the internal regulations of the detention centres.[70] Individuals detained in the centres may also file a complaint with the director of the centre, or their substitute.[71]

B. APPEALING THE RETURN DECISION

Return decisions can be subject to annulment proceedings (*Dutch: beroep tot nietigverklaring, French: recours en annulation*) at the Council on Alien Law Litigation (CALL). These proceedings may suspend ongoing return proceedings.

In cases of urgency and in case the third-country national claims that an expulsion may violate their fundamental rights, they can lodge an appeal for reasons of 'extremely urgent necessity' (*Dutch: uiterst dringende noodzakelijkheid, French: extrême urgence*). The third-country national must prove an extreme urgency, cite serious reasons justifying the annulment of the contested act and show that the enforcement of the act may cause serious damage that is difficult to repair. In the urgency proceedings, the appeal must be lodged within ten days (after the notification of the first expulsion decision) or five days (in case the appeal is lodged against a subsequent expulsion decision), to have suspensive effect.[72] In principle, the suspension of the appeal is only valid for five to ten days, depending on whether it was the first decision. However, the CALL may decide to take interim measures and extend the suspension of the expulsion until after a judgement is rendered. The CALL recently clarified that, in order to ask for the suspension in cases of extreme urgency, a removal or expulsion measure must be imminent.[73]

C. APPEAL: CIVIL CASES

A unilateral petition may be filed with the civil court in case of a violation of a subjective right. The judge may, on the basis of the petition of the third-country national (or their lawyer), adopt suspensive measures. Such unilateral petitions can be filed against both an expulsion and a detention. As they are unilateral petitions, they are always filed by the third-country national's lawyer.

The Immigration Office is informed of the judicial decision at the time of the bailiff's notification. If a judicial decision has consequences for the

70 Article 130- 134 of the Royal Decree.
71 Article 129 of the Royal Decree.
72 Article 39/82 Immigration Act.
73 Council of Alien Law Litigatio,, General Assembly, 24 June 2020, no. 237.408.

third-country national's detention, a case-by-case assessment is made of the necessity of an exemption decision (awaiting a decision on the merits, outcome of the appeal procedure, ...).

If the decision only suspends the expulsion, the third-country national remains, in principle, detained. In case the judge decides to suspend the detention, the third-country national is released.

The judge's decisions may be appealed, or third-party opposition may be filed. In case the third-party opposition is accepted, the execution of the judicial decision is suspended.

D. APPEAL: RULE 39 – EUROPEAN COURT OF HUMAN RIGHTS

Like detainees in all Member States of the Council of Europe, detainees in Belgium may request interim measures from the European Court of Human Rights. Indeed, Rule 39 of the Rules of Court indicate that "the Chamber or, where appropriate, the President of the Section or a duty judge appointed (…) may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they considers should be adopted in the interests of the parties or of the proper conduct of the proceedings".[74],[75] Any violations of Convention rights may also be brought before the Court, if the Court has jurisdiction to deal with them.[76]

E. APPEAL: PU – COURT OF JUSTICE

An Urgent Preliminary Ruling Procedure exists for questions regarding, amongst others, third-country national detainees that are detained for reasons related to migration.[77]

74 Registry of the European Court of Human Rights, Rules of Court, 20 March 2023, available at https://www.echr.coe.int/documents/rules_court_eng.pdf.

75 One has to take into account that The ECtHR applies the principle of the domestic legal avenues capable of suspending removals, or where such avenues have been used unsuccessfully.

76 In 2022, several cases regarding migration related detention or the lack of effective proceedings have been communicated by the ECtHR: ECtHR, F.O. and G.H. v Belgium, application number 9568/22, communicated 3 June 2022, https://hudoc.echr.coe.int/fre?i=001-218092; ECtHR, A.P. v Belgium, application number 60405/21, communicated on 6 April 2022, https://hudoc.echr.coe.int/fre?i=001-217154; M.S v Belgium and F.T. v Belgium, application numbers 15234/20 and 58765/21, communicated on 1 April 2022, https://hudoc.echr.coe.int/fre?i=001-217077; ECtHR, I.C. v Belgium and A.A. v Belgium, application numbers 8575/20 and 55365/20, communicated on 3 March 2022, https://hudoc.echr.coe.int/fre?i=001-216614 and L.K. v Belgium, application number 8883/20, communicated on 7 February 2022, https://hudoc.echr.coe.int/fre?i=001-216078.

77 Article 23a Statute of the EU Court of Justice, Article 107 and following Rules of Procedure of the EU Court of Justice.

F. CRITICISM ON THIRD-PARTY REVIEWS OF THE NATIONAL APPEAL SYSTEM

Appealing the (decision of) detention

In the first place, the **Council Chamber and the Indictments Chamber** (together with the Cassation Court) have jurisdiction to verify the legality and subsidiarity of the deprivation of liberty.[78] The appeal against the detention decision does not suspend the removal order, which can be implemented before any decision of the detention review court is taken, or even after a decision that is not final, has been taken.

Myria[79] and other stakeholders[80] believe that a court should be able to exercise final control over the administrative detention of a third-country national before a removal can be implemented. In September 2019, the Procurator-General (*Dutch: procureur-generaal; French: procureur général*) of the Cassation Court also referred to the obstacles of the appeal against the administrative detention of migrants and highlighted that it could be considered necessary to make the Council of Alien Law Litigation competent for a full review of administrative detention.[81]

Several stakeholders consider that if administrative detention is not, in principle, considered a sanction, there is **no reason why the persons who are subject to it should have fewer guarantees than those detained for criminal reasons**. At present, both categories of persons have their detention reviewed by the investigating courts, although the applicable rules are very different. According to the established case law of the Cassation Court, the Preventive Detention Act of 20 July 1990 cannot be applied to third-country nationals in administrative detention, meaning that the Act of 20 April 1874 is applicable. As regards the appeal to the Court of Cassation, the Court considers that it is necessary to refer to the rules laid down in the Code of Criminal Procedure, as the 1874 Act does not provide for the procedural rules applicable to appeals. Hence, although it is inspired by the judicial review regime of preventive detention, judicial review of administrative detention offers far fewer guarantees than those offered to an accused person under an arrest warrant. Myria believes that this difference is not always justified and that a similar level of guarantees should be put in place. More specifically, Myria suggests reconsidering the non-application of the law on pre-trial detention. The procedure for reviewing the administrative detention of foreigners should also be

78 Article 71 Immigration Act
79 Myria, Nota over het eindverslag van de Commissie voor de evaluatie van het beleid inzake de vrijwillige terugkeer en de gedwongen verwijdering van vreemdelingen (Commissie-Bossuyt) November 2021, https://www.myria.be/files/Nota_Myria_eindverslag_Bossuyt.pdf, last accessed on 31 August 2022, pages 22-26.
80 See amogst others Caritas International, Vulnérabilité et détention en centre fermé : recommandations pour une politique de retour respectueuse des droits fondamentaux, September 2019, https://www.caritasinternational.be/wp-content/uploads/2020/01/20190827-vulnerabilite-et-detention-centre-ferme-1.4.pdf, last accessed on 31 August 2022, pages 21-24.
81 Mercuriale of Mister André Henkes, Procurator General at the Cassation Court, 2 September 2019, https://justice.belgium.be/sites/default/files/downloads/cour_de_cassation_pg_mercuriale_2019_fr.pdf.

simplified (territorial jurisdiction) or better framed (time limit for proceedings before the Cassation Court), to allow for a more effective appeal. This would respond to the structural problems highlighted following several condemnations of Belgium by the European Court of Human Rights and which, according to Myria, should lead to a legislative amendment.[82]

Furthermore, when reviewing the administrative detention of foreigners, the investigating courts can only assess the **legality of the detention decision**. This does not cover the appropriateness of the detention, nor the notions of necessity and proportionality, except possibly when it is included in the examination of legality. In criminal matters, on the other hand, the Council Chamber judges the necessity of continued detention. Myria has already made a recommendation to broaden the scope of this review[83] in order to guarantee a full ex nunc appeal (legality and appropriateness of detention).[84] It further considers that the appeal should also cover the question of the existence of alternatives to detention, the possible existence of a risk of absconding, the suitability of the place of detention for the needs of the detainee, taking into account the specificities linked to age, gender and possible vulnerabilities (illness, disability, pregnancy, etc.).

