



# COMPARATIVE OVERVIEW OF NATIONAL PROTECTION STATUSES IN BELGIUM 2010-2019

April 2020



The European Migration Network 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 Home Affairs.

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## BELGIAN STUDY AND EU COMPARATIVE STUDY

**Belgian report:** This is the Belgian contribution to the EMN focused study Comparative overview of national protection statuses in the EU and Norway. Other National Contact Points (NCPs) produced a similar report on this topic for their (Member) State.

**Common Template and Synthesis Report:** The different national reports were prepared on the basis of a common template with study specifications to ensure, to the extent possible, comparability.

**Synthesis report:** On the basis of the national contributions of 25 NCPs, a Synthesis Report was produced by the EMN Service Provider in collaboration with the European Commission and the EMN NCPs. The Synthesis Report gives an overview of the topic in all the (Member) States.

**Aim of the study:** The objective of the present study is to offer an overview of the national protection statuses in Belgium in the period 2010-2019, thus providing an update of the national study on harmonised and non-harmonised protection statuses published in 2011. The paper aims to describe the determination procedure and the content of protection for each of these national statuses and to compare these to the position of applicants and beneficiaries of international protection.

**Scope of the study:** The study discusses non-harmonised forms of protection to be requested on the territory and resulting in a legal status. In Belgium, these national statuses are defined as “authorisations to stay” and can be granted on three types of grounds related to protection: for humanitarian reasons, for medical reasons, and as durable solution for unaccompanied minors.

**Available on the website:** The Belgian report, the Synthesis report and the links to the reports of the other (Member) States are available on [www.emnbelgium.be](http://www.emnbelgium.be).



## ABBREVIATIONS

CALL Council for Alien Law Litigation

CGRS Office of the Commissioner General for Refugees and Stateless Persons

CJEU Court of Justice of the European Union

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

FPS Federal Public Service

PSWC Public Social Welfare Centre



# TABLE OF CONTENTS

	<b>EXECUTIVE SUMMARY</b>	<b>6</b>
<b>1.</b>	<b>INTRODUCTION</b>	<b>14</b>
<b>2.</b>	<b>AUTHORISATION TO STAY FOR HUMANITARIAN REASONS</b>	<b>20</b>
2.1.	Policy and legal background	22
2.2.	Determination procedure	28
2.3.	Content of protection	34
2.4.	Figures	38
<b>3.</b>	<b>AUTHORISATION TO STAY FOR MEDICAL REASONS</b>	<b>42</b>
3.1.	Policy and legal background	44
3.2.	Determination procedure	48
3.3.	Content of protection	58
3.4.	Figures	60
<b>4.</b>	<b>DURABLE SOLUTION FOR UNACCOMPANIED MINORS</b>	<b>62</b>
4.1.	Policy and legal background	64
4.2.	Determination procedure	67
4.3.	Content of protection	72
4.4.	Figures	76
<b>5.</b>	<b>CONCLUSIONS</b>	<b>80</b>
	<b>ANNEXES</b>	<b>86</b>
	Annex 1: Schematic overview	88
	Annex 2: References	90
	Annex 3: Publications by EMN Belgium (2009-2019)	96







# EXECUTIVE SUMMARY



In Belgium, foreign nationals in need of international protection can apply for refugee and subsidiary protection status, both harmonised at the EU-level (cf. Text box 1). Outside the EU asylum *acquis*, certain categories of foreign nationals staying in the territory may apply for a specific national protection status, that meets the definitions of:

- “protection”: activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of human rights, refugee and international humanitarian law; and
- “status”: a legal status leading directly to the issuing of a residence permit granting a long-term right to reside in a Member State.

Three types of statuses fall within the scope of these definitions: authorisation to stay for humanitarian reasons, authorisation to stay for medical reasons, and authorisation to stay as durable solution for unaccompanied minors. This study describes the procedures, rights, debates and figures for each of these statuses between 2010 and 2019.

### WHO IS ELIGIBLE FOR A NATIONAL PROTECTION STATUS IN BELGIUM?

Firstly, provided all formal requirements are met, authorisation to stay for **humanitarian reasons** (Art. 9bis Immigration Act) may be granted on a discretionary basis if the foreign national demonstrates that:

- exceptional circumstances justify that s/he cannot submit the application from the Belgian embassy or consu-

late of his or her place of residence; and

- s/he has well-founded reasons to apply for authorisation to stay in Belgium.

Secondly, a foreign national may be eligible for authorisation to stay for **medical reasons** (Art. 9ter Immigration Act) if s/he:

- resides in Belgium at the time of the application; and
- suffers from a serious illness, i.e. an illness occasioning either a real risk to his or her life or physical integrity, or a real risk of inhuman or degrading treatment when there is no adequate treatment in the country of origin or habitual residence.

Lastly, authorisation to stay may be granted as a **durable solution** (Art. 61/14 to 61/25 Immigration Act) to a person who is:

- national of a country that does not belong to the European Economic Area; and
- under the age of 18 years; and
- unaccompanied by a person exercising parental authority or guardianship over him; and
- identified as unaccompanied minor by the Guardianship Service.



### TEXT BOX 1: INTERNATIONAL PROTECTION

As a reminder, foreign nationals in need of international protection can apply for two EU-harmonised statuses in Belgium: refugee status and subsidiary protection.

Refugee status should be granted to a third country national who:

- owing to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group is outside the country of nationality; and
- is unable or, owing to such fear, is unwilling to avail him/herself of the protection of that country.

In addition, a stateless person is qualified as a refugee if, being outside the country of his or her former habitual residence for the same reasons as mentioned above, s/he is unable or, owing to such fear, is unwilling to return to it.<sup>(1)</sup>

If a third-country national or stateless person does not qualify as a refugee, s/he is eligible for subsidiary protection if s/he:

- would face a real risk of suffering serious harm if returned to his or her country of origin or country of former habitual residence; and
- is unable, or, owing to such risk, unwilling to avail him/herself of the protection of that country.<sup>(2)</sup>

### HOW DO THE DETERMINATION PROCEDURES FOR THESE NATIONAL STATUSES DIFFER FROM THE INTERNATIONAL PROTECTION PROCEDURE?

First, the determination procedures involve different **national authorities**. While requests for international protection are examined by the independent Office of the Commissioner General for Refugees and Stateless Persons (CGRS), applications for authorisation to stay are assessed by the Immigration Office.

In addition, applicants for authorisation to stay for humanitarian or medical reasons have **less procedural safeguards**:

- no opportunity to be heard by the administration during a personal interview;
- no temporary residence permit during the process (the only exception being made for applicants for medical regularisation at first instance once their application has been declared admissible);

1 Art. 1A(2) Convention Relating to the Status of Refugees, 28 July 1951 and Art. 2(d) Qualification Directive.

2 Art. 2(f) Qualification Directive.



- no access to material aid, only access to urgent medical care (and to social aid for applicants for medical regularisation with a temporary residence permit);
- no possibility to appeal for reform of a negative decision, only for annulment;
- no automatic suspensive effect of the appeal.

The procedural guarantees for **unaccompanied minors** are more favourable, given that these minors:

- have a right to be heard by the Immigration Office, accompanied by their guardian and/or lawyer;
- are granted a temporary residence permit as long as no durable solution has been found;
- are entitled to material or social aid during the procedure.

However, unlike applicants for international protection, the guardians of these minors can only appeal for annulment and their appeal does not have automatic suspensive effect.

## HOW DO THE RIGHTS OF BENEFICIARIES OF NATIONAL AND INTERNATIONAL PROTECTION STATUSES DIFFER?

Overall, persons authorised to stay in Belgium for humanitarian or medical reasons enjoy **less favourable conditions** than beneficiaries of international protection. While they do have similar access to the mainstream health care, education, integration and employment services, they:

- only obtain a residence permit valid for one year and only renewable under specific conditions;
- are excluded from certain social benefits;
- are not entitled to a “grace period” for family reunification, during which no material conditions are required (though in 2018, this exemption has been reintroduced for beneficiaries of medical regularisation following national case law cf. infra).

The rights of **unaccompanied minors** authorised to stay as durable solution come closer to the guarantees of the EU-harmonised protection statuses, yet these minors:

- need to meet specific criteria to renew their residence permit;
- do not have a right to family reunification.

## HOW DID THESE NATIONAL PROTECTION STATUSES CHANGE BETWEEN 2010 AND 2019?

In the years following the regularisation campaign of 2009-2011, the federal governments agreed to take measures to reduce the number of applications for authorisations to stay for humanitarian and medical reasons. At the same time, the governments announced to strengthen the protection of unaccompanied minors staying in Belgium.

These policy choices led to several **legislative changes** during the past decade, the most important ones regarding:

- the provision of a legal basis for the durable solution procedure for unaccompanied minors, previously merely described in a circular (2011);
- the creation of a medical filter in the procedure for medical regularisation, allowing the administration to declare non-admissible the applications by foreign nationals invoking illnesses deemed to be “manifestly not serious” (2012);
- the introduction of an administrative fee in the procedure for authorisation to stay for humanitarian reasons and various other procedures (2015).

In comparison with these policy choices, European and national **case law** only had a minor impact on certain aspects of medical and humanitarian regularisation between 2010 and 2019, for instance:

- three judgments by the CJEU and the ECtHR on the right to an effective remedy in the procedure for medical regularisation (2011, 2014) did not

lead to any important changes in law or practice;

- the rulings of the CJEU on the different scopes of subsidiary protection and medical regularisation (2014) did not result in further amendments to the Immigration Act, but did lead to the limitation of the validity of renewed residence permits from two years to one year in early 2020;
- in addition, a judgment by the CALL on family reunification with a foreign national authorised to stay for medical reasons (2018) led to the reintroduction of a “grace period” or temporary exemption from the material requirements;
- and the recent annulment by the Council of State of the Royal Decrees determining the amount of the administrative fee to be paid in the procedure for humanitarian regularisation (2019) resulted in the reimbursement of certain fees paid since 2015 and in a debate on the lawfulness of the current requirement to pay such a fee.

On various occasions, the statuses discussed in this study generated **public debates** in national media and among experts:

- media coverage of young adults and families with minor children in irregular stay gave rise to ad hoc discussions on humanitarian regularisation, but these did not bring about a fundamental reform of Art. 9bis Immigration Act;
- the strict rules for medical regularisation in law and practice were sharply criticised by stakeholders who plead-



- ed for temporary residence rights, access to mainstream healthcare and more procedural safeguards during parliamentary hearings on this topic in 2017;
- the procedure for unaccompanied minors received less attention, yet was generally considered to be a good practice by experts.
- by contrast, the little-known special procedure for unaccompanied minors resulted in a relatively stable average of 70 authorisations to stay granted each year.

### HOW MANY FOREIGN NATIONALS REQUESTED AND OBTAINED A NATIONAL PROTECTION STATUS BETWEEN 2010 AND 2019?

Overall, the numbers of applications and authorisations to stay in the procedures for one of the national protection statuses remained **relatively low** when compared to the figures on international protection for the same period.

In the last decade, a **significant decrease** in the number of applications for regularisation took place, most probably as a result of the stricter measures introduced in the wake of the campaign of 2009-2011:

- the number of applications for humanitarian regularisation dropped from 30 289 in 2010 – a very high number that can be explained by the regularisation campaign – to 4 141 in 2019, with corresponding positive decisions decreasing from 10 727 to 1 613;
- similarly, the number of applications for medical regularisation declined from 6 559 in 2010 (and even 9 675 in 2011) to 1 237 in 2019, accompanied by a decrease in positive decisions from 2 227 to 192;

The **nationalities** of persons authorised to stay on the basis of one of these three national protection statuses are remarkably similar. Between 2010 and 2019, the most prominent countries of origin were the Democratic Republic of the Congo and Morocco, followed by countries in Eastern Europe, the Balkan, the Middle East, North and West Africa and South America. In general terms, these nationalities clearly differ from the top countries of origin of beneficiaries of international protection in Belgium.









01

# INTRODUCTION

Since the creation of the Common European Asylum System (CEAS) in the early 2000s, a series of directives has been adopted to harmonise the asylum procedures in EU Member States. Through the Qualification Directives,<sup>(3)</sup> Procedure Directives,<sup>(4)</sup> Reception Directives,<sup>(5)</sup> and Temporary Protection Directive,<sup>(6)</sup> common standards have been established for three types of international protection statuses: refugee status as defined in the 1951 Geneva Convention,<sup>(7)</sup> EU subsidiary protection and EU temporary protection. In addition to these EU-harmonised statuses, at the national level special protection schemes exist for foreign nationals falling outside the scope of international protection. In Belgium, some of these statuses already existed prior to the establishment of the CEAS, while others were put in place in more recent years.

This study aims to offer an overview of the national protection statuses in Belgium between 2010 and 2019, providing an update of the national study on EU and non-EU harmonised statuses published in 2009/2011.<sup>(8)</sup> For each of these non-harmonised statuses, the paper outlines the determination proce-

dures, describes the content of the protection granted and provides figures on applications and decisions by year. Special attention is paid to recent legal amendments, national and European case law and public debates on these statuses since 2010. Throughout the study, comparisons are made with the procedures and rights for applicants and beneficiaries of international protection.

In Belgium, six protection statuses can be identified within the scope of this study, three of which are harmonised at the EU-level. Both refugee status and subsidiary protection, arguably the most important of these protection statuses, are granted by the independent Office of the Commissioner General for Refugees and Stateless persons (CGRS).<sup>(9)</sup> The third harmonised status, temporary protection,<sup>(10)</sup> has never been activated to date, but could in theory be granted by the Immigration Office.<sup>(11)</sup>

At the national level, three other types of procedures can be accessed by foreign nationals to obtain some form of protection, intended as all activities aimed at obtaining full respect for the rights of the in-

3 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. The directive recasts Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

4 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. The directive recasts Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status.

5 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. The directive recasts Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

6 Council Directive 2001/55/EC of 20 July 2001 regarding the admission and residence in the context of EU temporary protection.

7 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Art. 1(A)2.

8 EMN Study by Marleen Maes, Marie-Claire Foblets and Dirk Vanheule on 'EU and Non-EU Harmonised Protection Statuses in Belgium', May 2011 (update). The first version of this study was published in December 2009.

9 French: *Commissariat général aux réfugiés et aux apatrides*, Dutch: *Commissariaat-generaal voor de Vluchtelingen en de Staatlozen*.

10 The general provisions of Temporary Protection Directive 2001/55/EC have been transposed in domestic law. Until today, no detailed national procedure has been elaborated for this particular protection status.

11 French: *Office des Etrangers*, Dutch: *Dienst Vreemdelingenzaken*.





dividual in accordance with human rights, refugee and international humanitarian law.<sup>(12)</sup> If protection needs have been established, these procedures result in the granting of a legal status and the issuing of a residence permit for limited or unlimited duration. The procedures to obtain one of these Belgian protection statuses, in legal terms defined as “authorisations to stay”,<sup>(13)</sup> have all been enshrined in national migration law on a permanent basis. Applications for these authorisations are assessed by the Immigration Office of the Federal Public Service Home Affairs and do not involve the earlier mentioned CGRS. Authorisations can be granted on three types of grounds related to protection, namely for humanitarian reasons (Art. 9bis), for medical reasons (Art. 9ter), and as durable solution for unaccompanied minors (Art. 61/14-25 Immigration Act). These three statuses will be discussed in detail in the present study.

It is worth noting that the EU Synthesis Report on protection statuses identifies a number of non-EU harmonised statuses that do not have an equivalent in Belgian law or practice. For example, unlike the constitutional traditions in some other Member States, in Belgium there is no “constitutional asylum” status pre-dating EU-harmonisation.<sup>(14)</sup> In addition, the national legislation does not provide for a mechanism for collective protection beyond EU temporary protection. Lastly, no separate status exists for foreign nationals fleeing their country for reasons of climate

change or natural disaster.<sup>(15)</sup> In certain circumstances, these persons may be eligible for one of the existing (inter)national protection statuses.

Certain other forms of protection for foreign nationals included in Belgian law and/or policy fall outside the scope of the present study on national protection statuses. The procedure for statelessness, for instance, is excluded, as it largely determined by international law.<sup>(16)</sup> Also not covered are the special residence statuses granted to victims of crimes, including smuggling or trafficking in human beings, in view of the fundamentally different nature of criminal proceedings. The current report does not discuss the mechanisms for relocation, resettlement, private sponsorship and humanitarian visas (cf. Text box 2) either, since these provide access to the territory rather than a residence status to persons already in Belgium. The particular situation of non-removable third-country nationals entitled to core benefits does not correspond to a legal status, and is thus also excluded from this report. Finally, residence statuses granted on the mere basis of family unity fall outside the scope of this study focused on protection.

12 See definition EMN Glossary 6.0.

13 French: *autorisation de séjour*, Dutch: *machtiging tot verblijf*.

14 The right to asylum embedded in the constitutions of Member States.

15 These protection statuses are discussed in the EMN Synthesis Report on ‘Comparative overview of national protection statuses in EU Member States’, upcoming.

16 Convention Relating to the Status of Stateless Persons, 28 September 1954. Furthermore, in Belgium the status of stateless person does not give access to residence rights.

For each of the three national protection statuses identified, the study discusses the policy and legal background, the existing determination procedure, and the content of protection granted to foreign

nationals authorised to stay. The coloured text boxes focus on relevant national and European case law and important public debates between 2010 and 2019.

### TEXT BOX 2: HUMANITARIAN VISAS

Belgium does not have a formal humanitarian admission programme. Yet in exceptional circumstances, the minister or state secretary and the Immigration Office can decide at their discretion to grant long-term visas on an individual basis. These are often referred to as “humanitarian” visas, even though legally the term “humanitarian grounds” is not foreseen.<sup>(17)</sup>

In recent years, these visas have often been issued to family members who do not have a right to family reunification, but are dependent on a person legally residing in Belgium, for instance adult children, grandchildren or de facto partners.<sup>(18)</sup> Other visas were issued to about 1 500 (mostly Christian) Syrian nationals in the context of “rescue-operations” between 2015 and 2018. Lastly, in 2018, 150 foreign nationals obtained a humanitarian visa in the framework of the first private sponsorship programme, coordinated by the Sant’Egidio community in partnership with the recognised religious communities.

Humanitarian visas can be renewed if the applicant meets certain specific criteria, often related to employment, education, financial self-sufficiency, integration efforts or public order.<sup>(19)</sup> Holders of these visa can apply for international protection in Belgium.

The system has been criticised repeatedly for its lack of transparency.<sup>(20)</sup> After a local city councillor was arrested on suspicion of visa fraud in 2019,<sup>(21)</sup> a series of parliamentary hearings and debates on the topic took place between January and March 2019.<sup>(22)</sup> As a result, the parliament adopted an amendment that obliges the minister to provide more information about the visas issued in his annual report.<sup>(23)</sup>

17 Art. 9 Immigration Act. Also see EMN Study on ‘Resettlement and Humanitarian Admission in Belgium’, December 2016, p. 22–25.

18 Federal Migration Centre Myria, *Humanitaire visa: grenzen en grondrechten*, May 2017, p. 11–14.

19 Federal Migration Centre Myria, *Humanitaire visa: grenzen en grondrechten*, May 2017, p. 29.

20 See for instance Federal Migration Centre Myria, *Humanitaire visa: naar een omkaderd en transparant beleid*, 29 January 2019.

21 ‘Mechels N-VA-gemeenteraadslid opgepakt in onderzoek naar mensensmokkel: partij reageert ‘geschokt’’, Knack, 15 January 2019.

22 Belgian House of Representatives, Report of the hearings on humanitarian visas, 29 January 2019, CRIV 54 COM 1021.

23 Art. 94/1 Immigration Act.









02

**AUTHORISATION TO STAY  
FOR HUMANITARIAN REASONS**



According to national law, foreign nationals staying in Belgium can apply for authorisation to stay in exceptional circumstances that justify their application in the territory and their request for authorisation. The legal status is granted by the competent Minister or State Secretary and his or her administration on a discretionary basis. Decisions should be taken pursuant to (inter)national legal standards, in the absence of criteria to determine the exceptional character of the personal situation of the applicant. The procedure, commonly referred to as “humanitarian regularisation” or “regularisation”, is often used as last resort by foreign nationals who do not qualify for other protection statuses. Applicants and beneficiaries of this status enjoy clearly less favourable conditions than their counterparts in the procedure for international protection.

## 2.1. POLICY AND LEGAL BACKGROUND

### Rationale of status

The Immigration Act of 15 December 1980 sets out the criteria and procedures for the entry, residence, settlement and removal of foreign nationals in Belgium.<sup>(24)</sup> The Belgian government can grant authorisation to stay to foreign nationals on a discretionary basis (Art. 9, first paragraph).

In principle, a foreign national needs to apply for authorisation to stay in Belgium from a diplomatic or a consular post abroad (Art. 9, second paragraph). By way of exception, a foreign national already staying in the territory can apply for an authorisation to stay for more than three months if “exceptional circumstances” justify that s/he cannot file the application from the Belgian embassy or consulate of the place of residence. In addition, the applicant has to put forward reasons for which s/he should be authorised to stay in Belgium.<sup>(25)</sup>

Initially, this exceptional procedure was described in Art. 9, third paragraph of the Act of 1980. In the late 1970s, this provision was introduced by a national member of parliament eager to resolve the situation of guest workers who had obtained a work permit, but did not apply for an authorisation to stay in a regular manner. The amendment was eventually accepted by the parliament against the will of the competent minister, who feared that the special provision would lead to abuse and uncontrolled immigration. As a compromise, the Chamber of Representatives agreed that the determination procedure would be left to the appreciation of the minister.<sup>(26)</sup> Until 1<sup>st</sup> June 2007, Art. 9, third paragraph could be used as basis for applications for authorisation to stay for reasons of medical and/or humanitarian nature in the absence of any specific criteria.

Through the Law of 15 September 2006 modifying the Immigration Act (entry into force 1st June 2007), this paragraph was repealed and replaced by Article 9bis and

24 Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 31 December 1980 [Immigration Act].

25 Luc Denys, ‘Van artikel 9 lid 1, 2 en 3 Vw. naar artikel 9 lid 1 en 2, 9bis en 9ter Vw.’, *Tijdschrift voor Vreemdelingenrecht*, 2007, 3, pp. 162-176.

26 Luc Denys, ‘Over het (kleine) verschil tussen artikelen 9 en 10 Vreemdelingenwet’, *Tijdschrift voor Vreemdelingenrecht*, 2006, 1, pp. 6-9.





9ter.<sup>(27)</sup> Art. 9ter introduced a more detailed separate procedure for authorisation to stay on medical grounds (cf. Section 3). Art. 9bis contained a number of provisions for other applications for authorisations to stay. Compared to the original third paragraph, the article only added some procedural aspects, such as the requirement to hold an identity document or a list of the elements that could not be invoked as “exceptional circumstances”.<sup>(28)</sup>

Art. 9bis is considered to be a residual procedure for foreign nationals already staying in the territory who are in need of protection, but who are not eligible for other (inter) national protection statuses. The situations of these persons are assessed on a case-by-case basis in compliance with European and international human rights law.

## Recent developments

At the time of publication of the first EMN Study on protection statuses in Belgium in late 2009, the federal government had only recently decided to grant authorisation to stay to foreign nationals already durably integrated in Belgian society. This decision came after several years of protests that had received a lot of media coverage (cf. Text box 3). The so-called “regularisation campaign” led to a high number of applications for authorisation to stay on the basis of Art. 9bis in the period 2009-11 (cf. Figures).

### TEXT BOX 3: REGULARISATION CAMPAIGNS<sup>(29)</sup>

The “regularisation” of certain irregularly staying foreign nationals was a major debate in Belgium in the period 2007-2009. Some of these persons launched hunger strikes in the hope to obtain an authorisation to stay on humanitarian or medical grounds.<sup>(30)</sup> On 19 July 2009, the federal government decided upon an instruction containing a list of criteria for humanitarian regularisations. The list included a temporary condition – the so-called “one-shot” – for persons at that time already durably integrated in Belgium.

Since 2011, no collective regularisation campaigns have been communicated. That year, the new federal government agreed that a “regularisation of stay should only be granted individually and on the basis of the law”<sup>(31)</sup>. In a similar vein, the government agreement of 2014 underscored that regularisation was an exceptional procedure and no collective regularisations would be organised.<sup>(32)</sup>

27 Law of 15 September 2006 modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 6 October 2006. This law entered into force on 1<sup>st</sup> June 2007.

28 Belgian House of Representatives, Legislative proposal modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, 10 May 2006, Doc 51 2478/001. Parts of this procedure were already outlined in the Circular of 19 February 2003 on the application of Art. 9, third paragraph of the Immigration Act, *Belgian Official Gazette*, 17 March 2003.

29 For a discussion of the earlier regularisation campaign of 1999-2000, see Luc Denys, ‘Van artikel 9 lid 1, 2 en 3 Vw. naar artikel 9 lid 1 en 2, 9bis en 9ter Vw.’, *Tijdschrift voor Vreemdelingenrecht*, 2007, 3, pp. 162-176.

30 See for instance ‘Zestien Afghansen gaan in hongerstaking in miniemenkerk’, *De Standaard*, 5 maart 2007.

31 Coalition Agreement of the Federal Government 2011-2014, 1<sup>st</sup> December 2011, p. 134.

32 Coalition Agreement of the Federal Government 2014-2019, 9 October 2014, p. 157.





In the last decade, the federal government has amended the procedure for authorisation to stay on the basis of Art. 9bis Immigration Act on several occasions. These amendments were largely motivated by the political intention to reduce the number of applications for humanitarian regularisation.

In the federal government agreement of 2011, the ambition was put forward to limit the processing times of determination procedures to six months.<sup>(33)</sup> The subsequent agreement of 2014 stated, even more explicitly, that “the necessity to regularise ha[d] to be limited as much as possible through quick procedures and a correct return policy”<sup>(34)</sup>. In terms of concrete measures, the document announced to fight the abuse of parallel procedures,<sup>(35)</sup> and to introduce an application fee for certain residence statuses, including humanitarian regularisation.<sup>(36)</sup>

The intentions put forward in these government agreements were translated in a number of legal amendments to Art. 9bis Immigration Act in the subsequent years. However, the objective to reduce the processing times for regularisation did not result in an official time limit being enshrined in law.

## Legal basis

The principal regulations for authorisation to stay on humanitarian grounds are set

out in **Art. 9bis Immigration Act**, inserted by the Law of 15 September 2006, and in several related provisions contained in this act. Since 2009, the rules of procedure have been modified by the Laws of 29 December 2010, 19 December 2014 and 14 December 2015.

First, the *Law of 29 December 2010* inserted **Art. 9quater** in the Immigration Act.<sup>(37)</sup> This provision stipulates that all applicants for both humanitarian regularisation (Art. 9bis) and medical regularisation (Art. 9ter) are obliged to choose a place of residence in Belgium. Through this provision, the legislator wanted to ensure that the administrative decision can be notified to the applicant. The notification proves that the person concerned has received the decision and has been informed about the possibility to file appeal within a set period of time. The foreign national cannot be removed from the territory if s/he has not received this formal decision.<sup>(38)</sup>

Second, the *Law of 19 December 2014* inserted **Art. 1/1** in the Immigration Act.<sup>(39)</sup> This article states that foreign nationals applying for an authorisation to stay on the basis of Art. 9bis and for certain other statuses need to pay a fee to cover the administrative costs for the processing of the application. The measure was introduced to address the rise in applications for authorisations to stay and to reduce the related workload of the competent authorities.<sup>(40)</sup> Since 2 March 2015, the payment

33 Coalition Agreement of the Federal Government 2011-2014, 1<sup>st</sup> December 2011, p. 134.

34 Coalition Agreement of the Federal Government 2014-2019, 9 October 2014, p. 157.

35 *Id.*, p. 152.

36 *Id.*, p. 156.

37 Law of 29 December 2010 containing various provisions, *Belgian Official Gazette*, 31 December 2010.

38 Belgian House of Representatives, Legislative proposal containing various provisions, 9 December 2010, DOC 53 0771/001, pp. 147-150.

39 Programme Law of 19 December 2014, *Belgian Official Gazette*, 29 December 2014.

40 Belgian House of Representatives, Programme law proposal, 28 November 2014, DOC 54 0672/001, pp. 81-84.



of this administrative fee is one of the criteria of admissibility in the procedure for humanitarian regularisation. Both the general introduction and the exact amount of this “foreigners’ tax” have been subject to debate. In September 2019, two Royal Decrees implementing this provision were annulled by the Council of State (cf. Text box 4).

Third, the Law of 14 December 2015 modified **Art. 9bis** (as well as Art. 9ter). The article now stipulates that the authorities need to assess requests for humanitarian regularisation merely on the basis of the latest application of the same type submitted by the foreign national. The administration thus assumes that when a foreign national submits a new request for an authorisation to stay, s/he withdraws his or her pending application(s).<sup>(41)</sup> The federal legislator adopted this new rule to discourage the use of multiple simultaneous requests and to increase the efficiency of the procedure.<sup>(42)</sup>

Finally, the Law of 18 December 2016 adds integration as general residence requirement for foreign nationals through the new Art. 1/2 Immigration Act.<sup>(43)</sup> On the one hand, this article provides a legal framework for a mandatory “newcomer

declaration”<sup>(44)</sup> to be signed by applicants for a residence status. This requirement, however, has not yet entered into force.<sup>(45)</sup> On the other hand, the provision allows the authorities to end the residence rights of a foreign national in case s/he did not make a reasonable effort to integrate. This last provision entered into force on 26 January 2017.<sup>(46)</sup>

Apart from the general rules in the Immigration Act, more detailed rules of procedure are laid down in the **Royal Decree** of 8 October 1981 implementing the Immigration Act.<sup>(47)</sup>

The Royal Decree of 16 February 2015, entered into force on 2 March 2015,<sup>(48)</sup> described the modalities for collecting the administrative fee and determined the exact amounts of the different fees. For humanitarian regularisation, the fee was initially set at € 215. On 1<sup>st</sup> March 2017, date of the entry into force of the Royal Decree of 14 February 2017,<sup>(49)</sup> the amount of the administrative fee increased from € 215 to € 350. In September 2019, both these Royal Decrees were annulled by the Council of State (cf. Text box 4).

41 Law of 14 December 2015 modifying Articles 9bis and Art. 9ter of the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 30 December 2015.

42 Belgian House of Representatives, Legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals, 10 September 2015, DOC 54 1310/001, pp. 4-7.

43 Law of 18 December 2016 introducing a general residence requirement in the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 8 February 2017.

44 French: *déclaration de primo-arrivant*, Dutch: *nieuwkomersverklaring*.

45 In fact, this provision can only enter into force once a cooperation agreement has been concluded with the three Communities, competent for integration.

46 These requirements do not apply to applicants and beneficiaries of international protection, stateless persons, EU citizens, students and certain other categories of foreign nationals. In addition, minors and seriously ill, legally incapacitated or protected persons are exempted from this requirement.

47 Royal Decree of 8 October 1981 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 27 October 1981 [Royal Decree implementing the Immigration Act].

48 Royal Decree of 16 February 2015 modifying the Royal Decree of 8 October 1981 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 20 February 2015.

49 Royal Decree of 14 February 2017 modifying the Royal Decree of 8 October 1981 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 21 February 2017.