Regarding the control of the **detention conditions**, Myria underlines that this competence should be attributed to the Council Chamber. According to the European Court of Human Rights, Article 5§4 of the ECHR requires that the judge in charge of reviewing the legality of the detention can also review the detention conditions. This remedy must be capable of preventing the continuation of the alleged violation or enabling the detainees to obtain an improvement in their material conditions of detention.[85]

Finally, Myria highlights that a **systematic review of administrative detention should be introduced** and that the court in charge of reviewing detention should at least have **judges specialised in immigration law**.[86] Reviews of administrative detention are currently based on an individual application by the person concerned. There is therefore no systematic judicial review.[87] For example, in 2019,[88] there were 1 152 proceedings brought before the judicial courts for administrative decisions of the Immigration Office, of which only a

82 Myria, Nota over het eindverslag van de Commissie voor de evaluatie van het beleid inzake de vrijwillige terugkeer en de gedwongen verwijdering van vreemdelingen (Commissie-Bossuyt) November 2021, https://www.myria.be/files/Nota_Myria_eindverslag_Bossuyt.pdf, last accessed on 31 August 2022, pages 24-25.
83 Myria, Annual Report Migration , 2011, pages 148-152
84 See: CJEU, Bashir Mohamed Ali Mahdi, 5 June 2014, C-146/14 PPU, on the appropriateness of extending detention, which should be subject to judicial review in order to allow the competent authority to take a decision on all the relevant matters of fact and law in order to determine whether the measure is justified.
85 See ECtHR, Vasilescu v. Belgium, 25 November 2014, no. 64682/12; ECtHR, Bamouhammad v. België, 17 November 2015, no. 47687/13
86 Ibid.
87 Except in the case where the detention is extended a second time by the Minister, namely after four months of detention, in which case the Minister must refer the matter to the Indictments Chamber.
88 Immigration Office, Yearly Statistical Report 2019, https://dofi.ibz.be/sites/default/files/202104/Statistisch%20jaarverslag%202019.pdf, last accessed on 31 August 2022, page 32.

part was related to the review of the legality of the administrative detention of foreigners in Belgium.[89] As an indication, in the same year, 8 555 first detentions in closed centres were recorded. It can therefore be assumed that no appeal is lodged by more than 4/5 of the foreigners in administrative detention.

According to Myria,[90] the causes must be sought not only in the migrants' lack of will to contest their detention situation, but also in the legal obstacles (appeal not suspending removal, complexity of the procedure, short appeal procedures) and practical obstacles (lack of information, insufficient legal aid, language barrier). Therefore, Myria proposes, in line with the recommendations of the Special Rapporteur on the human rights of migrants in the context of the detention of foreigners, to make the judicial review of the legality of detention automatic and regular in the case of prolonged detention.[91] The Immigration Office objects to this view and underlines that migrants receive abundant information regarding legal assistance, interpreters, appeal and other topics. Furthermore, it specifies that not all migrants wish to lodge an appeal, even if they are informed about the possibility.

Complaints mechanism

In the past, the ECtHR has expressed its doubts about the efficiency of this procedure: "the failure of the applicants to lodge a complaint with the committee raises doubts for the Court as to the efficiency of this appeal procedure".[92] According to the ECtHR, Article 5(4) of the ECHR requires that the judge who must review the decision to deprive a person of their liberty must also be able to review the person's detention conditions. That remedy must be able to prevent the continuation of the alleged violation or enable the detained persons to improve their material detention conditions.[93]

Other stakeholders, such as Myria, have also expressed their doubts regarding the complaint mechanism.[94] In their view, the system should meet the guarantees of independence and impartiality, should be accessible – without having to go through the management of the centre – should be relevant from the point of view of the migrant, should be transparent and should

89 In 2020, 1 348 and in 2021 915 appeals were lodged against decision of the Immigration Office at the Council Chamber and the Indictments Chamber (see: Immigration Office, Yearly Statistical Report 2021, https://dofi.ibz.be/sites/default/files/2022-08/2021%20Activiteitenverslag%20DVZ.pdf , last accessed on 31 August 2022, page 85).

90 Myria, Nota over het eindverslag van de Commissie voor de evaluatie van het beleid inzake de vrijwillige terugkeer en de gedwongen verwijdering van vreemdelingen (Commissie-Bossuyt) November 2021, https://www.myria.be/files/Nota_Myria_eindverslag_Bossuyt.pdf, last accessed on 31 August 2022, page 26.

91 Special Rapporteur on the human rights of migrants in the context of the detention of foreigners, François Crépeau, A/HRC/20/24, 2 April 2012, no. 23.

92 ECtHR, Muskhadzhiyeva and others v Belgium, 19 January 2010, application number 41442/07 par. 50.

93 See amongst others ECtHR, Vasilescu v. Belgium, 25 November 2014, no. 64682/12.

94 See for example: CPT, Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 28 septembre au 7 octobre 2009, July 2010 https://rm.coe.int/1680693e4e, last accessed on 31 August 2022, page 28 and Myria, Klachtencommissie 2004-2007: analyse en evaluatie van een ontoereikende maatregel, January 2008, https://www.myria.be/files/Rapport_Klachten_Commissie_-_januari_08.pdf, last accessed on 31 August 2022.

present sufficient procedural guarantees.[95]

The Immigration Office recognises that the system has been criticised, but insists that detained individuals have various means to denounce their detention conditions. Specifically, it highlights that different instances have the possibility and right to visit the detention centres, and therefore monitor the conditions at the detention centres.[96] These instances may then formulate non-binding recommendations to the Immigration Office. Whenever the Immigration Office considers the complaint or observation well-founded, it will adapt its practice. According to the Immigration Office, the most prevalent complaints are about food, change of room and regarding the individual's case file. No fundamental rights complaints were received through the complaint mechanism.

In the future, a national prevention mechanism may be put in place. Indeed, Belgium signed the Optional Protocol to the Convention Against Torture (OPCAT) in 2005 but did not ratify it yet. The Protocol obliges States to set up independent National Preventive Mechanisms (NPMs) to examine the treatment of people in detention, make recommendations to government authorities to strengthen protection against torture and comment on existing or proposed legislation. Today, Belgium does not yet have such a Preventive Mechanism.

Appealing the return decision

The **CALL has jurisdiction to receive appeals against return decisions**. If there is a risk that the foreigner will be returned before the CALL can rule on an application for annulment and/or suspension of the return decision, which does not have suspensive effect, the detained foreigner can apply for suspension of the return decision as a matter of extreme urgency. Because of the lack of this automatic suspensive effect, detainees sometimes use summary proceedings or file a unilateral application to stay a removal. In the past, Belgium has been condemned for not having provided sufficient effective remedies against deportation decisions, where there is a risk of non-refoulement.[97]

95 Myria, Nota over het eindverslag van de Commissie voor de evaluatie van het beleid inzake de vrijwillige terugkeer en de gedwongen verwijdering van vreemdelingen (Commissie-Bossuyt) November 2021, https://www.myria.be/files/Nota_Myria_eindverslag_Bossuyt.pdf, last accessed on 31 August 2022, page 26.

96 Immigration Office, Regulatory compliance and control, https://dofi.ibz.be/nl/themes/irregular-stay/detention/respect-voor-de-reglementering-en-controle, last accessed on 19 June 2023.

97 Sing and others v. Belgium, 02 October 2012, application number 33210/11, https://hudoc.echr.coe.int/fre?i=001-113660. See also: CJEU, B v CPAS Liège, 30 September 2020, C-233/19, par. 51: *"since the Belgian Government maintains that an appeal with automatic suspensive effect should be guaranteed only against a removal decision and not against a return decision, it should be pointed out that it is apparent from paragraphs 44 to 49 of today's judgment, CPAS Seraing (C-402/19) that judicial protection guaranteed to a third-country national who is the subject of a return decision, the execution of which may expose that person to a real risk of being subject to treatment contrary to Article 19(2) of the Charter, is insufficient if that third-country national did not have an appeal with automatic suspensive effect against that decision as soon as that person was notified of that decision".*

5

DETENTION OF VULNERABLE PERSONS

Within the national legal framework of Belgium, it is possible to detain (or to impose an alternative to detention on persons belonging to certain vulnerable groups.(98) Families with minor children (accompanied children) can be administratively detained in family units. Unaccompanied minors can only be detained if there are doubts as to their minority. For other groups of vulnerable persons and persons with special needs, no automatic exclusion from detention is provided in the national framework. Nonetheless, the decision to detain vulnerable persons must, in principle, always respect the principle of necessity and proportionality.(99) Furthermore, in return procedures, particular attention must be paid to the situation of vulnerable persons and emergency health care and essential treatment of illness must be provided.(100) On the other hand, in the international protection procedure, the Reception Conditions Directive prescribes that "Member States shall assess whether the applicant is an applicant with special reception needs (and) Member States shall ensure that the support provided to applicants with special reception needs (…) takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.(101)"

A *circulaire* from May 2009 regulates the situation of vulnerable persons when they are identified by the police as being irregularly staying.(102)

5.1 DETENTION OF CHILDREN

Given the vulnerability of (migrant) children, the national authorities must not only take into account the Belgian legal framework, but also the international framework that protects (migrant) children, such as the legal principle of the 'best interest of the child'. Indeed, in all measures relating to children, the child's best interests must be the primary consideration.(103)

Furthermore, the Convention on the Rights of the Child provides that "no child shall be deprived of his or her liberty unlawfully or arbitrarily and that the arrest, detention or imprisonment of a child shall be in accordance with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time."(104)

98 Article 48/9 of the Immigration Act regulates the recognition of a person applying for international protection as needing 'special procedural needs'. The identification of needs is a shared responsibility, as for example the IO, the CGRS, the applicant can identify this need or indicate that this need exists. In addition, the reception centres (Article 22 Reception Act) may notify the IO and the CGRS that such need exists.
99 Article 15 Return Directive and Article 9 Reception Conditions Directive.
100 Article 16 Return Directive.
101 Article 22 (1) Reception Conditions Directive
102 https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=09-07-15&numac=2009000462
103 Article 3 CRC and Article 22bis of the Belgian Constitution.
104 Article 37 CRC.

The Belgian Reception Act provides for a non-limitative list of criteria that must be considered when a child's best interests are assessed:(105)the possibility of family reunification;the minor's welfare and social development, with particular attention to the minor's personal situation;safety and security considerations, in particular where the minor is a possible victim of trafficking in human beings;the position of the minor in accordance with their age, maturity and vulnerability.

A. UNACCOMPANIED CHILDREN AT THE BORDER

Article 74/19 of the Immigration Act legally prohibits the detention of unaccompanied migrant children.(106)

In this context, Article 41 of the Reception Act further assures that unaccompanied minors **arriving at the border** about whom there are no doubts regarding their age, will be assigned to an Observation and Orientation Centre (OOC)(107) for unaccompanied minors within 24 hours.(108) However, **where there are doubts as to the age of the minor, they may be detained in a detention centre** while an age assessment is carried out by the Guardianship Service for a maximum of three working days, renewable once (maximum six working days in total).(109)

105 Article 37 Reception Act.
106 Article 74/19 of the Immigration Act.
107 While an OOC is not a closed centre, it has some specific security measures mainly to ensure protection against human traffickers. All unaccompanied minors can circulate freely, although in a limited way, in the centre.
108 Article 41 Reception Act.
109 Article 41(2) Reception Act.

According to the annual report of the Immigration Office, in 2021, at the border, out of 26 persons that claimed to be an unaccompanied minor, 20 (77%) were recognised as being one. In 12 cases there were doubts as to the minority of the individual. In 2020, out of 19 individuals who claimed to be unaccompanied minors, 15 were recognised as being so (79%). In 13 out of 19 cases, there were doubts about their age. Finally, in 2019, 29 out of 43 (67%) were effectively recognised as being unaccompanied minors. In 31 cases there were initially doubts about the age of the claimed unaccompanied minor.(110)

Furthermore, in practice, figures indicate that oftentimes unaccompanied minors stay in closed centres for a longer period than stipulated in the Reception Act. In 2019, the average length of stay of unaccompanied minors was 19.67 days in the Caricole transit centre. In 2018, it was 45.47 days in the same centre.(111)

The CPT standards prescribe that "where there is uncertainty as to the minority of an irregular alien, in other words whether he is under 18 years of age, the person concerned shall be treated as if he were a minor until proven otherwise"(112). As a consequence, national actors support the introduction of a prohibition on the detention of minors whose age has not yet been established by an age verification(113) and advocate for a clear legislative definition of criteria and time limits to regulate the possibility of raising doubts regarding an unaccompanied minor's age.(114)

B. UNACCOMPANIED CHILDREN INTERCEPTED ON THE TERRITORY

Unaccompanied children **intercepted on the territory** without a residence permit will be placed in an OOC where the unaccompanied minor can stay for 15 days (renewable once). During this period, the Guardianship Service will conduct the registration and identification of the minor and assign a guardian. Sometimes they can be held in detention for the duration of their age assessment procedure. If there is no doubt at the time of the interception and the person is considered to be an adult, they can be detained. However, if, during the stay in the detention centre, the person declares to be an unaccompanied minor, the guardian service must be notified, and the

110 Immigration office, Yearly report, 2021, https://dofi.ibz.be/sites/default/files/2022-08/2021%20Activiteitenverslag%20DVZ.pdf , last accessed on 19 June 2023, page 46.
111 Myria, Advies over het verbod om minderjarigen op te sluiten, 22 September 2020, https://www.myria.be/nl/publicaties/advies-over-het-verbod-om-minderjarigen-op-te-sluiten , last accessed on 18 October 2022, page 12.
112 CPT/Inf/E (2002) 1 - Rev. 2010 p. 64
113 Myria, Advies over het verbod om minderjarigen op te sluiten, 22 September 2020, https://www.myria.be/nl/publicaties/advies-over-het-verbod-om-minderjarigen-op-te-sluiten , last accessed on 18 October 2022, page 12.
114 UNHCR, Vers une protection renforcée des enfants non accompagnés et séparés en Belgique, April 2019, page 29.

age determination will start. In that case, there is no period of three days as at the border, but this must be done as soon as possible and be treated as a priority.