#### TEXT BOX 4: ADMINISTRATIVE FEE

On the basis of Art. 1/1 Immigration Act, the Royal Decree of 16 February 2015 makes a distinction between three categories of foreigners that have to pay application fees of respectively € 215, € 160 and € 60, including a number of exemptions. In its advice to the federal government on the draft Royal Decree<sup>(50)</sup>, the Council of State remarked that this distinction should be duly justified in light of the constitutional principle of equality. As regards the Decree of 14 February 2017 increasing the amount of the fee from € 215 to € 350, the Council of State asked if this standard amount was proportionate to the services offered.<sup>(51)</sup>

The State Secretary for Asylum and Migration noted that the fee had been introduced to cover the administrative costs for the processing of the applications, as explained in the comments preceding the Royal Decree of 2015.<sup>(52)</sup> In the media, he also argued that the revenue of the fees could be invested in extra places in detention centres and in forced returns of foreign nationals.<sup>(53)</sup> In 2017, he observed that the introduction of the fee had had a clearly dissuasive effect on potential applicants for regularisation,<sup>(54)</sup> resulting in a decrease of the number of applications and a reduction of the administrative backlog.<sup>(55)</sup>

In September 2019, the Council of State annulled both the Royal Decree of 16 February 2015 and the Royal Decree of 14 February 2017, judging that the federal government failed to demonstrate sufficiently that the amount of the fee was proportionate to the services offered.<sup>(56)</sup> In practice, the ruling implies that most foreign nationals who applied for regularisation between March 2015 and January 2019 can request a total or partial reimbursement of the amount paid.<sup>(57)</sup> At the time of writing, it is still being discussed whether the rulings by the Council could have a broader impact on recent applications.<sup>(58)</sup> In any case, the Immigration Office continued to require an administrative fee of € 358 into 2020 on the basis of the most recent indexation of the amount.<sup>(59)</sup>

50 Council of State, Advice 57.000/4, 4 February 2015, *Belgian Official Gazette*, 20 February 2015.

51 Council of State, Advice 60.364/4, 28 November 2016, *Belgian Official Gazette*, 21 February 2017.

52 Royal Decree of 16 February 2015 modifying the Royal Decree of 8 October 1981 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 20 February 2015.

53 'Francken mag opbrengst vreemdelingentaks houden', *De Morgen*, 7 April 2015.

54 'Francken maakt verblijfsaanvraag pak duurder', *De Morgen*, 27 January 2017.

55 Policy Note Asylum and Migration 19 October 2017, DOC 54 2708/017, pp. 11, 42. Do note that the fee for applications for an authorisation to stay should be distinguished from a second "foreigners' tax" that can be levied by the municipalities for the issuance of certain residence permits. Since the entry into force of the Royal Decree of 5 March 2017 on 30 March 2017, municipalities can require a fee of up to € 50 for the renewal, extension or replacement of a residence permit for limited duration. A few municipalities have made use of this provision ('Vreemdelingentaks alleen in N-VA-gemeenten', *De Morgen*, 25 October 2017).

56 Council of State, 11 September 2019, n. 245.403 and n. 245.404. If this relation is not proportionate, an administrative fee gets the nature of a tax, in which case the amount should be provided by law and not by Royal Decree.

57 See the forms to request reimbursement for applications filed between 2 March 2015 and 25 June 2016 and between 1st March 2017 and 2 January 2019 published on the website of the Immigration Office: <https://dofi.ibz.be/sites/dvzoe/EN/Application-guides/Pages/Administrative%20fee.aspx>.

58 The annulled Royal Decrees regulated both the exact amounts of the fee and the competences of the Immigration Office, communities and consular posts to take decisions of non-admissibility in case of non-payment of this fee. On the one hand, it should be noted the Council of State did not annul the legal basis for the payment of the fee, nor the three additional Royal Decrees of 8 June 2016, 22 July 2018 and 12 November 2018 reintroducing and indexing the initial amounts. On the other hand, it can be argued that these decrees are equally unlawful, and that the administration is no longer competent to take decisions in this regard (Agentschap Integratie & Inburgering, *Raad van State vernietigt retributie verblijfsaanvragen*, 1st October 2019; *De Standaard*, *Dienst Vreemdelingenzaken blijft illegale taks heffen*, 11 december 2019).

59 Information provided by the Immigration Office on 24 January 2020.



Instructions for the administration have also been published in three **Circulars** dated 21 June 2007,<sup>(60)</sup> 20 February 2008,<sup>(61)</sup> and 23 March 2016.<sup>(62)</sup> In 2009, further instructions on the application of Art. 9bis were issued, one of which was later annulled by the Council of State (cf. Text box 5).

### TEXT BOX 5: CRITERIA FOR HUMANITARIAN REGULARISATION IN 2009

On 19 July 2009, the State Secretary for Asylum and Migration issued an instruction to clarify the grounds on which an authorisation to stay could be granted.<sup>(63)</sup> The document explained that the administration could grant authorisation to stay to foreign nationals because of either:

- a particularly long asylum procedure; or
- “pressing humanitarian situations”, intended as a violation of international human rights treaties in case of removal of the person concerned.

The document also contained a non-exhaustive, illustrative list of pressing humanitarian situations based on administrative practice. The list mentioned a temporary criterion for persons who could demonstrate their durable local integration at the time of issuance of the instruction.<sup>(64)</sup>

The instruction of July 2009 was annulled by the Council of State by the end of the year, among other reasons because the criteria in the instruction should have been approved by the Parliament rather than issued by the Minister.<sup>(65)</sup> The administration nevertheless continued to assess applications on the basis of the criteria mentioned in the annulled instruction by using its discretionary competence.<sup>(66)</sup> In 2011, the Council of State pointed out that the criteria could not be used as legally binding conditions by the Immigration Office.<sup>(67)</sup>

60 Circular of 21 June 2007 regarding the modifications in the regulation regarding the residence of foreign nationals following the entry into force of the Law of 15 September 2006, *Belgian Official Gazette*, 4 July 2007.

61 Circular of 20 February 2008 regarding the regularisation of stay for medical reasons and its impact on the right to social aid, *Belgian Official Gazette*, 14 March 2008.

62 Circular of 23 March 2016 modifying the Circular of 21 June 2007, *Belgian Official Gazette*, 4 April 2016.

63 The instruction of 19 July 2009 was preceded by the instruction of 26 March 2009 regarding the application of Article 9bis Immigration Act.

64 Instruction of 19 July 2009 regarding the application of former Article 9, 3 and Article 9bis of the Immigration Act.

65 Council of State, 9 December 2009, n. 198.769.

66 In 2011, the Council of State confirmed that the criteria for humanitarian regularisation mentioned in the instruction of 2009 were not binding (5 October 2011, n. 215.571). After this ruling, the Immigration Office adapted its statements of reasons in negative decisions. For an analysis of the application of these criteria by the Immigration Office, see Eric Somers, ‘De beoordeling van ‘regularisatie’-aanvragen (art. 9bis Vw.) met criteria uit de instructie van 19 juli 2009 na de Raad van State-rechtspraak: rien ne va plus?’, *Tijdschrift voor Vreemdelingenrecht*, 2013, 3, pp. 210-223. This article has been translated in French as ‘L’évaluation des demandes de “régularisation” (art. 9bis de la loi sur le séjour) selon les critères de l’instruction du 19 juillet 2009 après la jurisprudence du Conseil d’Etat: rien ne va plus?’, *Revue du droit des étrangers*, 2013, 4, pp. 593-608.

67 Council of State, 5 October 2011, n. 215.571.



## 2.2. DETERMINATION PROCEDURE

### Eligibility

Authorisation to stay on the basis of Art. 9bis Immigration Act is granted on a discretionary basis in the event of “exceptional circumstances”<sup>(68)</sup>.

In order to be eligible, a foreign national needs to demonstrate that:

- exceptional circumstances justify that s/he cannot file the application from the Belgian embassy or consulate of his or her place of residence;<sup>(69)</sup> and
- s/he has well-founded reasons to apply for authorisation to stay in Belgium.

Art. 9bis of the Immigration Act does not contain specific criteria nor an exact definition of persons eligible for authorisation to stay. On various occasions, in particular in the period up to 2009, the question has

been raised whether criteria for humanitarian regularisation should be made public and/or set out in law (cf. Text box 6). Until today, stories of young adults and families with minor children in irregular stay cause short-lived discussions on the need to regularise (cf. Text box 7).

The authorities grant authorisation to stay at their discretion and on a case-by-case basis. Though no official eligibility criteria exist, it should be noted that certain parameters may have a positive influence on applications. For instance, in certain situations, well-founded reasons may be constituted by a particularly long asylum procedure or by integration in the Belgian society.<sup>(70)</sup> In recent years, the Immigration Office seems to have granted more authorisations to stay to well-integrated families with school-aged children that have been living in Belgium for several years, or with children born in Belgium.<sup>(71)</sup>

### TEXT BOX 6: DEBATES ON ART. 9BIS CRITERIA

Until today, the criteria for authorisation to stay on the basis of Art. 9bis are undefined in law. Over the years, advocates repeatedly pleaded for the publication of such criteria for the sake of transparency and legal certainty. They urged the federal government to find a solution for foreign nationals who were already well-integrated in society or who had been in irregular stay for several years, due to long waiting periods and procedures to obtain a residence permit.<sup>(72)</sup>

Opponents contended that specific criteria risked to create subjective rights for foreign nationals. They also claimed that such criteria would attract more applicants and would send the wrong message that irregular stay would be rewarded after a certain period of time. Some moreover argued that the situations targeted by Art. 9bis simply cannot be defined in law.<sup>(73)</sup>

68 Art. 9bis Immigration Act, inserted by the Law of 15 September 2006.

69 In September 2019, the CALL ruled that the concept of “exceptional circumstances” could not be narrowed down to Art. 3 ECHR, as there may be other circumstances justifying that the foreign national cannot file the application from abroad (CALL, n. 226.086, 13 September 2019).

70 Luc Denys, *Overzicht van het vreemdelingenrecht*, Heule, Inni Publishers, 2019, p.130-143.

71 Federal Migration Centre Myria, *Migratie in cijfers en in rechten*, July 2019, p. 103-104.

72 See for instance Belgian House of Representatives, Report on the legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals, 4 July 2006, Doc 51 2478/008, pp. 315-318.

73 See for instance Belgian House of Representatives, Legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals, 24 April 2012, DOC 53 2165/001.





## TEXT BOX 7: YOUNG ADULTS AND FAMILIES

Over the last years, several personal stories of migrants facing return to their country of origin have triggered public debates on the question of regularisation. In most of these cases, the discussion centred on the situation of young adults and families with children who had been staying in Belgium for years and seemed to be well-integrated in society.

In 2012, national media first reported on the case of Scott Manyo, a 20-year-old from Cameroun who studied in Belgium and had a strong network in the youth movement of the municipality where he lived.<sup>(74)</sup> Shortly after, the forced returns of the young Afghan men Parwais Sangari and Navid Sharifi led to a series of protests and discussions. Both were rejected asylum-seekers who had been living in Belgium for several years and had been trained in a shortage occupation.<sup>(75)</sup> In both these cases, the Minister for Migration and Asylum refused to use her discretionary power.<sup>(76)</sup>

In recent years, media also focused on attempts to return families with minor children who were either born in Belgium or had arrived at a very young age. Among these the family of Djellza, a 16-year-old girl from Kosovo who had been raised in Belgium since a couple of months after her birth.<sup>(77)</sup> Since 2018, media have also reported extensively on families staying in the new “family units” in detention centres, such as the Armenian couple Khmoyan and their two daughters of eight and two years old.<sup>(78)</sup>

Some organisations and politicians argued for granting these young adults and families with minor children a humanitarian status, saying that a return would be inhuman and contrary to the best interest of the child. In 2012, several political parties supported the legislative proposal for the introduction of a so-called “children’s pardon”, inspired by the original Dutch model of the *kinderpardon*.<sup>(79)</sup> In 2016, the Flemish Commissioner for the Rights of the Child pleaded in favour of a special regime of regularisation for minors who had been staying in Belgium for many years and were well-integrated.<sup>(80)</sup> Until now, however, none of these proposals have been taken up by the federal government.<sup>(81)</sup>

74 ‘Advocaat Kameroense scoutsleider in beroep tegen uitwijzing’, *De Morgen*, 26 April 2012.

75 ‘Parwais Sangari vandaag uitgewezen’, *Knack*, 9 July 2012; ‘Navid, uitgewezen naar land dat hij niet kent’, *De Standaard*, 10 August 2013.

76 ‘Tijd kopen voor Navid Sharifi’, *De Standaard*, 26 September 2013.

77 ‘Als baby naar België, na 16 jaar uitgewezen’, *De Standaard*, 26 August 2016.

78 ‘Armeens gezin uit Borgerhout blijft opgesloten in Steenokkerzeel’, *De Standaard*, 29 January 2019.

79 ‘Groen zet in op ‘kinderpardon’, *De Morgen*, 20 November 2012.

80 Kinderrechtencommissaris, *Kinderpardon*, 26 August 2016.

81 ‘Kinderpardon valt op koude steen’, *De Standaard*, 31 January 2019.



## Access to procedure

Applications for authorisation to stay based on Art. 9bis should be filed **in the territory**. This provision diverges from the general rule according to which authorisation to stay has to be requested from a diplomatic or consular post abroad (cf. *supra*).

The procedure for humanitarian regularisation can be initiated **at all times**, irrespective of other (ongoing or concluded) procedures. If the foreign national has already applied for residence statuses prior to applying for regularisation on the basis of Art. 9bis, however, certain invoked elements may not be taken into account.

The foreign national can apply for a residence permit based on Art. 9bis after having filed a request for *international protection*. In this case, elements related to the 1951 Geneva Convention or subsidiary protection criteria that have already been rejected by the asylum authorities or elements that should have been introduced in the asylum application will be considered non-admissible.<sup>(82)</sup>

During the procedure, the foreign national can also submit an *application 9ter* (cf. Section 3) or a subsequent *application 9bis* based on new elements. Since the entry into force of the Law of 14 December 2015 modifying Art. 9bis and Art. 9ter of the Immigration Act, however, the authorities assess requests merely on the basis of the latest application of the same

type filed by the person concerned.<sup>(83)</sup>

Conversely, if authorisation to stay on the basis of Art. 9bis has not (yet) been granted or has come to an end, the foreign national can submit a request for international protection or apply for other residence statuses.

## Rights during procedure

Unlike applicants for international protection, foreign nationals applying for authorisation to stay for humanitarian reasons do not receive a temporary residence permit during their procedure.

In addition, these persons do not have access to material aid (including accommodation), offered during the international protection procedure. Applicants in the Art. 9bis procedure only have access to urgent medical care.<sup>(84)</sup>

## Outline of procedure

The foreign national has to submit his or her **application** to the **municipality** where he resides.

The applicant needs to choose a *place of residence* in Belgium. If this place changes in the course of the procedure, s/he needs to inform the Immigration Office. If no place has been chosen, it is assumed that the foreign national has chosen the Immi-

82 Art. 9bis, §2, 1° and 2° Immigration Act. The sole exception being elements

83 Belgian House of Representatives, Legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals, 10 September 2015, DOC 54 1310/001, pp. 4-7.

84 Art. 57, §2, 1° Organic Law of 8 July 1976 regarding the Public Social Welfare Centres (PSWC), *Belgian Official Gazette*, 5 August 1976. Urgent medical care can be preventive or curative in nature and can be provided by health care institutions or by outpatient care services. It does not include financial support, housing or other social aid in kind (Art. 1 Royal Decree of 12 December 1996 regarding the urgent medical care provided by Public Social Welfare Centres to foreign nationals in irregular stay, *Belgian Official Gazette*, 31 December 1996).



gration Office as place of residence.<sup>(85)</sup>

The person applying also needs to submit proof of payment of the *administrative fee*.<sup>(86)</sup> As of 1<sup>st</sup> June 2019, the amount of the fee is set at € 358 (indexation of the

amount of € 350 introduced on 1st March 2017). At the time of writing, it is still unclear whether two recent rulings by the Council of State could have an impact on this requirement (cf. Text box 4).

### TEXT BOX 8: EXEMPTION FOR STATELESS PERSONS

*Constitutional Court, n. 18/2018, 22 February 2018*

In February 2018, the Constitutional Court ruled that stateless persons, who have been recognised as such and who cannot obtain a right of residence in another country they have ties with, should be exempted from the requirement to pay an administrative fee in their applications for humanitarian regularisation and other residence statuses. The Court annulled Art. 1/1, §2 of the Immigration Act, inserted by the Programme Law of 19 December 2014, as it does not provide an exemption for this category of persons.

Furthermore, the applicant should submit proof of his or her *exceptional circumstances*. The foreign nationals need to present reasons for his application in the Belgian territory – as opposed to the regular channel from a diplomatic or consular post abroad – and for his request for authorisation to stay.

In most cases, the foreign national also needs to produce *proof of identity*,<sup>(87)</sup> either a national passport (or equivalent travel document) or a national identity card. Expired documents are also accepted.<sup>(88)</sup> Two categories of applicants are exempted from this requirement: asylum-seekers in the asylum procedure and

foreign nationals who can demonstrate that it is impossible to obtain identity documents from Belgium.<sup>(89)</sup>

The municipality collects the above mentioned documents and conducts a *residence check* within ten days of the date the application was lodged.<sup>(90)</sup>

If the residence check reveals that s/he does not stay on the territory of the municipality, his or her application is not taken into consideration. The municipality notifies this decision to the applicant.<sup>(91)</sup>

If the residence check confirms that s/he stays on the territory of the municipality, the municipality sends the file to the **Immi-**

85 Art. 9quater Immigration Act, inserted by the Law of 29 December 2010.

86 The requirement to pay a fee to cover the administrative costs has been inserted by the Programme Law of 19 December 2014.

87 Art. 9bis, §1, first paragraph Immigration Act.

88 Circular of 21 June 2007.

89 Art. 9bis, §1, second paragraph Immigration Act.

90 Circular of 21 June 2007.

91 Art. 26/2/1, §2, second paragraph Royal Decree implementing the Immigration Act.



**gration Office** for further **examination**.<sup>(92)</sup> The Office grants or refuses authorisation to stay on a discretionary basis.

The *exceptional circumstances* justifying the application on the territory are assessed on an individual basis. The foreign national needs to demonstrate that it was impossible or particularly difficult to return to his or her country of origin or country of legal residence to apply for authorisation to stay. Long-time residence in Belgium and durable integration in the Belgian society do not constitute exceptional circumstances.<sup>(93)</sup>

The Immigration Office first assesses if the application is *admissible*. The Office can take a decision of non-admissibility if:

- no exceptional circumstances are present;<sup>(94)</sup> or
- no identity documents have been submitted or no reasons for the absence of these documents have been given;<sup>(95)</sup> or
- no new elements have been invoked;<sup>(96)</sup> or
- no proof of payment of the administrative fee has been submitted.<sup>(97)</sup>

In these cases, the Office takes a decision of non-admissibility and may also issue an order to leave the territory.<sup>(98)</sup>

Furthermore, an application for authorisation to stay on the basis of Art. 9bis Immigration Act can be declared *without purpose*, for instance when the applicant already obtained a valid residence permit, left the Schengen area, returned to his or her country of origin or passed away. The Immigration Office can also take such decision on the basis of an earlier entry ban (cf. Text box 9).<sup>(99)</sup>

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92 Art. 26/2/1, §2, first paragraph Royal Decree implementing the Immigration Act.

93 Circular of 21 June 2007.

94 Ibid.

95 Ibid.

96 Art. 9bis, §2 Immigration Act.

97 Art. 1/1, §1 Immigration Act. The requirement to pay this fee is currently under discussion (cf. Text box 4).

98 Art. 26/2/1, §3, second paragraph Royal Decree implementing the Immigration Act.

99 Art. 74/11, §3, second paragraph Immigration Act.



## TEXT BOX 9: ENTRY BAN AS GROUND FOR REFUSAL

CJEU, n. C-225/16, 26 July 2017, *Ouhrami*

In the *Ouhrami* case, the Court of Justice of the European Union (CJEU) ruled that an entry ban only takes effect at the moment of the foreign national's departure from the territory. In a series of national cases in 2017-2018,<sup>(100)</sup> the Council for Alien Law Litigation (CALL) and the Council of State referred to this ruling by the CJEU, concluding that the Immigration Office could not reject an application for the mere reason that the applicant had not respected a previously imposed entry ban.<sup>(101)</sup> In a reinterpretation of the case in 2019, however, the Council of State remarked that the CJEU never concluded that the existence of an entry ban could not be taken into consideration as such.<sup>(102)</sup> Since this last ruling, the Immigration Office once again may declare an application “without purpose” if the foreign national has been subject to an entry ban of more than three years at the moment of the introduction of the application.<sup>(103)</sup>

If the application has been declared admissible, the Immigration Office assesses the file on its merits. If the application is considered to be unfounded, the Office issues a decision of refusal of residence with an order to leave the territory.<sup>(104)</sup> If the application is considered to be well-founded, the Office grants authorisation to stay.

The final decision of the Immigration Office is notified to the applicant in person or sent to his or her chosen place of residence. In general, the **notification** takes place by registered letter or courier. If the applicant has chosen his or her lawyer's office as place of residence, the decision is sent by fax.<sup>(105)</sup>

If the applicant has been authorised to stay, the municipality invites the foreign national to collect a temporary certificate.<sup>(106)</sup> The municipality registers his or her personal data in the foreigners register, part of the national register, and issues a **residence permit** (cf. Content of protection).<sup>(107)</sup>

There are no legal time limits for the determination procedure, but the Immigration Office should take a decision within a reasonable period of time.

100 See for instance CALL, n. 195.139, 16 November 2017.

101 Federal Migration Centre Myria, *Migratie in cijfers en in rechten*, July 2019, p. 105.

102 Council of State, n. 245.654, 7 October 2019.

103 Information provided by the Immigration Office on 24 January 2020.

104 Art. 26/2/1, §5, last paragraph Royal Decree implementing the Immigration Act.

105 Art. 62, §3, second paragraph Immigration Act, inserted by the Law of 24 February 2017 modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals.

106 Art. 119 Royal Decree implementing the Immigration Act.

107 Art. 12 Immigration Act.



## Appeal procedure

In case of refusal of authorisation to stay, the applicant can lodge an appeal before the federal administrative court Council for Alien Law Litigation (CALL).<sup>(108)</sup>

The CALL only verifies the legality of the administrative decision and then either dismisses the appeal or annuls the decision. Its competences are thus more restricted than in the appeal procedure for international protection, in which the Council can reassess the file and can confirm, annul or reform the decision by the CGRS.<sup>(109)</sup>

Unlike the appeal procedure for applicants for international protection, the appeal before the CALL moreover does not have an automatic suspensive effect. To request suspension of removal measures, the foreign national needs to lodge a separate appeal in the same petition.<sup>(110)</sup>

There are no legal time limits for the appeal decision. The CALL, however, should take a decision within a reasonable period of time.<sup>(111)</sup>

Against a judgment by the CALL, both the foreign national and the Immigration Office can lodge an appeal on points of law (cassation) before the Council of State.<sup>(112)</sup>

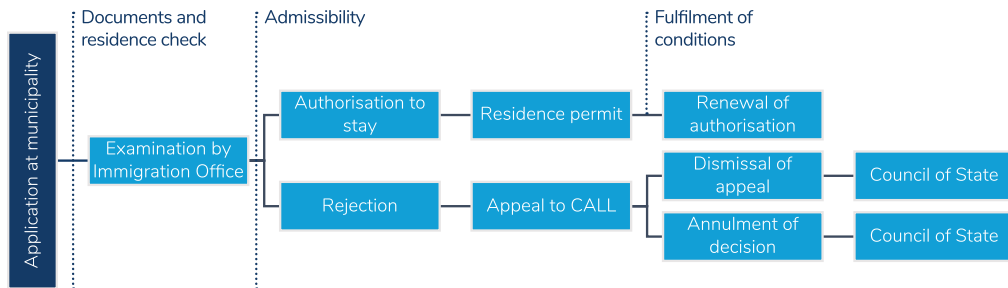


Figure 1: Application procedure for authorisation to stay for humanitarian reasons

## 2.3. CONTENT OF PROTECTION

### Residence permit

The foreign national authorised to stay on the basis of Art. 9bis receives a residence permit for limited duration (A-card) or unlimited duration (B-card). The length of authorised stay is determined by the Im-

migration Office on a discretionary basis and is mentioned in the decision. In most cases, the authorisation and residence permit are valid for **one year**.

The foreign national needs to apply for **renewal** of the first residence permit to his or her municipality between 45 and 30 days before the date of its expiry.<sup>(113)</sup> The

108 Art. 39/2, §2 Immigration Act.

109 Art. 39/2, §2 Immigration Act. This procedure is known as "unlimited jurisdiction" (French: *plein contentieux*, Dutch: *volle rechtsmacht*).

110 Art. 39/82 Immigration Act.

111 In 2019, the CALL was ordered to pay damages to a foreign national in the Art. 9bis appeal procedure, as it had failed to take a decision within a reasonable period of time (Court of First Instance Brussels, n. 18/3437/A, 28 March 2019).

112 Art. 39/67 Immigration Act.

113 Art. 33 Royal Decree implementing the Immigration Act.



applicant has to submit evidence proving that s/he fulfils the individual conditions set by the Immigration Office or giving valid reasons for his or her failure to meet these conditions.<sup>(114)</sup> On the basis of both this individual evidence and the general integration efforts of the applicant,<sup>(115)</sup> the Immigration Office takes a decision and, the case being, determines the duration of the subsequent authorisation to stay at its discretion. In most cases, the authorisation and residence permit are once again valid for one year.

Residence permits for **unlimited duration** are granted on a discretionary basis to foreign nationals authorised to stay for humanitarian reasons. In practice, the Immigration Office grants these permits five years after the first authorisation to stay at the earliest.

In contrast to foreign nationals authorised to stay for humanitarian reasons, refugees and beneficiaries of subsidiary protection receive residence permits respectively valid for five years and two years (after a first permit valid for one year).<sup>(116)</sup> Beneficiaries of international protection moreover do not have to meet specific criteria to renew their residence permit and are entitled to a permit for unlimited duration after five years of residence.<sup>(117)</sup>

## Family reunification<sup>(118)</sup>

The partner, minor children or adult dependent children of the foreign national authorised to stay for humanitarian reasons have a right to family reunification.<sup>(119)</sup>

As sponsor of family reunification, the foreign national needs to guarantee several material requirements. S/he must have accommodation suitable to the size of the family and have health insurance. In addition, s/he needs to have sufficient, stable and regular resources. The threshold of sufficient income is set at 120% of the integration income.<sup>(120)</sup>

In contrast to beneficiaries of international protection, foreign nationals authorised to stay do not enjoy a grace period of one year during which no material conditions are required.<sup>(121)</sup>

The family members obtain a residence permit of limited duration (A-card), the validity of which depends on the validity of the sponsor's residence permit.<sup>(122)</sup>

## Travel document

To apply for a travel document, the foreign national authorised to stay on the basis of Art. 9bis needs to hold a residence permit for unlimited duration and needs to prove

114 Art. 13, §3, 2° Immigration Act.

115 Art. 1/2, §3 Immigration Act, inserted by the Law of 18 December 2016. To assess these integration efforts, the Immigration Office takes into account, *inter alia*, the attendance of integration courses, professional and/or educational activities, language knowledge and participation in associations. Initially, this non-exhaustive list of evaluation criteria also included the criminal past of the applicant. In 2018, however, the Constitutional Court annulled this last element, ruling that its broad scope was not proportionate to the objective of integration and participation (4 October 2018, n. 126/2018).

116 Art. 49, §1, second paragraph and Art. 49/2, §2 Immigration Act.

117 Art. 49, §1, third paragraph and Art. 49/2, §3 Immigration Act.

118 For an in-depth analysis, see the EMN Study on 'Family Reunification with Third Country National Sponsors in Belgium', July 2017.

119 Art. 10, §1, 4-6° Immigration Act.

120 French: *revenu d'intégration*, Dutch: *leefloon*. See Art. 10, §5 Immigration Act.

121 Art. 10, §2 Immigration Act and Art. 10bis, §2 Immigration Act.

122 Art. 13, §2 Immigration Act.





that s/he does not hold, and cannot obtain, a national passport.<sup>(123)</sup> The special travel document with red cover is valid for two years.<sup>(124)</sup>

Beneficiaries of subsidiary protection can apply for the same type of travel document with red cover, but are exempted from the requirement to hold a residence permit for unlimited duration. Refugees do not have to meet specific criteria and are granted a travel document with blue cover.<sup>(125)</sup>

### Socioeconomic rights

Foreign nationals authorised to stay on the basis of Art. 9bis enjoy conditions comparable to those of beneficiaries of international protection with regard to health care, education, integration and employment.

As other foreign nationals authorised to stay in Belgium, the person authorised to stay on the basis of Art. 9bis has access to the mainstream **health care** services.<sup>(126)</sup>

Like other foreign nationals in regular stay, s/he also has access to the **civic integration** courses organised by the Community

or Region.<sup>(127)</sup> The federated entities have introduced a mandatory integration trajectory for third-country nationals holding a residence permit valid for more than three months. These programmes consist of a basic language course (of respectively Dutch, French, and German) and a social orientation course.<sup>(128)</sup>

Furthermore, s/he has access to the **education systems** provided by the Communities and can participate in internships and vocational trainings organised by the employment service of the competent Region, that is VDAB (in Flanders), Forem (in Wallonia) or Actiris (in Brussels Capital Region).<sup>(129)</sup>

The foreign national authorised to stay is also exempted from the requirement to hold a work permit in order to access the **labour market**.<sup>(130)</sup> Like other foreign nationals holding a residence permit, s/he also has access to the procedures for recognition of qualifications, be they degrees or professional skills. The procedures for recognition are organised by the Communities.<sup>(131)</sup>

However, in terms of social security and social assistance, foreign nationals au-

123 Art. 60 Consular Code of 21 December 2013, *Belgian Official Gazette*, 21 January 2014.

124 Art. 57, 3° Consular Code of 21 December 2013.

125 Circular of 15 September 2017 on travel documents for non-Belgians.

126 EMN Study on 'Migrant Access to Social Security: Policy and Practice in Belgium', March 2014, pp. 10-11.

127 Civic integration of foreign nationals is a competence of the Communities. In the French Community, this competence is exercised by the Walloon Region and the French Community Commission COCOF (*Commission communautaire française*) of Brussels Capital Region.

128 Decree of the Flemish Government of 7 June 2013 regarding the Flemish integration policy, *Belgian Official Gazette*, 26 July 2013; Decree of the German-speaking Community of 11 December 2017 regarding integration and coexistence in diversity, *Belgian Official Gazette*, 20 December 2017. For the French Community, see the Decree of the Walloon Region of 8 November 2018 modifying book II of the second part of the Walloon Code on Social Action and Health pertaining to the integration of foreigners and persons of foreign origin, *Belgian Official Gazette*, 7 December 2018; the Decree of the French Community Commission of 18 July 2013 regarding the integration trajectory for newcomers in Brussels Capital Region, *Belgian Official Gazette*, 18 September 2013; and the Ordinance of the Common Community Commission of 11 May 2017 regarding the integration trajectory of newcomers, *Belgian Official Gazette*, 30 May 2017. Please note that the ordinance of 2017 introducing a mandatory integration programme in Brussels has not yet entered into force.

129 EMN Study on 'Labour Market Integration of Third-Country Nationals in Belgium', September 2018, pp. 42-43.

130 Art. 10, 4° of the Royal Decree of 2 September 2018 regarding the implementation of the Law of 9 May 2018 regarding the employment of foreign nationals who find themselves in a particular residence situation.

131 EMN Study on 'Labour Market Integration of Third-Country Nationals in Belgium', September 2018, pp. 43-46.



thorised to stay on humanitarian grounds may enjoy less favourable conditions than beneficiaries of international protection.

The foreign national authorised to stay on the basis of Art. 9bis is entitled to the standard **social security** benefits provided that s/he fulfils the general eligibility criteria. S/he thus has access to unemployment benefits, retirement pensions, health care and other work-related benefits. Depending on his or her nationality, the foreign national may nonetheless face stricter rules with regard to the contribution periods requested and the exportability of pensions. These restrictions do not apply

to refugees.<sup>(132)</sup>

The beneficiary also has access to certain forms of **social assistance**, such as social aid. Until recently, certain foreign nationals authorised to stay on the basis of Art. 9bis did not have a right to social aid.<sup>(133)</sup> In 2017, this exception was annulled by the Constitutional Court (cf. Text box 10). By contrast, the foreign national authorised to stay is not entitled to social integration, i.e. employment and integration income. Refugees and beneficiaries of subsidiary protection do have access to social integration.<sup>(134)</sup>

### TEXT BOX 10: RIGHT TO SOCIAL AID

Constitutional Court, n. 61/2017, 18 May 2017

The 2014 EMN Study on ‘Migrant Access to Social Security’ noted that foreign nationals who had been authorised to stay during the 2009-2010 “regularisation campaign” (cf. Text box 3) on the basis of a work permit or a professional card did not have a right to social aid.<sup>(135)</sup> This exception was introduced by the Programme Law of 28 June 2013.<sup>(136)</sup>

In 2017, this provision was annulled by the Constitutional Court. The Court argued that the deterioration of socioeconomic rights of this particular category of foreign nationals could not be justified by reasons of public interest.