UNHCR Belgium has highlighted that when unaccompanied minors are intercepted on the territory, they may be briefly detained when awaiting a transfer to an Observation and Orientation Centre or even for a period of longer than 24 hours, when the authorities take longer than 24 hours to signal their age.(115) The UNHCR recommends continuing to raise awareness amongst the police and the administration, to inform these people on the first line about the vulnerabilities of (unaccompanied) minors and to train them to interact with them.

5.2 DETENTION OF FAMILIES WITH MINOR CHILDREN

The detention of families in so called '**closed family units**' was regulated by the **Royal Decree of 22 July 2018**.(116) This Royal Decree established the regime and operational framework applicable to places where a third-country national is detained or placed at the disposal of the government on the Belgian territory. Between 11 August 2018 and 4 April 2019, irregularly staying families with minor children were detained as a last resort in these closed family units while awaiting their return. The units were located on the grounds of a detention centre and adapted to the needs of a family with minor children. The units were separated from the rest of the center and every family had its own unit. There were indoor and outdoor playgrounds for children and there was a class room, where the children could follow classes. The families were also allowed to cook for themselves. The units were managed by the Immigration Office.

On 4 April 2019, the Council of State **partially suspended the implementation of the Royal Decree.**(117) More specifically, it took issue with the regulations that allowed (i) families to be restricted in their access to outdoor spaces; (ii) the staff of the centres to enter the family houses without any conditions between 6 a.m. and 10 p.m. and (iii) young persons over the age of 16 who were considered security threats to be held in isolation for 24 hours. As a result, irregularly staying families with minor children could, in principle, **no longer be detained** and were in practice no longer detained in the closed family units on the site of the closed centre '127bis'.(118)

115 UNHCR, Vers une protection renforcée des enfants non accompagnés et séparés en Belgique, April 2019, pages 23-25.
116 http://www.ejustice.just.fgov.be/eli/besluit/2018/07/22/2018031606/justel
117 Council of State, judgement no. 244.190 of 4 April 2019 http://www.raadvst-consetat.be/arr.php?nr=244190
118 See also input Belgium Annual Report on Migration (ARM) on question 39:"Where there any new legal or policy developments at national level in relation to the (alternatives to) detention of (unaccompanied) minors or families with minors for the purpose of return."

In 2019, a legislative proposal was tabled that would prohibit the detention of all children for migration purposes.[119]

In a subsequent judgment in July 2021, the Council of State stated, that it was, in principle, not prohibited to detain migrant families with children in a closed setting.[120] However, the **new Belgian Government agreed**[121] that minors (both accompanied and unaccompanied) could not be detained in closed centres. This was also explicitly mentioned by the former Secretary of State for Asylum and Migration in his General Policy Note on Asylum and Migration of 4 November 2020.[122]

Families and single parents with minor children, can be detained in an **open family unit.** These units are legally considered as detention centers. In practice, for example, one adult always needs to remain in the unit. However, the families do have a certain degree of freedom (see 6 B).

These are legally considered to be detention centres. In practice, for example, one adult must always remain present in the house. However, the family units are not closed and families have a large degree of freedom of movement. That is why the Immigration Office qualifies them as an alternative to detention.

119 Draft law amending the Immigration Act, 17 December 2019, https://www.dekamer.be/FLWB/PDF/55/0892/55K0892001.pdf
120 Council of State, 24 June 2021, no. 251.051.
121 Coalition agreement https://www.belgium.be/en/about_belgium/government/federal_authorities/federal_government/policy/government_agreement.
122 General Policy Note on Asylum and Migration, 4 November 2020, https://www.dekamer.be/FLWB/PDF/55/1580/55K1580014.pdf

On 22 March 2022, the **Committee on the Rights of the Child** concluded that Belgium had violated Article 37 of the Convention of the Rights of the Child, read alone and in conjunction with Article 3.[123],[124]

The Communication was submitted by the parents on behalf of their two daughters, born in Belgium: A.M.K., born on 9 January 2011, and S.K., born on 3 September 2016. On 8 January 2019, at 5.30 a.m., the family was arrested at their home, notified of a new order to leave the country and taken to a 'closed family unit' at a closed centre for aliens near Brussels International Airport. The family would remain at the closed centre for three weeks and two days, on the basis of the regime of the Royal Decree of 22 July 2018. Finally, the Committee established that **the Belgian practice had violated the Convention and condemned the State to adequate compensation.**

More specifically, it considered that "by failing to consider possible alternatives to the detention of the children, the State party has not given due regard, as a primary consideration, to their best interests, either at the time of their detention or when their detention was extended".[125]

In its considerations, it referred to earlier comments regarding their position on the detention of children in migration contexts: **Detention of any child because of their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child**, taking into consideration the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, and according to which the possibility of detaining children as a measure of last resort must not be applicable in immigration proceedings".[126]

123 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

124 Committee on the Rights of the Child, Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning st no. 73/2019, 22 March 2022.

125 *Ibid.* 10.13.

126 Joint general comment of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23, paras. 5, 9 and 10.

5.3 OTHER GROUPS OF VULNERABLE PERSONS

Apart from the above-mentioned categories of vulnerable persons, the Reception Directive[127] lists, non-exhaustively, **other categories of vulnerable persons**, which shall be taken into account when implementing the national law:

- ◇ unaccompanied minors,
- ◇ disabled people,
- ◇ elderly people,
- ◇ pregnant women,
- ◇ single parents with minor children,
- ◇ victims of human trafficking,
- ◇ persons with serious illnesses,
- ◇ persons with mental disorders and
- ◇ persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.

The Belgian Immigration Act does not list victims of human trafficking, persons with serious illnesses and persons with mental disorders explicitly as 'vulnerable'[128], while the Reception Act does.[129] The Reception Act further specifies that "child victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment, or of armed conflict, have the right to the support of experts and may access mental health care and rehabilitation services."[130]

A. FOLLOW-UP AT THE DETENTION CENTRE

Upon intake of a new resident by the doctor and the social assistant, it is **checked whether there are any medical, psychological, file-related or behavioural risks**. Furthermore, the third-country national is interviewed regarding their medical condition and examined by the doctor of the centre. The doctor delivers two attestations. First, a medical certificate, 'Annex II', in which the doctor assesses the foreseeable medical consequences in case of return if the person suffers from a condition which, if left untreated, could lead to death or a serious, rapid and irreversible deterioration of their health

127 Article 21 Reception Directive.
128 Article 1, 12° Immigration Act.
129 Article 36 Reception Act.
130 Article 39 Reception Act.

or a significant reduction in life expectancy.[131] Second, a certificate in which the doctor assesses whether the person is fit to stay at the centre.

If any risk is noticed during the stay, a **multidisciplinary team** discusses the problems and the centre's management takes a decision on a group-appropriate or tailor-made regime and its way of implementation. The director of the centre and the attaché for residents are informed for further follow-up.

In the absence of a previous identification as a vulnerable person, the personnel, such as the return coach, may identify a person as **vulnerable**. In case of psychological problems, a psychologist can provide follow-up at the centre. Every centre has a psychologist and all closed centres have a coordinating psychologist. If the centre's psychologist is not present when they are needed, the coordinating psychologist steps in.