## Citizenship

In Belgium, the acquisition of citizenship does not depend on the type of residence status, but on the duration of legal stay and the specific situation of the foreign national. In order to acquire citizenship, most foreign nationals need to have resided in

Belgium on the basis of legal stay for at least five years and need to meet several other criteria, such as social integration, language knowledge and economic integration.<sup>(137)</sup> The general conditions and exceptions are discussed in the upcoming EMN Study on ‘Pathways to Citizenship’.

132 EMN Study on ‘Migrant Access to Social Security: Policy and Practice in Belgium’, March 2014, pp. 37-42.

133 French: *aide sociale*, Dutch: *maatschappelijke dienstverlening*.

134 Art. 3, 3° Law of 26 May 2002 regarding the right to social integration.

135 EMN Study on ‘Migrant Access to Social Security: Policy and Practice in Belgium’, March 2014, p. 33.

136 Art. 57sexies Organic Law of 8 July 1976 regarding the PSWC, inserted by the Programme Law of 28 June 2013.

137 Art. 12bis Belgian Nationality Code of 28 June 1984, *Belgian Official Gazette*, 12 July 1984.



## End of protection

For various reasons, the Immigration Office can decide to end the authorisation to stay on the basis of Art. 9bis (and other types of authorisation to stay) and issue an order to leave the territory.

First, the authorisation to stay ends when the Immigration Office **refuses to extend** the authorisation to stay previously granted, for instance because the applicant failed to meet the required criteria (cf. supra). In these cases, the Immigration Office can also issue an order to leave the territory.<sup>(138)</sup>

Second, the foreign national authorised to stay can lose his or her status if it results that the authorisation has been **fraudulently acquired**. The Immigration Office can revoke the authorisation to stay and issue an order to leave the territory if s/he has used false or misleading information or false or falsified documents, or if s/he has committed fraud or has used other irregular means in order to obtain the authorisation to stay. In its decision process, the Immigration Office needs to take into account the nature and solidity of the family relationships of the person concerned, the duration of his or her stay in the territory and the existence of family, cultural and social ties with his or her country of origin.<sup>(139)</sup>

Third, the authorisation to stay can be revoked for reasons of **public order** and **national security**.<sup>(140)</sup> After at least ten years of authorised and uninterrupted stay, the

Immigration Office needs to invoke serious reasons of public order and national security to revoke the authorisation.<sup>(141)</sup> Decisions to end residence rights for these reasons should be based solely on the personal behaviour of the foreign national and not on economic grounds.<sup>(142)</sup>

The above mentioned rules apply to various categories of foreign nationals authorised to stay in Belgium. For refugees and beneficiaries of subsidiary protection, special rules apply. The residence rights of beneficiaries of international protection can only be ended once the protection status itself has been revoked or ended by the CGRS. Revocation and cessation can take place on the basis of specific grounds listed in the 1951 Geneva Convention and the Immigration Act.<sup>(143)</sup>

## 2.4. FIGURES

In 2010, after the ministerial instruction on regularisation, more than 30 000 applications for authorisation to stay on the basis of Art. 9bis were filed, and more than 10 000 positive decisions were issued. In more recent years, applications for humanitarian regularisation have become less important in quantitative terms.

In the first years after the regularisation campaign, still more than 8 000 applications for this type of authorisation to stay were submitted each year. This number started declining after the introduction of the administrative fee in 2014 and reached a historic low in 2017, with only

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138 Art. 13, §3, 2° Immigration Act.

139 Art. 74/20 Immigration Act.

140 Art. 21 Immigration Act.

141 Art. 22 Immigration Act.

142 Art. 23, §1 Immigration Act.

143 Art. 55/3, 55/3/1 and Art. 55/5, 55/5/1 Immigration Act.

about 2 500 applications. The annual number of applications rose once again to more than 4 000 in 2019 (cf. Figure 2),

but remained much lower than the 27 460 first requests for international protection that same year.<sup>(144)</sup>

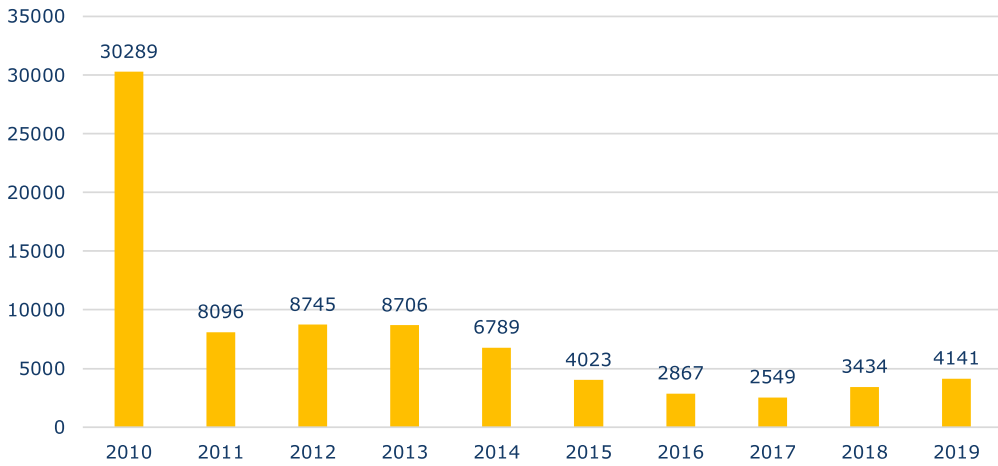


Figure 2: Applications for authorisation to stay on the basis of Art. 9bis Immigration Act (data source: Immigration Office)

The figures on authorisations to stay form a comparable pattern: from a first decline from about 10 000 positive decisions in 2010 to less than 700 in 2016, to an in-

crease to more than 1 600 in 2019. An authorisation to stay may – and in practice often does – apply to more than one person (cf. Figure 3).

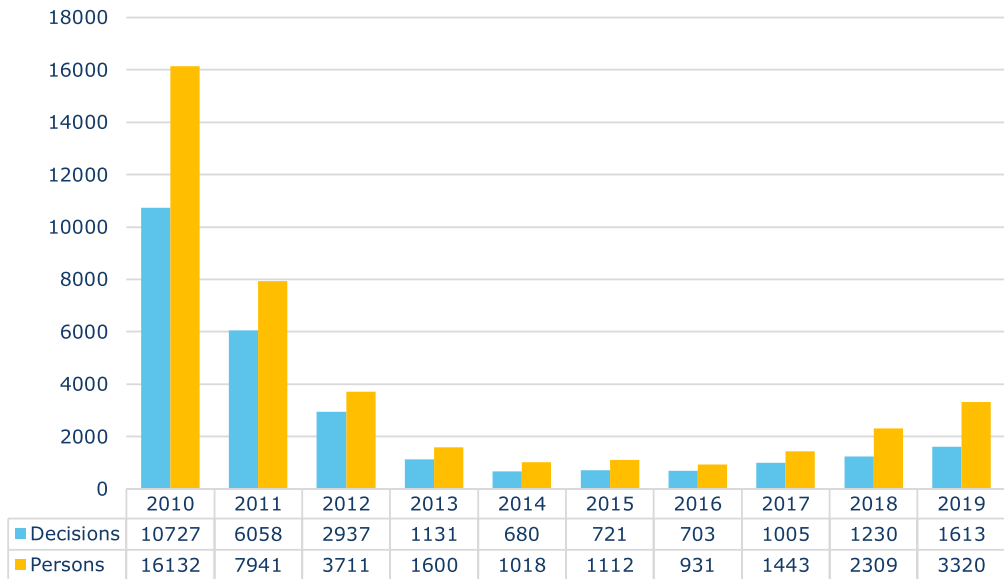


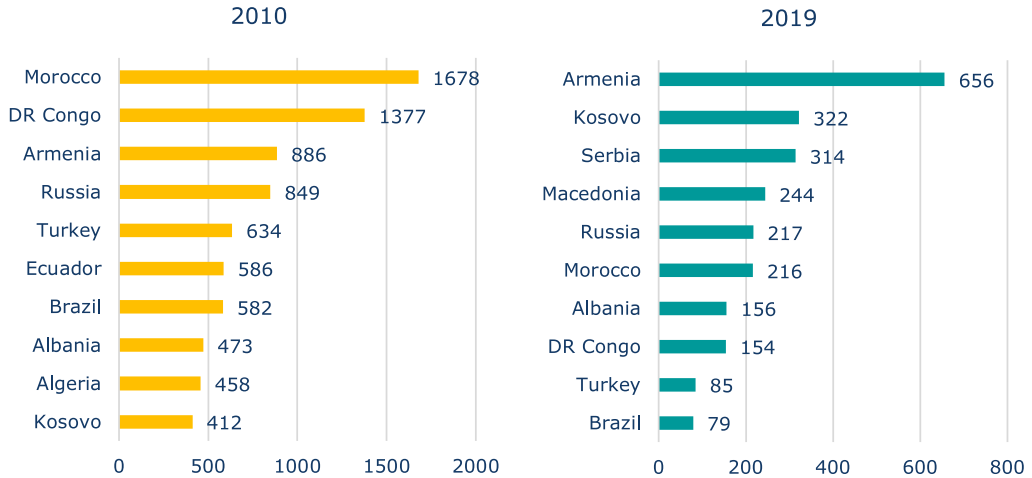
Figure 3: First authorisations to stay granted on the basis of Art. 9bis for limited duration (A-card) and unlimited duration (B-card) in number of files (data source: Immigration Office)

<sup>144</sup> 2019 Eurostat data on “Asylum and first time asylum applicants”.



Many of the persons granted authorisation to stay for humanitarian reasons between 2010 and 2019 held the Moroccan or Congolese nationality, with respectively 5 238 and 3 189 positive decisions. Other important nationalities registered in the previous decade include Algeria, Armenia, Brazil, China, Ecuador, Pakistan and Tur-

key, and more recently Russia, Guinea, Cameroon, Serbia, Albania, Kosovo and Macedonia (cf. Figures 4 and 5).<sup>145</sup> There are no data available on the gender or age of these persons.



Figures 4 and 5: Top nationalities of persons granted authorisation to stay on the basis of Art. 9bis in 2010 and 2019 (data source: Immigration Office)

145 Data source: Immigration Office.











03

# AUTHORISATION TO STAY FOR MEDICAL REASONS



In addition to the earlier described humanitarian regularisation, authorisation to stay can also be granted to seriously ill foreign nationals already residing in Belgium at the time of the application. A serious illness is an illness occasioning either a real risk to the applicant's life or physical integrity or a real risk of inhuman or degrading treatment when there is no adequate treatment in the country of origin or habitual residence. The procedure for this "medical regularisation" clearly differs from the general procedure for regularisation, while persons authorised to stay for medical reasons enjoy slightly more favourable conditions than foreign nationals authorised to stay for humanitarian reasons.

### 3.1. POLICY AND LEGAL BACKGROUND

#### Rationale of status

Until 2006, no separate procedure for authorisation to stay for medical reasons existed. Seriously ill foreign nationals could instead apply for authorisation to stay for humanitarian reasons, at the time based on Art. 9, third paragraph (cf. Section 2).

In 2006, the federal legislator established a special procedure for this particular category of foreigners in need of protection.<sup>(146)</sup> The Law of 15 September 2006 inserted Art. 9ter in the Immigration Act, apart from the procedure for "humanitarian regularisation" provided by Art. 9bis (replacing old Art. 9, third paragraph). Through this "medical regularisation", the government

intended to provide legal certainty to seriously ill foreign nationals lacking adequate medical treatment in their country of origin.<sup>(147)</sup>

According to the explanatory memorandum to the legislative proposal, foreign nationals suffering from a serious illness fall within the scope of application of subsidiary protection as described in Art. 15(b) of the EU Qualification Directive.<sup>(148)</sup> The legislator nevertheless argued that applications by these foreign nationals should be treated outside the regular asylum procedure considering that:

- the national asylum services did not have the required competences to assess the medical situation of a foreign national or the medical facilities in the country of origin or habitual residence;
- the asylum procedure was deemed not suitable for urgent medical cases;
- on a budgetary level, such a special procedure would have required additional investments for medical experts, COI research and case-by-case assessments.

In 2014, the Court of Justice of the European Union ruled that medical regularisation did not constitute an application for subsidiary protection (cf. Text box 11).

146 Law of 15 September 2006 modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 6 October 2006.

147 Belgian House of Representatives, Legislative proposal modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, 10 May 2006, Doc 51 2478/001, pp. 5-12, 34-36.

148 Art. 15(b) Council Directive 2004/83/EC of 29 April 2004. The directive has been recast in 2011 (cf. Introduction).



### TEXT BOX 11: SCOPE OF SUBSIDIARY PROTECTION

*CJEU, n. C-542/13, 18 December 2014, Mohamed M'Bodj v Etat belge*

*CJEU, n. C-562/13, 18 December 2014, CPAS d'Ottignies v Moussa Abdida*

Art. 3 ECHR and Art. 15(b) of the EU Qualification Directive both refer to the prohibition of “torture and inhuman or degrading treatment or punishment”. In *M'Bodj* and *Abdida*, two landmark cases involving the Belgian State, the CJEU ruled that certain situations, for instance those of seriously ill foreign nationals lacking adequate treatment in their country of origin, fell within the scope of Art. 3 ECHR, yet outside the scope of “serious harm” described in Art. 15(b) of the Directive. As a consequence, the national procedure of Art. 9ter did not have to meet the minimum standards described in the directive.<sup>(149)</sup>

In 2014, the federal government agreed to “decouple” medical regularisation from the procedure for international protection,<sup>(150)</sup> i.e. to modify the provisions on identification, exclusion and unrestricted residence five years after submission of the application.<sup>(151)</sup> At the time of writing, the Immigration Act had not yet been amended on these points. In February 2020, however, the Immigration Office decided to limit the validity of renewed residence permits in the Art. 9ter procedure from two years – the period provided for beneficiaries of subsidiary protection<sup>(152)</sup> – to only one year, a measure not requiring any amendments to the Immigration Act.<sup>(153)</sup>

### Recent developments

In recent years, several measures were taken to restrict authorisations to stay for medical reasons. In December 2011, the federal government announced that it would “discourage the misuse of applications for residence permits for medical reasons as much as possible”, taking measures to prevent that undeserving applications would be lodged and granted. By reducing the number of applications, the government argued, the cases of seriously ill persons in need of protection could be

examined within a reasonable period of time.<sup>(154)</sup> The 2014 government agreed to step up the fight against false medical certificates.<sup>(155)</sup>

The various restrictions in law and practice raised serious concerns among professionals and organisations over the last years. In 2015, a group of physicians, lawyers and social workers produced a white paper asking for the proper application of the law and respect for human rights in the Art. 9ter procedure.<sup>(156)</sup> In 2016, the Belgian Advisory Committee on Bioeth-

149 Bob Brijs, '9ter Vw. in therapie bij het Hof van Justitie: gevolgen voor de Belgische rechtspraak', *Tijdschrift voor Vreemdelingenrecht*, 2015, 4, pp. 246-257.