If a third-country national switches from a closed to an open centre, or vice versa, and is particularly vulnerable, the centres' doctor will exchange information on the third-country national.

B. DETENTION BY THE POLICE AFTER INTERCEPTION

In case a third-country national is administratively detained, the police fills out a **questionnaire, to comply with the right to be heard, that contains specific questions regarding the risks of a violation of Article 3 and 8 ECHR** (such as health and family life) in case of return. This form is passed on to the Immigration Office, which decides whether to issue an Order to Leave the Territory and, possibly, to detain the person, taking into account the information contained in on the questionnaire and the interception report. If the Immigration Office decides to detain, it has to address every element that the third-country national has included in the questionnaire. For example, if the questionnaire mentions that the person needs a wheelchair and the Immigration Office decides to detain them, it chooses a centre that is accessible for wheelchair users.

Myria has recommended that, instead, the police **should interview the person in a way that they can formulate all the elements relating to their personal situation** that may have an impact on the return decision and that it transmits the information to the Immigration Office before any decision is taken. Furthermore, it underlines the need to take account of the person's vulnerabilities, their right to be informed, in a language they understand, of the reasons for their detention, by introducing a more systematic system of interpretation, additional to, at the request of the person,

131 Based on information received by the Immigration Office and Nansen Refugee, Vulnérabilité en détention: motivation des titres en détention, p. 11.

the right to be assisted by a lawyer during their administrative arrest by the police.[132]

C. DETENTION AT THE BORDER

In case a third-country national does not fulfil the conditions for entry, the police at the border establishes an **administrative report, in which they mention the possible vulnerability of a person**. This report is passed to the Immigration Office. If the third-country national is identified as a victim of human trafficking, the police will open an inquiry. Third-country nationals are asked to complete a questionnaire ('right to be heard'). The questionnaire, amongst others, asks questions to assure that the authorities act in conformity with Article 3 and 8 ECHR.

D. THE SPECIAL NEEDS PROGRAMME (RETURN)

The Immigration Office introduced the Special Needs programme in 2009. It offers some vulnerable persons the possibility to apply for **individual assistance** tailored to their specific needs in the context of their return trajectory.

For each **new arrival in a detention centre, the centre's doctor completes a medical certificate** that indicates whether or not the person suffers from a disease that could constitute a risk of inhuman or degrading treatment (contrary to Article 3 ECHR) in the event of return, or whether additional examinations must be carried out to determine this. If they determine that such a risk exists, a second certificate is completed. The central service of the Immigration Office (Medcoi service) is then asked to check whether the recommended treatments are available and accessible in the country of return.

The objective is **to support vulnerable people** (especially those with specific psychological or medical needs). Their stay in a detention centre can be adjusted, they can receive guidance on their return and, if necessary, help with reintegration in their country of origin, which can be monitored. For example, if the third-country national has mental health issues, they can be taken to a psychiatric ward or receive material or medical support in the centre. Furthermore, a doctor, psychologist or person of trust may accompany the third-country national during their return.

132 Myria, Myriadoc 5: Retour, detention et éloignement des étrangers (2017) : un retour, à quel prix ?, https://www.myria.be/files/Myriadoc_5_D%C3%A9tention__retour_et_%C3%A9loignement.pdf , last accessed on 21 October 2022, page 57.

The application for the special needs programme is introduced in the closed centre and passed on to the 'special needs team' at the Immigration Office. The team will evaluate the availability and accessibility of the requested care and the follow-up that can be provided in the country of origin.

	Number of processed cases[133]	Total of returns realised under the special needs programme	Special needs: reintegration support upon return	Special needs: support before return
2019	87	39	38	13
2020	55	22	12	9
2021	68	33	27	15

E. EXTRA CARE AND ATTENTION (EXTRA ZORG EN AANDACHT-EZA)[134]

Since 2008, to ensure a better follow-up of 'special needs' files, the Immigration Office has worked with '**follow-up tables'** per centre for residents who need extra care (Extra-Care and Attention tables). There are around 17 categories of 'extra-care persons', including vulnerable persons and people with behavioural problems. These persons are identified and followed-up at the closed centres by a multidisciplinary team of doctors, psychologists, social assistants and security. The central services monitor these cases and give them priority. Every week, a cross-competence meeting with the return services, such as the coordinating psychologist, identification service, border inspection and international transfers and Ilobel[135], is organised. When **an 'extra-care' person** returns, the Immigration Office notifies the Airport Police Authority and the Transfer-unit so that they can take all necessary measures.

Each closed centre fills in the follow-up table with the findings and advice of the various teams concerning the individual files of the persons in need of extra care.

133 More information can be found in the yearly report of the Immigration Office: Immigration Office, yearly report 2021, https://dofi.ibz.be/sites/default/files/2022-08/2021%20Activiteitenverslag%20DVZ.pdf, last accessed on 29 March 2023.
134 This information was obtained during an interview with the Immigration Office.
135 Immigration and Liaison Officers' Unit

Some specific categories are **automatically included in the EZA-list**:

- ◇ hunger strikers,
- ◇ ongoing special needs procedures for which there is an impact on the return or stay (not only medical impact),
- ◇ resident whose family is staying in open family units,
- ◇ pregnant women with a problematic pregnancy or a pregnancy at an advanced stage of development.

When a person in detention to be returned is detected as a possible **victim of human trafficking,** the competent services will be informed. If these services acknowledge that there are serious indications that this person is indeed a victim of human trafficking, they will be released from detention. The competent services will, subsequently, provide a follow-up.

In the case of **pregnant women**, the internal guidelines of the Immigration Office prescribe that a forced return is only possible if a woman is less than 24 weeks pregnant. Between 24 weeks and 34 weeks of pregnancy, return is only possible if she does not resist. As of 34 weeks of pregnancy, no forced return is possible. This practice is a result of the Vermeersch II Commission, which, in 2004-2005, analysed the Belgian return policy. Its successor, the Bossuyt Commission, is briefly discussed in 6.2.

GCF-DATABASE

This Immigration Office database aims at exchanging information between the closed centres and the central administration. Every detainee has a file, which includes, amongst others,

1. Information on the Third-Country National's (non)-presence at the centre
2. Identification number
3. Photos
4. Detention title
5. Appeal procedures
6. The Third-Country National's identification as an *'Extra Zorg en Aandacht (Extra Care and Attention)'*. To identify someone as falling under EZA, they receive a code which is named HOR-CODE.

Furthermore, the database shows, amongst others, the available places at the different centres.

6

ALTERNATIVES TO DETENTION IN PRACTICE

6.1 ALTERNATIVES TO DETENTION IN EU MEMBER STATES

In 2021, the EMN conducted a European study on the use of detention and alternatives to detention, to which 25 EU Member States participated.[136] Results indicated that the most frequently used alternatives to detention are reporting obligations, the requirement to reside at a designated place, the obligation to surrender a passport or identity document, the requirement to communicate an address, and release on bail.

Reporting obligations are established by law in all participating EU Member States (25)[137] and are used by most (24).[138] This alternative requires third-country nationals to report to a competent authority at regular intervals. Failure to report to the authorities can lead to detention in all reporting EU Member States, decided on a case-by-case basis. **The requirement to reside** at a designated place is established by law in 20 EU Member States[139] and used in practice in 17.[140] This alternative requires third-country nationals to stay at a designated place, indicated by the authorities, which can range from their private residence to a shelter or a reception centre. **The obligation to surrender a passport, travel document or identity document** to the authorities is legally available in 17 EU Member States[141] and used in 14.[142] **The requirement to communicate an address to authorities** is legally available in 15 EU Member States[143] and used in eight.[144] **Release on bail** (with or without sureties) is available in nine EU Member States[145] with four[146] using it in practice. It consists of releasing a third-country national from custody, with or without the payment of a sum of money from an independent surety to guarantee their appearance in court.

6.2 ALTERNATIVES TO DETENTION: THE BELGIAN PRACTICE

In Belgium, none of the most common EU alternatives to detention described above are implemented. **Reporting obligations and the requirement to reside at a designated place** are provided for in Belgian legislation, but they have not been implemented.[147]

136 https://emnbelgium.be/sites/default/files/publications/EMN_Study_on_detention_0.pdf
137 AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI (only in return procedures), SK
138 AT, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK
139 AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, MT, NL, PL, PT, SI.
140 AT, BE, CZ, DE, EE, EL, FI, FR, HR, HU, IE, IT, LT, LU, NL, PT, SI.
141 BG, CY, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LV, MT, NL, PL, SE
142 BG, CY, EE, ES, ES, FI, FR, HR, IE, IT, LU, LV, NL, SE.
143 CZ, EE, EL, FI, FR, HR, HU, IE, IT, LU, MT, PT, SE, SK (as an obligation within both existing alternatives to detention).
144 CY, CZ, EE, FI, FR, HR, IE, PT, SK.
145 AT, BG, CY, CZ, EL, HU, IE, PL, SK
146 AT, HU, IE (sometimes used in habeas corpus cases), PL.
147 Both are applied as a procedural requirement but are not considered a measure as alternative to detention as such.

Other alternatives to detention applied in practice in Belgium are **the extension of the deadline for leaving the territory** and **community management programs** where individuals live independently in the community and are assisted by a case manager (family units).

In addition, **several forms of coaching** have been established and are used following the issuance of a return decision.

The Bossuyt Commission

In March 2018, the Bossuyt Commission was tasked to evaluate the policy and practice regarding the voluntary return and the forced removal of third-country nationals in Belgium. The Bossuyt Commission conducted a general evaluation at national level in the form of an **interim report**[148] and a **concluding report.** In its final report[149], presented to the Minister of Asylum and Migration in September 2020, the Bossuyt Commission includes inter alia an overview of several ATDs, their bottlenecks and recommendations. The report was commented on by various actors.[150]

The Commission was preceded by two similar commissions chaired by em. Prof. Dr. E. Vermeersch. The Vermeersch Commissions were established following the death of the Nigerian Semira Adama during a forced return and were tasked with the evaluation of the instructions on removal (Vermeersch I, report presented on 21 January 1999 to the Minister of Interior) and to adopt guidelines to ensure a humane and effective removal policy (Vermeersch II, report presented on 31 January 2005 to the Minister of Interior).

A. EXTENSION OF THE DEADLINE FOR LEAVING THE TERRITORY

Third-country nationals may leave the territory voluntarily in two ways. First, a third-country national may leave voluntarily, at their initiative and expense, without support or guidance. Secondly, third-country nationals may be assisted in their return. The **assisted voluntary return** concerns third-country nationals who decide to leave the territory and wish to receive support. This support may include assistance in obtaining the necessary documents for the journey, reimbursement of costs and payment of the aeroplane ticket and even assistance with reintegration in the country of return.

148 Public information available at: https://www.myria.be/files/DEF_INTERIMVERSLAG_NL.pdf
149 Public information available at : https://www.myria.be/files/Rapport_final_Bossuyt.pdf
150 Public information available at: Note_Myria_rapport_final_Bossuyt.pdf; https://www.jrsbelgium.org/Duurzame-oplossingen-het-antwoord-op-het-rapport-Bossuyt?lang=nl

The period of voluntary return that is granted to the third-country national must be defined in accordance with Article 74/14 Immigration Act, **which sets out a minimum period of voluntary return of 7 days and a maximum period of 30 days.** In practice, generally, the period of voluntary return amounts to 30 days.

However, this period may both be shortened and extended. The timeframe may be shortened for the reasons mentioned in Art. 74/14 §3, which include a risk for absconding or a threat to public order or national security.

Art 74/14, § 1 of the Immigration Act provides that when a third-country national is unable to comply with the Order to Leave the Territory and therefore the voluntary return cannot be carried out within the stipulated period and if the circumstances specific to the person's situation justify it, **an extension of the deadline for leaving the territory can be granted.**

To receive the extension, a third-country national who did not comply with an Order to Leave the Territory, must apply to the Immigration Office by (registered) letter that contains the documents demonstrating the impossibility of voluntary return within the stipulated period.[151] An extension can be granted if return preparations are demonstrated or if specific circumstances of the individual, such as having children who attend school, advanced pregnancy, health problems and other humanitarian conditions hinder the return. The Secretary of State or the Immigration Office notifies the decision in writing (e-mail/letter).

Used in practice:

	2021[152]	
Reason Extension BGV	**Request**	**Extension**
Children attending school	6	2
Illness	33	16
Pregnancy	6	4
Birth	16	14
IOM	87	80
Legal cohabitation	8	7
Humanitarian reasons	1	0
Others	115	49
Request persons Open Return Places	-	1

151 If the extension is requested within the ICAM procedure, this will be done by the ICAM coach.
152 Statistics on the use of this alternative were only kept systematically since 2021. In the past, statistics were kept in a different manner, making a comparison with previous years impossible.

B. MANAGEMENT PROGRAM: FAMILY UNITS OF THE IMMIGRATION OFFICE FOR FAMILIES WITH MINOR CHILDREN

Since October 2008,[153] **families with minor children** in irregular stay are accommodated in open community-based **family units**. These are legally considered to be detention centres. In practice, for example, one adult must always remain present in the house. However, the family units are not closed and families have a large degree of freedom of movement. That is why the Immigration Office qualifies them as an alternative to detention. The units, consisting of individual houses and apartments, are considered 'community-based' because of their location in the centre of municipalities and the fact that they cannot be distinguished from other houses. There are currently 28 residential units (each occupied by one family) in use, spread across five sites: Zulte (6), Tubize (6), Sint-Gilis-Waas (7), Tielt (3) and Beauvechain (6). Family members can leave the family unit for limited reasons (education, groceries, their lawyer, participating in religious ceremonies...).

Nine coaches, deployed by the Immigration Office, work in the units (two at each site and one deployable in multiple sites). The main task of the coaches is to encourage families to collaborate in the organisation of their return and point out the consequences in case of lack of cooperation. In addition, they assist the families with material support. Coaches are not involved in the decision-making process. On a daily basis, when necessary, the coaches provide all the requested information to the third-country national. If a family does not cooperate with the return process, a forced removal from the unit may be organised.

The **average length of stay** in the family units was 37.7 days in 2018; 33.8 days in 2019 and 47.3 days in 2020.[154]

153 Article 74/8 §1 Immigration Act; Royal Decree of 14th May 2009.
154 Travel restrictions due to COVID-19 led to an increase in the average number of days. Numbers provided by the Immigration Office.