150 Coalition Agreement of the Federal Government 2014-2019, 9 October 2014, p. 153.

151 Information provided by the Immigration Office, 3 July 2019.

152 Art. 49/2, §2 Immigration Act.

153 Information provided by the Immigration Office on 9 March 2020.

154 Coalition Agreement of the Federal Government 2011-2014, 1<sup>st</sup> December 2011, p. 135.

155 Coalition Agreement of the Federal Government, 9 October 2014, p. 157.

156 *Witboek over de machtiging tot verblijf om medische redenen (9ter). Voor een toepassing van de wet met respect voor de mensenrechten van ernstig zieke vreemdelingen*, October 2015.



ics issued a critical opinion regarding the problems faced by foreign nationals with medical and psychological problems in Belgium.<sup>(157)</sup> Shortly after, the Federal Ombudsman published a critical review report about the functioning of the 9ter department within the Immigration Office.<sup>(158)</sup> After the publication of this last report, a number of hearings with government officials and expert organisations were held in the federal parliament.<sup>(159)</sup> In the same period, the independent Federal Migration Centre Myria advised the Chamber of Representatives to strengthen the fundamental rights of seriously ill foreign nationals by modifying the Immigration Act.<sup>(160)</sup> The points raised by these various stakeholders will be discussed throughout this study.

## Legal basis

The essential elements related to authorisation to stay on medical grounds are set out in **Art. 9ter Immigration Act** and in a number of other provisions contained in this act. Stricter rules have been inserted by the Laws of 29 December 2010, 8 January 2012 and 14 December 2015.

Following a ruling by the Constitutional Court, the Law of 29 December 2010 established a list of alternative criteria to prove the identity of the applicant (cf. Text box 12). This act also modified certain procedural aspects, including the obligation to choose a place of residence in the territory (Art. 9quater), the requirement to send the application by registered letter and the use of a standard medical certificate.

### TEXT BOX 12: PROOF OF IDENTITY

Constitutional Court, n. 193/2009, 26 November 2009

Art. 9ter initially required the applicant of medical regularisation to produce an identity document in conformity with the requirement in the Art. 9bis procedure (cf. Section 2). The Constitutional Court ruled that this provision created an unequal treatment between applicants for Art. 9ter and applicants for subsidiary protection that goes beyond what is strictly necessary.<sup>(161)</sup> After this judgment, the legislator adopted a list of alternative criteria to prove the identity of the applicant in the Law of 29 December 2010.<sup>(162)</sup>

The Law of 8 January 2012 further tightened the procedure for medical regularisations by introducing a series of measures, including the “medical filter” (cf. Text box

13). By means of this new instrument, an application can be declared non-admissible if the invoked illness manifestly does not correspond to a “serious illness”

157 Belgian Advisory Committee on Bioethics, Opinion No. 65 of 9 May 2016 concerning the issue of immigrants with medical problems, including serious psychiatric ones.

158 Federal Ombudsman, *Medische regularisatie. Werking van de afdeling 9ter bij de Dienst Vreemdelingenzaken*, 2016.

159 Belgian House of Representatives, Report of the hearings on medical regularisation, 6 April 2017, DOC 54 2408/001.

160 Federal Migration Centre Myria, *Hoe de grondrechten van ernstig zieke vreemdelingen beter garanderen?*, Advice on legislative proposal n. 1885/01, 6 December 2016, pp. 4-7.

161 EMN Study on 'EU and Non-EU Harmonised Protection Statuses in Belgium', May 2011 (update), pp. 43-44.

162 Belgian House of Representatives, Legislative proposal containing various provisions, 9 December 2010, DOC 53 0771/001 pp. 145-146.



in the sense of Art. 9ter. Apart from this provision, the amended law now requires the applicant to submit a standard medical certificate that is not older than three months, as well as all useful and recent information about his or her illness.<sup>(163)</sup> The law moreover introduced new technical grounds for negative decisions. First, an application can be refused if the foreign

national has not replied to an invitation by the Immigration Office without offering a valid reason for his or her absence within 15 days, similar to the international protection procedure.<sup>(164)</sup> Second, an application can be declared devoid of purpose if the applicant has obtained an authorisation to stay for an unlimited period on another basis.<sup>(165)</sup>

### TEXT BOX 13: THE MEDICAL FILTER

Since 2012, an application for medical regularisation can be declared non-admissible for both formal and medical reasons. The provision regarding the “medical filter” stipulates that the medical officer should be consulted in this very first stage of the determination procedure so that manifestly unfounded applications can immediately be rejected. The federal government introduced this additional threshold to combat the frequent misuse of the procedure.<sup>(166)</sup> During the parliamentary hearings five years later, a medical officer of the Art. 9ter department of the Immigration Office observed that the general quality of applications had significantly improved since the introduction of the filter.<sup>(167)</sup>

During his review of the department, the Federal Ombudsman nevertheless noted that this mechanism did not guarantee a homogenous application of the concept of an “illness manifestly not corresponding to a serious illness” by the competent medical officers. To prevent arbitrariness, he recommended the authorities to elaborate common standards and evaluation criteria defining the scope of the term.<sup>(168)</sup> The Immigration Office replied that the establishment of a list of illnesses should be avoided, as such list would never be exhaustive, would compromise the medical autonomy of the officers and would not allow to take into consideration the individual situation of each applicant.<sup>(169)</sup>

Lastly, according to the new provision inserted by the *Law of 14 December 2015* modifying Art. 9bis and Art. 9ter, the competent authorities assess requests merely on the basis of the latest application of the

same type submitted by the foreign national.

Detailed rules of procedure for authorisation to stay on medical grounds are de-

163 Immigration Act.9ter, §1, third and fourth paragraph, inserted by the Law of 14 December 2015.

164 Immigration Act.9ter, §1/1, inserted by the Law of 14 December 2015.

165 Immigration Act.9ter, §7. On various occasions, the administrative courts ruled that foreign nationals with temporary residence rights, for instance as a student or on the basis of Art. 9bis, should have access to the procedure for medical regularisation (see for instance Council of State, n. 233.168, 8 December 2015; CALL, n. 205.182, 12 June 2018).

166 Belgian House of Representatives, Legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals, 19 October 2011, DOC 53 1824/001.

167 Belgian House of Representatives, Report of the hearings on medical regularisation, p. 49.

168 Federal Ombudsman, *Medische regularisatie*, p. 25, 58.

169 Remarks by the Immigration Office, published at p. 73 of the report by the Federal Ombudsman.





scribed in the **Royal Decree** implementing the Immigration Act and in the Royal Decree of 17 May 2007,<sup>(170)</sup> modified by the Royal Decree of 24 January 2011.<sup>(171)</sup>

The **Circulars** dated 21 June 2007,<sup>(172)</sup> 20 February 2008,<sup>(173)</sup> and 23 March 2016<sup>(174)</sup> clarify the administrative steps to be respected by the Immigration Office and the municipalities.

## 3.2. DETERMINATION PROCEDURE

### Eligibility

Art. 9ter Immigration Act provides that foreign nationals applying for authorisation to stay for medical reasons need to:

- reside in Belgium at the time of the application; and
- suffer from a serious illness.

A serious illness is defined as an illness occasioning either a real risk to the applicant's life or physical integrity or a real risk of inhuman or degrading treatment when there is no adequate treatment in the country of origin or habitual residence.<sup>(175)</sup> According to national case law, the scope of Art. 9ter is broader than the obligation of *non-refoulement* contained in Art. 3 ECHR (cf. Text box 14).

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170 Royal Decree of 17 May 2007 establishing the modalities of execution of the Law of 15 September 2006, *Belgian Official Gazette*, 31 May 2007.

171 Royal Decree of 24 January 2011 modifying the Royal Decree of 24 January 2011 establishing the modalities of execution of the Law of 15 September 2006, *Belgian Official Gazette*, 28 January 2011.

172 Circular of 21 June 2007 regarding the modifications in the regulation regarding the residence of foreign nationals following the entry into force of the Law of 15 September 2006, *Belgian Official Gazette*, 4 July 2007.

173 Circular of 20 February 2008 regarding the regularisation of stay for medical reasons and its impact on the right to social aid, *Belgian Official Gazette*, 14 March 2008.

174 Circular of 23 March 2016 modifying the Circular of 21 June 2007, *Belgian Official Gazette*, 4 April 2016.

175 Art. 9ter, §1 Immigration Act.



### TEXT BOX 14: SCOPE OF ART. 9TER IMMIGRATION ACT

Council of State, n. 223.961, 19 June 2013

The Immigration Office long stated that medical regularisation ought to be restricted to illnesses posing a direct threat to the life of the applicant in case of return.<sup>(176)</sup>

The Office based this position on the rigorous interpretation of Art. 3 ECHR by the European Court of Human Rights (ECtHR) in health-related cases.<sup>(177)</sup>

In 2013, the Council of State ruled that Art. 3 only offers a minimum standard and does not preclude broader protection in national legislation. The Council moreover made clear that the definition of Art. 9ter includes two hypotheses, namely a real risk to the life or physical integrity on the one hand, and a real risk of inhuman or degrading treatment on the other. The administration needs to examine both these hypotheses before taking a decision.<sup>(178)</sup>

After the judgment by the Council of State, civil society organisations and professionals nonetheless kept on denouncing the strict assessment of the “seriousness” of the illness and the frequent exclusion of psychological or psychiatric elements. They also criticised the strict examination of the state of health of the foreign national at the time of renewal of his or her residence permit (cf. Content of protection).<sup>(179)</sup>

#### Access to procedure

Applications for authorisation to stay based on Art. 9ter should be filed **in the territory**.

The procedure for medical regularisation can be initiated **at all times**, irrespective of other (ongoing or concluded) procedures. If the foreign national has already applied for residence statuses prior to applying for regularisation on the basis of Art. 9ter, however, certain invoked elements may not be taken into account.

The foreign national can apply for a residence permit based on Art. 9ter after having filed a request for *international protection*.

During the procedure, the foreign national can also submit an *application 9bis* (cf. Section 2) or a subsequent *application 9ter* based on new elements. Since the entry into force of the Law of 14 December 2015 modifying Art. 9bis and Art. 9ter of the Immigration Act, however, the authorities assess requests merely on the basis of the latest application of the same type filed by the person concerned.<sup>(180)</sup>

176 Brijs, Bob, ‘9ter Vw. in therapie bij het Hof van Justitie: gevolgen voor de Belgische rechtspraak’, *Tijdschrift voor Vreemdelingenrecht*, 2015, 4, pp. 246-257.

177 In 2016, the ECtHR changed this position ruling that Art. 3 ECHR also included a real risk of a serious, rapid and irreversible decline in the applicant’s state of health resulting in intense suffering or a significant reduction in life expectancy (ECtHR, n. 41738/10, 13 December 2016, *Paposhvili v Belgium*).

178 Agentschap Integratie en Inburgering, *Ook Raad van State zegt dat 9ter-bescherming ruimer is dan alleen “direct levensbedreigende” ziektes - DVZ past praktijk aan*, 28 September 2013.

179 *Witboek over de machtiging tot verblijf om medische redenen (9ter)*, pp. 57-58, 69-73.

180 Belgian House of Representatives, *Legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals*, 10 September 2015, DOC 54 1310/001, pp. 4-7.



Conversely, if authorisation to stay on the basis of Art. 9ter has not (yet) been granted or has come to an end, the foreign national can submit a request for international protection or apply for other residence statuses.<sup>(181)</sup>

### Rights during procedure

Unlike applicants for international protection, foreign nationals applying for authorisation to stay for medical reasons do not receive a temporary residence permit upon registration of their application. Only if and once their application has been declared admissible, foreign nationals in the Art. 9ter procedure are granted a residence right through a certificate of registration,<sup>(182)</sup> also known as orange card.

This certificate of registration is valid for three months and can be extended three times for three months and from then on for periods of one month.<sup>(183)</sup> By contrast, applicants for international protection receive a first certificate valid for four months, which is extended every four months in the first two years and from then on for periods of one month.<sup>(184)</sup>

In terms of socioeconomic rights, applicants for medical regularisation are only entitled to urgent medical care as long as their application has not been declared admissible by the authorities.<sup>(185)</sup> This limited access to health care *during* the procedure has been denounced by professionals and civil society organisations on various occasions (cf. Text box 15).

Once their application has been declared admissible, applicants have a right to social aid,<sup>(186)</sup> encompassing material, social, medical and/or psychological support,<sup>(187)</sup> but they do not have access to the labour market nor (in general)<sup>(188)</sup> to health insurance. This means that in case of certain needs, many applicants are obliged to request social aid.

By contrast, applicants for international protection are entitled to material aid (including accommodation) from the moment of registration.<sup>(189)</sup> In addition, they have access to the labour market four months after they lodged their application.<sup>(190)</sup>

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181 Please note that if a foreign national has already obtained a temporary authorisation to stay for medical reasons, s/he can still apply for authorisation to stay for humanitarian reasons on the basis of Art. 9bis. In 2018, the CALL ruled that in this situation, the applicant still has a legitimate interest given the conditional nature of his or her residence rights on the basis of Art. 9ter (CALL, n. 213 042, 27 November 2018).

182 French: *attestation d'immatriculation*; Dutch: *attest van immatriculatie*.

183 Art. 7, second paragraph Royal Decree of 17 May 2007.

184 Art. 74 and Art. 75 Royal Decree implementing the Immigration Act. The duration of the extension is not mentioned in the Royal Decree, but is set at four months and one month in practice.

185 Art. 57, §2, 1° Organic Law of 8 July 1976 regarding the PSWC.

186 Social aid is a type of support accessible to Belgian nationals and foreign nationals in regular stay, whereas material aid is offered to applicants for international protection staying in a reception centre. Apart from social, medical and psychological support, material aid also includes housing, food and clothing (Art. 2, 6° Reception Act).

187 Art. 1 and Art. 57, §1 Organic Law of 8 July 1976 regarding the PSWC.

188 An applicant only has access to health insurance if s/he is a dependant of person entitled to this insurance (Art. 32 of the Law of 14 July 1994 regarding the compulsory insurance for medical treatment and benefits consolidated on 14 July 1994, *Belgian Official Gazette*, 27 August 1994).

189 Art. 6 Law of 12 January 2007 regarding the reception of asylum seekers and certain other categories of foreign nationals [Reception Act].

190 Art. 18, 3° Royal Decree of 2 September 2018.



### TEXT BOX 15: URGENT MEDICAL CARE

In his review report of the 9ter department of 2016, the Federal Ombudsman remarked that the often lengthy procedures<sup>(191)</sup> could have serious consequences for the applicant as well as for society as a whole. He argued that restricted access to health care in the first stage of the procedure could not only deteriorate the medical situation of the foreign national, but could also have an impact on public health and public finance.<sup>(192)</sup>

Professionals and civil society organisations stressed that restrictions in law and practice had already led to distressing humanitarian situations. For instance, some applicants in the initial stage of the procedure did not have proper access to urgent medical care due to complicated administrative procedures. Experts also criticised the lack of access to adequate health care in the appeal procedure.<sup>(193)</sup> In this stage of the procedure, foreign nationals do not have a right to stay in the territory and thus only have access to urgent medical care. Since the Abdida ruling (cf. Text box 20), however, some national judges have decided to grant a right to social aid pending the appeal.<sup>(194)</sup>

#### Outline of procedure

To apply for authorisation to stay for medical reasons, the foreign national has to send his or her **application** to the Immigration Office by **registered letter**.

The applicant needs to choose a *place of residence in Belgium*. If this place changes in the course of the procedure, s/he needs to inform the Immigration Office. If no place has been chosen, it is assumed that the foreign national has chosen the Immigration Office as place of residence.<sup>(195)</sup> Furthermore, the application must mention an

address in the territory as *effective place of stay*.

The application needs to contain all *useful and recent information* about his or her illness and about the possibilities and accessibility of adequate treatment in his or her country of origin or stay.<sup>(196)</sup>

S/he also needs to submit a *standard medical certificate* completed by a physician and not older than three months. The certificate needs to contain information about the illness, its degree of seriousness and the treatment that is deemed necessary.<sup>(197)</sup>

191 Since the publication of the report by the Ombudsman in 2016, the processing times of applications for authorisations to stay for medical reasons have been seriously reduced. In 2019, the average processing time for these applications amounted to no more than 3 to 4 months (information provided by the Immigration Office, 27 January 2020). Er staat dat de behandelingstermijn dikwijls lang is, dit klopt echter al lang niet meer. De gemiddelde behandelingstermijn van een aanvraag 9ter bedraagt momenteel 3 à 4 maanden, soms wat korter, zelden langer naargelang er wel of niet bijkomende informatie dient opgevraagd te worden.