Use of open units in practice:

Intakes	Total number of families	Border procedure	Domestic procedure (irregular stay)	Dublin procedure
2017	169	84	75	10
2018	192	135	45	12
2019	163	131	25	7
2020	60	34	12	14
2021	61	47	7	7

Outflow **border** procedure	**Absconding**	**Refoulement**	**Exemption**	
			Due to ongoing application / recognition of international protection / subsidiary protection	Other reasons
2017	16	30	25	23
2018	23	34	61	10
2019	14	29	56	16
2020	4	15	20	7
2021	9	17	14	4

Outflow **domestic** procedure (irregular stay))	**Absconding**	**Return**			**Exemption**	
		Forced return	Voluntary Return	Total Return	Due to ongoing application / recognition of international protection / subsidiary protection	Other reasons
2017	34	8	8	16	0	0
2018	25	5	3	8	1	11
2019	13	1	2	3	1	5
2020	4	0	2	2	0	5
2021	4	0	3	3	2	2

Outflow **Dublin** procedure	**Absconding**	**Removal: (Dublin)**	**Exemption**	
			Due to ongoing application / recognition of international protection / subsidiary protection	Other reasons
2017	6	3	0	0
2018	4	7	0	2
2019	2	8	0	0
2020	9	0	0	2
2021	5	3	0	0

C. COACHING

At the time of writing this study, ATDs have been subject to important changes. A key change was the **establishment, in June 2021, of a new department 'Alternatives to Detention (ATD)'**, responsible for the development and implementation of alternatives to detention within the Immigration Office, to meet the objectives formulated in the September 2020 Coalition Agreement of the federal government.

From 2011 untill 2021, the **SEFOR** (Sensitisation, Follow-up and Return) procedure was in place. This procedure involved informing and sensitizing third-country nationals by the municipalities. Gradually, this role was taken over by the Immigration Office. Since the creation of the new ATD department, this role has been incorporated into ICAM coaching.

Within the new department and its ICAM coaching trajectory, the focus is no longer limited to families with minors but also targets families and persons in irregular stay.

(I) Sefor

The SEFOR department was created in 2011 within the Immigration Office following the circular letter of 10 June 2011110 on the powers of the mayor in the context of the removal of a third-country national. The purpose of the circular letter was to ensure better cooperation between the various authorities (police, municipality, the Immigration Office, etc.) and specified the role of the municipalities in the removal of third-country national and, more generally, in the organisation of Belgium's return policy. Although the application of the circular letter covered all persons who received an Order to Leave the Territory, in practice the coaching was limited to **(i) families with minor children residing at a private address and (ii) in the open return places**.[155]

Sefor procedure used in practice:

	Requested address controls	Still remaining at the address	Not at the address anymore	No response from the police
2020	471	95	236	112
2019	1620	331	1005	284
2018	1312	331	769	212
2017	1911	469	1157	285
2016	2373	598	1305	470
2015	No data available for 2015			

155 Final report Bossuyt Commission, https://www.myria.be/files/Rapport_final_Bossuyt.pdf, fiche 4, last accessed on 19 June 2023, pages 52-54.

(i) Return coaching for families with minor children residing at a private address

As stipulated in Article 74/9 §3 of the Immigration Act and further implemented through the Royal Decree of 17 September 2014 concerning the sanctions that may be imposed under article 74/9 §3 of the Immigration Act **irregularly staying families with minor children**, residing at a **private address,** could be coached in several steps towards return.

The procedure was conducted through the municipality. First, families were invited for a **return conversation** with an officer of the Immigration Office who reviewed the file, assessed possible residence procedures, probed the willingness to return and tried to detect the possible return obstacles (e.g., education, medical issues, etc.). The family received information on the possibilities for voluntary return and assistance (supported by a leaflet). The trajectory consisted of at least three conversations, unless the family opted out earlier. At the end of the return conversations, the families were given the possibility to sign **a return agreement**. When the family chose to sign the return agreement, the Immigration Office continued the coaching and assisted the family in the return procedure. However, if the family refused to sign the return agreement, the file was passed on to another department and the family concerned could be forcibly detained and returned.[156] SEFOR could request the police to intercept the family and to place them in a family-unit return facility in view of a forced return. Regardless of whether the agreement was signed or not, each family that presented itself at the return conversation, was given a period of 30 days to sign up for voluntary return.

Return coaching for families with minor children residing at private address used in practice:

	Families invited for conversation	Families responding positive to the invitation	Independent and voluntary return of families from private accommodation
2020	150	100	2
2019	148	85	4
2018	99	60	2
2017	118	82	4
2016	111	73	6
2015	No data available for 2015		

156 Final report Bossuyt Commission, https://www.myria.be/files/Rapport_final_Bossuyt.pdf, last accessed on 19 June 2023, fiche 4,pages 55-57.

(ii) Return coaching by the Immigration Office in the open return places

Article 6/1 of the Reception Act of 2007 stipulates that an international protection applicant can always sign up for an individualised return trajectory.[157] The return trajectory is a framework for individual counselling on return, whereby priority is given to voluntary return. From the moment an applicant files an application for international protection, they are informed about the possibilities for voluntary return by means of a leaflet. On four other occasions, during the examination of the application for international protection, **voluntary return** is formally mentioned: (i) after the CGRS issues a negative decision;[158] (ii) when an appeal is submitted to the CALL; (iii) during the appeal procedure and (iv) in the event of an enforceable negative decision on the application for international protection.

When a failed applicant in an ordinary international protection procedure is notified about the Order to Leave the Territory, the Immigration Office follows the progress of the return process. Failed applicants are allocated to open return places **(*OTP Open Terugkeer Plaats/PRO Places de Retour Ouvertes*)** to prepare their return. Fedasil, contrary to the Immigration Office, does not consider the open return places for failed applicants of an ordinary international protection procedure as an alternative to detention, as these residents are entitled to material assistance under the Reception Act.

During the validity period of the Order to Leave the Territory, the Immigration Office does not carry out a forced return, however, Fedasil and the Immigration Office offer intensive return assistance towards voluntary return. If, after the expiry of the period of the Order to Leave the Territory, the third-country national did not return or did not take any other concrete steps towards return, the Immigration Office can organise the forced removal (including, possibly, administrative detention).

When a person, **subject to a Dublin procedure**, is issued an Order to Leave the Territory, the person concerned is assigned a 'Dublin place' at an open return centre, where they must report within five days. At the open return place, the person must indicate whether they wish to voluntarily depart to the responsible Dublin Member State. If this is the case, the Immigration prepares the transfer. If the person concerned refuses to depart voluntarily, the Immigration Office may proceed with a forced removal.

157 The 'return trajectory ' was introduced in the Belgian Law of 19 January 2012 modifying the legislation regarding the reception of asylum seekers, Belgian Official Gazette, 17 February 2012.
158 Fedasil must provide information on return support no later than five days.

Used in practice:

In the period 2015-2020, 183 third-country nationals have returned voluntarily from an Open Return Place.[159]

In 2019, 435 were allocated to open return places, 65 persons returned voluntarily.[160]

(II) Icam

In 2021, the Immigration Office established a new 'Alternatives to Detention (ATD)' department to scale up alternatives to detention in response to the September 2020 Government agreement and the recommendations of the Bossuyt Commission. To that end, the department developed an **Individual Case Management (ICAM) coaching trajectory**. The department deploys ICAM coaches tasked with supporting and informing individuals and families in irregular stay towards a durable perspective: a legal stay in Belgium or a return.

At the time of writing this study, the practical implementation of the ICAM coaching trajectory is in **full development**.

The department compromises **4 services**: the General Coordination Unit (ACOO), the Unit 'Coaching for families and individuals' (CFI), the unit 'Voluntary Return' and a unit that consists of ICAM coaches in the open return places (OTP) and Dublin places.

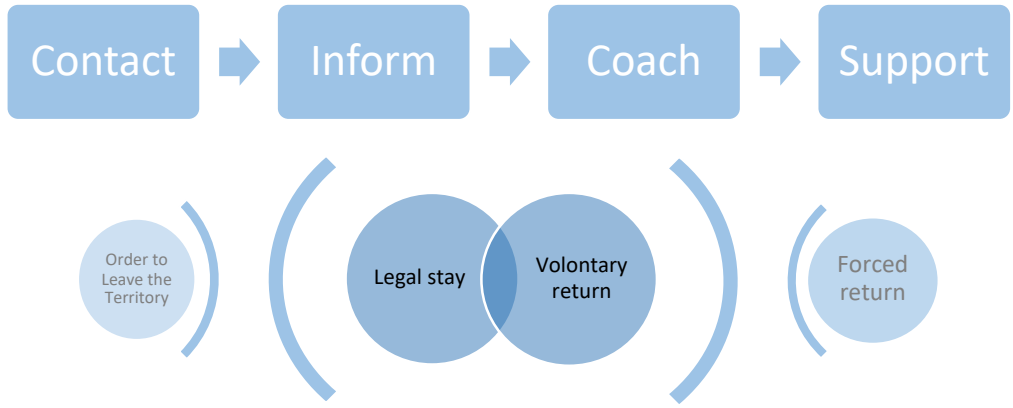
The department adopts an approach close to the third-country national, with physical presence in locations close to the third-country national.

The General Coordination Unit is tasked with staff coordination, manages contacts with civil society and monitors a number of overarching policy-related tasks such as coordinating the functioning of the ICAM offices, optimising partnerships with civil society organisations, policy monitoring, etc. **The ICAM coaches** are tasked with informing individuals towards a long term solution. In general, third-country nationals who were issued an Order to Leave the Territory will receive an invitation to present themselves to the ICAM coach. The coaching is done, on the one hand, through scheduled appointments, on the other hand, through the organisation of 'counter days' for third-country nationals without a place of residence.

159 Data provided by Fedasil, who manages the Open Return Places.
160 Final report Bossuyt Commission, https://www.myria.be/files/Rapport_final_Bossuyt.pdf, page 45. Last accessed on 19 June 2023.

The ICAM coach discusses the administrative situation of a third-country national and provides additional information regarding the third-country national's individual file. Coaches are not involved in the decision-making process. First, it will be examined whether possibilities for legal residence exist. If, after a thorough analysis, it appears that legal residence is not an option, the ICAM coach will, in order to avoid a forced return, suggest possible options for voluntary return and provide the necessary information to this end. If a person is interested in a voluntary return, they will be transferred to the Fedasil return desk available in five cities. If a third-country national refuses to cooperate, the third-country national will be informed about the possibility of forced return. The file is transferred to the Immigration Office's Unit 'Follow-up of Order to Leave the Territory' and an address verification will be requested from the police. Extra attention is paid to vulnerable persons (e.g., victims of human trafficking, psychological problems etc.).

Schematic view of the coaching trajectory



For the coaching trajectory to be successful, an overall coordinated approach and a strong cooperation with partners is needed. Hence, the ATD Department is currently identifying all relevant **external stakeholders** within the administrations, public sector services and civil society (e.g., Fedasil, Police, Municipalities) and **internal partners** within the departments of the Immigration Office.

The SEFOR circular letter of 10 June 2011 will be amended and replaced by the circular letter 'ICAM-support'. The new circular will specify new ways of intensive and individual coaching, the competences of all actors involved and the extended role of the ICAM coach.

7

RIGHTS OF AND AID FOR THIRD-COUNTRY NATIONALS IN DETENTION CENTRES

The regime in the detention centres is **regulated by the Royal Decree of 2 August 2002**.[161] It prescribes that the detainees at the Belgian detention centres are "entitled to individual, medical, psychological and social counselling under the conditions stipulated in this decree"[162] and that "each resident is treated equally, correctly and respectfully by the centre's staff, with respect for personal privacy and without any discrimination".[163]

Upon arrival, each detainee receives '**a reception leaflet'**, containing the rights and obligations relating to their stay in the centre. Furthermore, it lists the possibilities for medical, psychosocial, moral, philosophical or religious assistance. In addition, all residents receive '**an information leaflet'** informing them of (i) the possibilities of appeal against different types of detention, (ii) the possibilities of lodging a complaint concerning the conditions of detention, and (iii) the possibilities of obtaining assistance from a non-governmental organisation and of requesting legal aid. The brochures are available in French, Dutch, German and English, amongst others.[164]

7.1 MEDICAL AID

Each detention centre has a **medical department, which is accessible every working day during the hours specified in the centre's regulations and which is permanently available for urgent cases**.[165] Medical consultations in the centre are free for the detainee. However, the detainee always has the right to ask for an external physician to examine them. The costs for this consultation are at the expense of the detainee.[166]

7.2 LEGAL AID

Residents have the right to legal aid.[167] This includes the **right to call with their lawyer, every day and free of charge**, between 8.00 in the morning and 22.00 in the evening, except during meals.[168] Furthermore, it includes the right of the detainee to talk to a lawyer, and an interpreter if needed, at the centre daily from 8.00 in the morning until 22.00 in the evening.[169] If the detainee does not have a lawyer or cannot afford one, a

161 Royal Decree of 2 August 2002 laying down the regime and operating rules applicable to places situated on Belgian territory, managed by the Immigration Office, where a foreigner is detained, placed at the disposal of the government or kept, in application of the provisions cited in Article 74/8, § 1, of the Act of 15 December 1980 on the access to the territory, the stay, the establishment and the removal of foreigners, accessible via https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2002080275&table_name=wet.
162 Article 6 Royal Decree.
163 Article 7 Royal Decree.
164 *Ibid.* Article 17.
165 *Ibid.* Article 51.
166 *Ibid.* Article 53.
167 *Ibid.* Article 62.
168 *Ibid.* Article 63.
169 *Ibid.* Article 64.

pro bono lawyer will be provided for them. In the closed centre of Bruges and Vottem, a pilot project was started to have pro bono lawyers present in the centres during fixed hours. While it was initially considered a success, it was severely impacted by COVID-19. Nonetheless, the right to legal aid was still guaranteed in other ways. Recently, Belgium has been condemned for impeding access to legal aid in the first weeks of detention.[170]

7.3 A TEAM OF RETURN COACHES AND PSYCHOLOGICAL CARE

Each detention centre has a team of return coaches[171], which is accessible at the times stipulated in the centre's regulations.[172] This team, in cooperation with the medical service, provides psychological and social support to the resident during their stay and prepares them for possible return.[173]

7.4 OTHER RIGHTS

Detainees have other rights, such as the right to receive visitors, such as family members[174], diplomatic and consular representatives[175] and other persons.[176] This further includes, at a minimum, a conjugal visit once a month.[177] Detainees also have the right, in principle, to unlimited correspondence by letter, of which the written content cannot, in principle, be read by the personnel of the centre.[178]

170 ECtHR, M.A. v. België, 27 October 2020, no. 19656/18.
171 Immigration office, "Organisation of detention centres", https://dofi.ibz.be/en/themes/irregular-stay/detention/organisation-detention-centres, last accessed on 19 June 2023.
172 *Ibid. Article* 67.
173 *Ibid.* Article 68.
174 *Ibid.* Article 34-35.
175 *Ibid.* Article 32.
176 *Ibid.* Article 37.
177 *Ibid.* Article 36.
178 *Ibid.* Article 19-20.

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Funded by the
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