192 Federal Ombudsman, *Medische regularisatie*, p. 29.

193 See for instance *Witboek over de machtiging tot verblijf om medische redenen (9ter)*, pp. 73-75.

194 De Schutter, Brecht, 'Het recht op maatschappelijke dienstverlening voor ernstig zieke vreemdelingen in onwettig verblijf. Een stand van zaken vier jaar na het arrest-Abdida met overzicht van rechtspraak', *Tijdschrift voor Vreemdelingenrecht*, 2019, 1, pp. 11-12.

195 Art. 9quater Immigration Act, inserted by the Law of 29 December 2010.

196 Art. 9ter, §1, third paragraph Immigration Act.

197 Art. 9ter, §1, fourth paragraph Immigration Act.



In most cases, the foreign national needs to produce *proof of identity*. This proof may be constituted by a combination of elements that contain the applicant's personal data, have been issued by the competent government, have not been drafted on the basis of mere statements by the applicant and allow to establish a physical link with him or her. Asylum-seekers in the asylum procedure are exempted from this requirement.<sup>(198)</sup>

The **Immigration Office** first **assesses** whether the application is *admissible*. A request can be declared non-admissible if it fails to pass through the “medical filter” introduced in 2012, that is, if the medical officer or physician appointed by the Office concludes that the illness invoked by the applicant manifestly does not correspond to a “serious illness” (cf. Text box 13).

During this first stage, the Immigration Office also instructs the municipality to conduct a residence check. If this check reveals that the applicant does not stay on the territory of the municipality,<sup>(199)</sup> his or her request is declared non-admissible. Such decision can also be taken if:

- the request has not been sent by registered letter or does not mention the effective place of stay of the applicant; or
- no proof of identity or proof of exemption has been submitted; or
- the standard medical certificate has

not been submitted, is older than three months or is incomplete; or

- no new elements have been invoked.<sup>(200)</sup>

In these cases, the Immigration Office takes a decision of non-admissibility and may also issue an order to leave the territory.

If the admissibility requirements are met, the Office instructs the municipality to register the personal data of the applicant in the foreigners register,<sup>(201)</sup> part of the national register, and to issue a certificate of registration.<sup>(202)</sup>

Once the request has been declared admissible, the medical officer or physician appointed by the Immigration Office examines the case on *its merits*. S/he assesses if the applicant suffers from a “serious illness” occasioning a real risk to his or her life or physical integrity or a real risk of inhuman or degrading treatment when there is no adequate treatment in the country of origin or habitual residence. The first of these hypotheses concerns a very serious illness implying that a removal of the person concerned cannot be envisaged even if s/he can obtain medical treatment in his or her country. The second hypothesis regards a serious illness which does not necessarily obstruct a return, but whereby a removal may amount to a real risk of inhuman or degrading treatment due to the absence of adequate medical treatment in

198 Art. 9ter, §2 Immigration Act, inserted by the Law of 29 December 2010 containing various provisions.

199 Civil society organisations such as vzw Medimmigrant note that many applicants struggle in providing an address for a range of reasons, for instance because they are homeless or because their hosts do not give permission to use their address. Some applicants moreover report that they received a negative residence check due to hospitalisation at the time of the check.

200 Art. 9ter, §3 Immigration Act.

201 By contrast, the personal data of applicants for international protection are registered in the provisional “waiting register” during the procedure.

202 Art. 7, second paragraph Royal Decree of 17 May 2007.





the country of origin or habitual residence. In this case, the medical officer or physician should examine the availability and accessibility of medical treatment on the basis of information from internal databases such as the European Medical Country of Origin Information (MedCOI).<sup>(203)</sup>

The Immigration Act moreover stipulates that the medical officer or physician can proceed to a physical examination of the applicant and seek expert advice, if deemed necessary.<sup>(204)</sup> Despite these le-

gal provisions, both these instruments are rarely used in practice.<sup>(205)</sup> After examination of the file, in most cases consisting in desk research only, the medical officer or physician offers medical advice to the administration.

On various occasions over the last years, professionals have urged the Immigration Office to duly respect the principles of good administration and the Code of medical ethics when assessing applications for regularisation (cf. Text boxes 16 and 17).

### TEXT BOX 16: PRINCIPLES OF GOOD ADMINISTRATION

The authors of the white paper on Art. 9ter have identified a number of problems in the procedure for authorisation to stay for medical reasons. Among other issues, they noted that the Immigration Office often applied an excessive formalism in their assessments of admissibility. The paper also underlined that the Office at times failed to conduct an adequate examination of the case at hand, for instance with regard to the accessibility of medical treatment in the country of origin. Furthermore, the authors contended, the Immigration Office did not always give sufficient reasons for a refusal of authorisation to stay.<sup>(206)</sup> The administration itself denies such claims<sup>(204)</sup> and points out that each decision is taken on an individual basis and after a thorough assessment of the case.<sup>(207)</sup>

On various occasions, the appeal court CALL confirmed that the Immigration Office had acted contrary to the principles of good administration. For example, the CALL annulled various refusals of authorisation to stay for medical and humanitarian reasons because these decisions contained standard statements of reasons.<sup>(208)</sup>

203 Federal Ombudsman, *Medische regularisatie*, pp. 17-18, 27-28.

204 Art. 9ter, §1, fifth paragraph Immigration Act.

205 During the parliamentary hearings of 2017, the director-general of the Immigration Office declared that physical examinations took place in 5 to 10% of applications (Belgian House of Representatives, Report of the hearings on medical regularisation, pp. 42-43). The parliamentary debate also focused on an internal instruction of the Immigration Office of 14 June 2012 prohibiting the medical officers to contact the personal physician of the applicant (first mentioned in the report by the Federal Ombudsman, *Medische regularisatie*, p. 40).

206 Witboek over de machtiging tot verblijf om medische redenen (9ter), pp. 54-56, 58-64, 68-69.

207 Federal Ombudsman, *Medische regularisatie*, p. 75-76; Belgian House of Representatives, Report of the hearings on medical regularisation, p. 10.

208 See for instance CALL n. 99.287, 20 March 2013.



### TEXT BOX 17: CODE OF MEDICAL ETHICS

Physicians employed by the Immigration Office receive a standard labour agreement, in which no reference is made to the code of medical ethics. In 2013, the National Council of the College of Physicians advised to add a special annex to the agreement referring to the medical officer's independence and the obligation of medical confidentiality.<sup>(209)</sup> The Minister for Asylum and Migration, however, did not follow this advice. The Immigration Office, from its side, remarked that in practice, the medical officers could carry out their tasks in full autonomy and independence.<sup>(210)</sup>

In its extensive advice of 2016, the Belgian Advisory Committee on Bioethics remarked that the medical officers involved in the Art. 9ter procedure in most cases did not conduct a medical examination of the applicant, consult with his or her personal physician or seek expert advice. *The Committee argued that the advice provided to the Immigration Office constituted a "medical act" and thus needed to respect the Code of medical ethics. Art. 35(b) of the Code stipulates that "the physician cannot exceed his competence. He has to seek advice from colleagues, among others specialists, each time this proves useful or necessary within the diagnostic or therapeutic context".*<sup>(211)</sup>

The Federal Ombudsman likewise questioned the ethical value of a medical advice given to the authorities that dissents from the opinion of the patient's personal physician. The Ombudsman moreover pointed to the problematic lack of homogeneity in both the *prima facie* assessments (the medical filter) and the examinations of files on their merits.<sup>(212)</sup>

Apart from medical aspects, the Immigration Office also checks if the application contains elements of public order. A seriously ill foreign national can be excluded from authorisation to stay on the basis of Art. 9ter provided that there are serious reasons for considering that s/he has committed a crime against peace, a war crime or a crime against humanity, has been

guilty of acts contrary to the purposes and principles of the United Nations, or has committed a serious crime.<sup>(213)</sup> In 2016, the European Court of Human Rights observed that in these cases, the risk of ill-treatment should also be assessed (cf. Text box 18).

209 Nationale Raad van de Orde van Geneesheren, *Arbeidsovereenkomst bestemd voor de artsen werkzaam bij de Dienst Vreemdelingenzaken*, Doc a143020, 16 November 2013. The vice-president of the council reiterated this point during the parliamentary hearings on Art. 9ter in 2017 (Belgian House of Representatives, Report of the hearings on medical regularisation, pp. 46-47).

210 Federal Ombudsman, *Medische regularisatie*, pp. 71-72; Belgian House of Representatives, Report of the hearings on medical regularisation, p. 9.

211 Belgian Advisory Committee on Bioethics, *Opinion No. 65 of 9 May 2016 concerning the issue of immigrants with medical problems, including serious psychiatric ones*, pp. 7-9.

212 Federal Ombudsman, *Medische regularisatie*, pp. 34, 25-27.

213 Art. 9ter, §4 and Art. 55/4 Immigration Act. The same grounds for exclusion apply to foreign nationals requesting subsidiary protection.



### TEXT BOX 18: ASSESSMENT OF ART. 3 ECHR

ECtHR, n. 41738/10, 13 December 2016, *Paposhvili v Belgium*

The Court noted that adequate procedures should be put in place in order to compare the state of health of the applicant before and after a removal and to verify if sufficient and appropriate care is available and accessible in the country of destination. Since the ECtHR ruling, the Immigration Office conducts a separate assessment of Art. 3 ECHR in two cases: when the Office issues an order to leave the territory together with a decision on an application for medical regularisation that has not been assessed on its merits due to non-admissibility or exclusion, and when clear contra-indications for travelling exist.

If the application is considered to be unfounded, the Immigration Office issues a decision of refusal of residence and may also issue an order to leave the territory. If the application is considered to be well-founded, the Office grants authorisation to stay.

In principle, the final **decision** of the Immigration Office is sent to the municipality of the chosen place of residence of the applicant. It could also be sent by registered letter to his or her place of residence or by

fax to the office of his or her lawyer (if chosen as place of residence).<sup>(214)</sup>

If the applicant has been authorised to stay, the municipality issues a **residence permit** (cf. Content of protection).<sup>(215)</sup>

There are no legal time limits for the determination procedure, but the Immigration Office should take a decision within a reasonable period of time (cf. Text box 19).

### TEXT BOX 19: REASONABLE TIME

Like other national administrations, the Immigration Office is required to take a decision within a reasonable period of time. In 2016, however, the Ombudsman noted that some applicants for medical regularisation had to face particularly long waiting periods in the stage of admissibility, especially after a previous annulment by the CALL or the Council of State. He therefore suggested to introduce a legal time limit in this first stage of the procedure.

In its reply to the Ombudsman, the Immigration Office agreed that decisions should be taken as quickly as possible, but argued that it was not possible to impose a legal time limit considering the available resources and the fluctuating number of applications for authorisation to stay on the basis of Art. 9ter. Furthermore, the Office often needed to rely on input provided by external partners.<sup>(216)</sup>

214 Art. 62, §3, second paragraph Immigration Act.

215 Art. 12 Immigration Act.

216 Federal Ombudsman, *Medische regularisatie*, pp. 34, 28-29, 57. The remarks by the Immigration Office are found at p. 70. This point was further discussed during the parliamentary hearings in April 2017.



## Appeal procedure

In case of refusal of authorisation to stay, the applicant can lodge an appeal before the federal administrative court Council for Alien Law Litigation (CALL).<sup>(217)</sup>

The CALL only verifies the legality of the administrative decision and then either dismisses the appeal or annuls the decision. Its competences are thus more restricted than in the appeal procedure for international protection, in which the Council can reassess the file and can confirm, annul or reform the decision by the CGRS.<sup>(218)</sup>

Unlike the appeal procedure for applicants for international protection, the appeal before the CALL moreover does not have an automatic suspensive effect. To request suspension of removal measures, the foreign national needs to lodge a separate appeal in the same petition.<sup>(219)</sup>

There are no legal time limits for the appeal decision. The CALL, however, should take a decision within a reasonable period of time.

Against a judgment by the CALL, both the foreign national and the Immigration Office can lodge an appeal on points of law (cassation) before the Council of State.<sup>(220)</sup>

On various occasions over the last years, the European courts have ruled that this appeal procedure did not constitute an effective remedy. The European case law gave rise to calls for reform by several public services and civil society groups (cf. Text boxes 20 and 21).

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217 Art. 39/2, §2 Immigration Act.

218 Art. 39/2, §2 Immigration Act.

219 Art. 39/82 Immigration Act.

220 Art. 39/67 Immigration Act.



## TEXT BOX 20: RIGHT TO AN EFFECTIVE REMEDY

ECtHR, n. 10486/10, 20 December 2011, *Yoh-Ekale Mwanje v Belgium*

ECtHR, n. 70055/10, 27 February 2014, *S.J. v Belgium*

CJEU, n. C-562/13, 18 December 2014, *CPAS d'Ottignies v Moussa Abdida*

In the case of *Yoh-Ekale Mwanje v Belgium*, the European Court of Human Rights ruled that the appeal court ought to have the competence to consider new elements invoked by the applicant. This legal lacuna was partly filled by a new general provision inserted in the Immigration Act in 2014, according to which the judge should examine all evidence presented by applicants subject to removal measures.<sup>(221)</sup> However, the Immigration Act does not allow the judge to take into consideration new medical elements in the context of Art. 9ter.

In recent years, the question was raised whether the appeal for annulment in the Art. 9ter procedure should include an examination *ex nunc* (at the time of the consideration of the case by the judge) as is the case in the international protection procedure. In two cases in 2018-19, the Council of State referred this matter to the Constitutional Court for a preliminary ruling. The Council asked if the unequal treatment of applicants in these procedures violated the principle of non-discrimination enshrined in the Constitution and the prohibition of torture and right to an effective remedy as described in the ECHR. The Constitutional Court responded negatively to this question, taking into account the fact that applicants can file both an appeal for suspension and a subsequent application for medical regularisation and that the appeal judge needs to examine all evidence in case of a return decision.<sup>(222)</sup>

In the 2014 case *S.J. v Belgium*, the European Court moreover ruled that the procedure for suspension of removal measures was too complicated to be considered an effective remedy. In the *Abdida* case later that year, the Court of Justice confirmed that a foreign national facing a return that may expose him to a serious risk of grave and irreversible deterioration in his or her state of health needs to have access to a suspensive appeal. However, the Immigration Act has not been amended on this point so far.

221 Art. 39/82, §4, fourth paragraph and Art. 39/85, §1, third paragraph Immigration Act, inserted by the Law of 10 April 2014 containing various provisions related to the procedure before the CALL and the Council of State, *Belgian Official Gazette*, 21 May 2014. These new provisions were inserted after the ruling by the ECtHR on the right to an effective remedy in the Dublin procedure (n. 30696/09, 21 January 2011, *MSS v Belgium and Greece*).

222 Constitutional Court, 20 November 2019, n. 186/2019; 19 December 2019, n. 206/2019.

**TEXT BOX 21: CALLS FOR REFORM**

Since 2014, several national experts have argued in favour of an appeal with suspensive effect in the procedure for medical regularisation. Such suspension would ensure that – possibly (seriously) ill – foreign nationals would have a residence right pending appeal, and thus would have access to the mainstream health care services. In addition, many times over these professionals have asked to replace the existing appeal for annulment by an appeal with unlimited jurisdiction, comparable to the system in place for applicants of international protection.<sup>(223)</sup> The Immigration Office supports neither of these calls for reform, arguing that a revised appeal procedure may entail unfounded applications and unnecessarily long processing times.<sup>(224)</sup> Until today, these proposals have not led to any legislative changes.

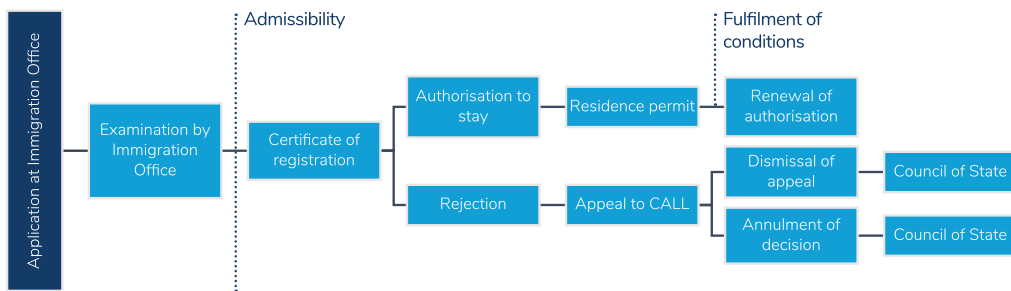


Figure 6: Application procedure for authorisation to stay for medical reasons

### 3.3 CONTENT OF PROTECTION

#### Residence permit

If the application of the foreign national is considered to be well-founded, s/he is granted an authorisation to stay and a residence permit for limited duration (A-card) valid for at least **one year**.<sup>(225)</sup> Authorisation to stay is also granted to members of the nuclear family living under the same roof.

After this first year, s/he can **renew** his or her residence permit for limited duration every year.<sup>(226)</sup> S/he needs to apply for renewal to his or her municipality between 45 and 30 days before the date of the expiry of the residence permit.<sup>(227)</sup> The authorisation to stay can be extended if s/he fulfils the required criteria,<sup>(228)</sup> i.e. if the medical circumstances still exist or have not changed in such a way that authorisation to stay is no longer necessary. This

223 See for instance Witboek over de machtiging tot verblijf om medische redenen (9ter), pp. 66-68; Federal Migration Centre Myria, *Hoe de grondrechten van ernstig zieke vreemdelingen beter garanderen?*; Federale Ombudsman, *Medische regularisatie*, p. 57.

224 See the remarks by the Immigration Office in Federale Ombudsman, *Medische regularisatie*, p. 71.

225 Art. 8 Royal Decree of 17 May 2007.

226 This renewed residence permit used to be valid for two years, but as a consequence of the case law by the CJEU on the scope of subsidiary protection, the Immigration Office decided to limit its validity to one year in February 2020 (cf. Policy and legal background).

227 Art. 33 Royal Decree implementing the Immigration Act.

228 Art. 13, §3, 2° Immigration Act.





change of circumstances should be sufficiently profound and durable in nature.<sup>(229)</sup>

Five years after the application has been filed, the foreign national authorised to stay on the basis of Art. 9ter is entitled to a residence permit for **unlimited duration** (B-card).<sup>(230)</sup>

In contrast to persons authorised to stay for medical reasons, refugees and beneficiaries of subsidiary protection receive residence permits that are respectively valid for five years and two years (after a first permit valid for one year),<sup>(231)</sup> and do not have to meet specific criteria to renew their residence permit.<sup>(232)</sup>

## Family reunification

Family members of a foreign national authorised to stay for medical reasons have a right to family reunification. The procedures and conditions to be met are comparable to those of family members of a foreign national authorised to stay for humanitarian reasons (cf. Section 2).

Until recently, foreign nationals authorised to stay on the basis of Art. 9ter did not enjoy a grace period of one year after being granted a status during which no material conditions were required. In 2018, the CALL ruled that such a period should be granted nonetheless (cf. Text box 22).

### TEXT BOX 22: GRACE PERIOD

CALL, n. 200.115, 22 February 2018

In 2014, the Court of Justice observed that medical regularisation did not constitute an application for subsidiary protection (cf. Text box 11). In the years after this ruling, the Immigration Office no longer granted more favourable conditions for family reunification to foreign nationals authorised to stay for medical reasons. In 2018, however, the CALL judged that these persons should be exempted from the obligation to meet the material requirements for a certain period of time in the same way as beneficiaries of subsidiary protection, in accordance with the intention of the national legislator. Since this ruling, beneficiaries of international protection and foreign nationals authorised to stay on the basis of Art. 9ter are exempted from the obligation to fulfil the material conditions for family reunification in the first year after the granting of their status.

## Other provisions

The provisions regarding Belgian travel documents, socioeconomic rights, citizenship and end of protection on the basis of

Art. 9ter are equal to those of persons authorised to stay on the basis of Art. 9bis (cf. Section 2).

<sup>229</sup> Art. 9 Royal Decree of 17 May 2007.

<sup>230</sup> Art. 13, §1, second paragraph Immigration Act.

<sup>231</sup> Art. 49, §1, second paragraph Immigration Act and Art. 49/2, §2 Immigration Act.

<sup>232</sup> Art. 49, §1, third paragraph and Art. 49/2, §3 Immigration Act.



### 3.4. FIGURES

Given its restricted scope, medical regularisation on the basis of a “serious illness” remains a minor procedure in comparison to the procedures for both international protection and humanitarian regularisation.

After the legislative change in January 2012 (cf. Policy and legal background), the number of applications for authorisation to stay for medical reasons decreased significantly. Since 2016, the annual number of applications has proven relatively stable, with about 1 250 applications filed in 2019 (cf. Figure 7).

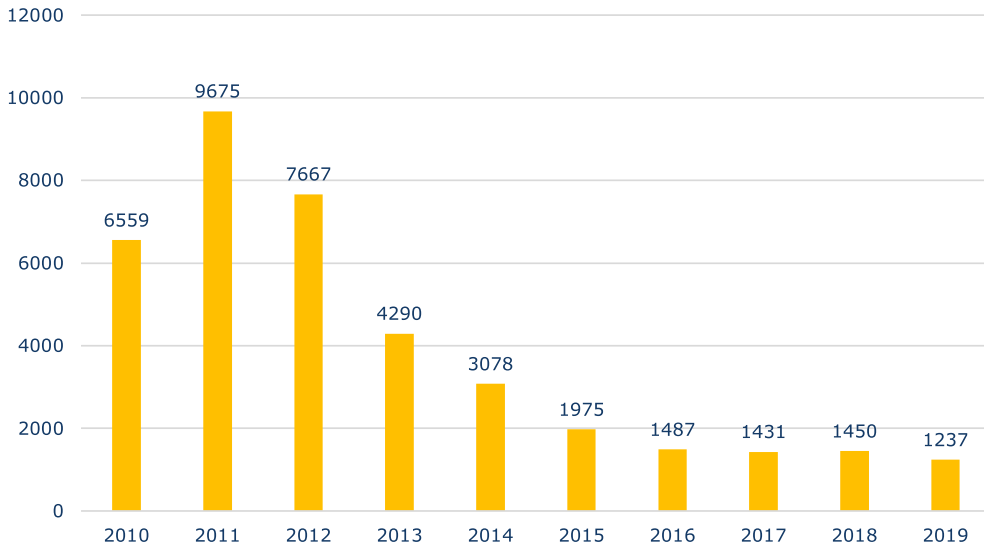


Figure 7: Applications for authorisation to stay on the basis of Art. 9ter Immigration Act (data source: Immigration Office)

In the past decade, relatively few authorisations to stay have been granted each year. In 2010, more than 2 000 positive decisions were taken in the context of the – much broader – regularisation campaign.<sup>(233)</sup> Since 2012, the number of positive decisions has fluctuated between 150 and 300. In many cases, one such decision resulted in more than one person being granted authorisation to stay (cf. Figure 8).

<sup>233</sup> It should be noted however that of the 2 227 authorisations to stay granted on the basis of Art. 9ter in 2010, only 1 044 concerned “medical regularisation” as such, the other authorisations being based on the criteria mentioned in the instruction on regularisation of 2009.

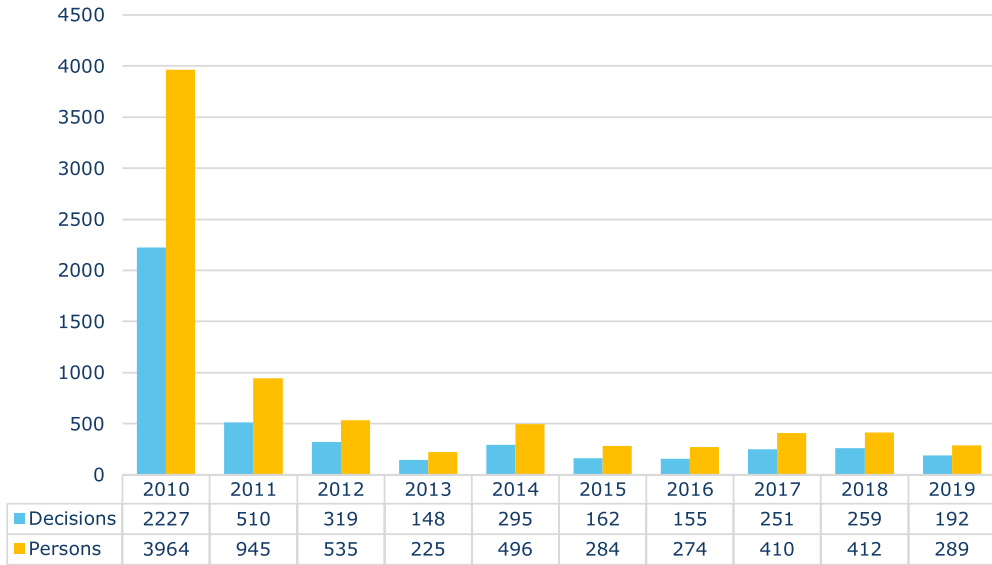
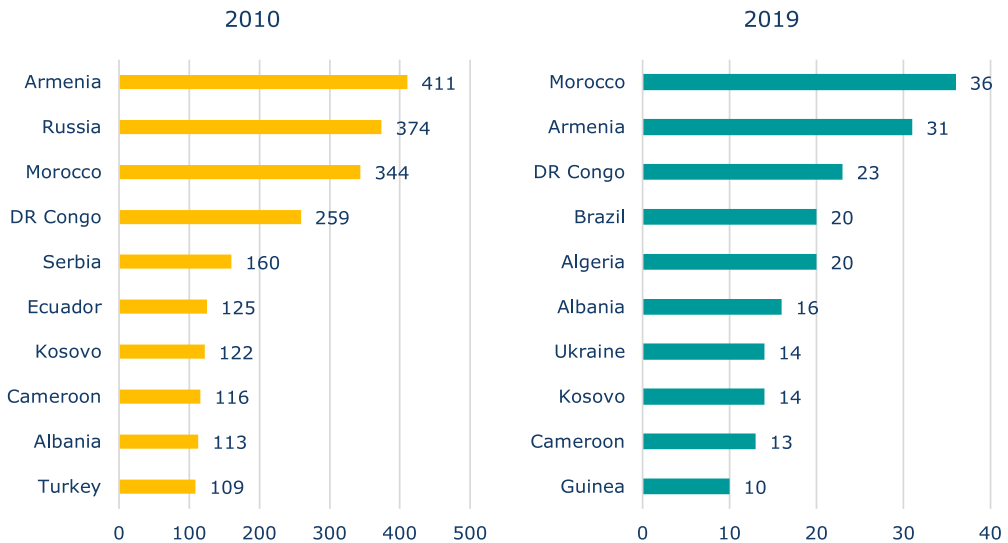


Figure 8: Authorisation to stay granted on the basis of Art. 9ter for limited duration (A-card) and unlimited duration (B-card) in number of files (data source: Immigration Office)

The top nationalities of persons authorised to stay for medical reasons in 2010-2019 are similar to those of foreign nationals in the procedure for humanitarian regularisation. The most important countries of origin are indeed the Democratic Republic of the Congo (669) and Morocco (640

authorisations), followed by Armenia, Russia, Kosovo, Serbia, Albania, and to a lesser extent Cameroon and Guinea (cf. data for 2010 and 2019 in Figures 9 and 10).<sup>(234)</sup> There are no data available on the gender or age of these persons.



Figures 9 and 10: Top nationalities of persons granted authorisation to stay on the basis of Art. 9ter in 2010 and 2019 (data source: Immigration Office)

<sup>234</sup> Data source: Immigration Office.







04

**DURABLE SOLUTION  
FOR UNACCOMPANIED MINORS**



The third and final national protection status in Belgium covered in this study is the special authorisation to stay as “durable solution” for unaccompanied minors. The procedure to apply for this status can be accessed regardless of other procedures initiated by the minor or his guardian, including a request for international protection. During the process, the authorities seek to determine the most durable solution for the minor, being either family reunification in the country where his or her parents reside legally, return to the country of origin or legal stay, or authorisation to stay in Belgium. The rights of the minor during the procedure and upon granting of the status are similar to those of child applicants and beneficiaries of international protection.

#### 4.1. POLICY AND LEGAL BACKGROUND

##### Rationale of status

In the period following the Belgian ratification of the Convention on the Rights of the Child and the European Council Resolution on unaccompanied minors from third countries,<sup>(235)</sup> the federal government decided to strengthen the protection of unaccompanied minors already residing in the territory.<sup>(236)</sup> From the early 2000s onward, measures were taken to appoint guardians, to improve the reception conditions, and to adopt a special legal status for this vulnerable category of foreign nationals.

First, the Guardianship Act of 24 December 2002 set out rules for the representation and care of unaccompanied minors. The Act of 2002 established a Guardianship Service within the FPS Justice competent to appoint a guardian to unaccompanied minors staying in the territory. Together with the guardian and other competent authorities involved, this new service had the task to seek a “durable solution” in the interest of the minor concerned.<sup>(237)</sup> The parliamentary documents clarify that this could be family reunification in accordance with Art. 10 of the Convention on the Rights of the Child,<sup>(238)</sup> regularisation of stay or return to the country of origin or another country guaranteeing adequate reception and care.<sup>(239)</sup>

In 2005, a ministerial circular was published to clarify the procedure for unaccompanied minors in Belgium.<sup>(240)</sup> The document defined the concept of “durable solution”, determined the competences of the MINTEH Unit at the Immigration Office and outlined the application procedure.

##### Recent developments

In the last decade, the federal government has adopted a number of measures to improve the protection of unaccompanied minors in Belgium.

Six years after the publication of the Circular, the federal parliament decided to provide a legal basis for the special procedure

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235 Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03), *Official Journal of the European Communities*, 19 July 1997.

236 See EMN Study on ‘EU and Non-EU Harmonised Protection Statuses in Belgium’, May 2011 (update).

237 Programme Law (I) of 24 December 2002 (Art. 479) Title XIII Chapter VI: Guardianship of unaccompanied foreign minors, *Belgian Official Gazette*, 31 December 2002 [Guardianship Act].

238 Art. 10 of the Convention on the Rights of the Child refers to the right of the child and his or her parents to leave any country, including their own, and to enter their own country.

239 Belgian House of Representatives, Programme law proposal, 27 November 2002, Doc 50 2124/015, p. 29.

240 Circular of 15 September 2005 regarding the residence of unaccompanied foreign minors.





and status for unaccompanied minors.<sup>(241)</sup> In September 2011, the relevant provisions were incorporated into the Immigration Act (cf. *infra*).

In December 2011, the newly formed government announced to improve the procedures for unaccompanied minors in order to enhance the determination of the best interest of the child.<sup>(242)</sup> Among other plans, the government observed that more attention had to be paid to the reception of unaccompanied foreign minors who did not apply for asylum, this in collaboration with the Communities (competent for youth care and education).<sup>(243)</sup>

The 2014 federal government agreement reiterated that the protection of unaccompanied minors needed to be strengthened. The agreement moreover announced that these minors should have access to the special procedure even if they already applied for international protection or another residence status.<sup>(244)</sup>

These political ambitions have been translated in several legal modifications over the last years. Thanks to these amendments, unaccompanied minors have access to a permanent legal procedure focussed on the best interest of the child (cf. Text box 23).

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241 Belgian House of Representatives, Legislative proposal modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals aimed at granting a temporary authorisation to stay to the unaccompanied foreign minor, 5 October 2010, DOC 53 0288/001. The proposal was based on a document first introduced by a member of the Senate in April 2008.

242 Coalition Agreement of the Federal Government 2011-2014, 1<sup>st</sup> December 2011, p. 134.

243 Coalition Agreement of the Federal Government 2011-2014, 1<sup>st</sup> December 2011, p. 132.

244 Coalition Agreement of the Federal Government 2014-2019, 9 October 2014, pp. 156-157.



### TEXT BOX 23: BEST INTEREST OF THE CHILD

Today, the procedure to determine the most durable solution for unaccompanied minors is described in detail in the Immigration Act and its Royal Decree. The process, centred on the principle of the best interest of the child, requires the administration to organise a hearing with the minor concerned in order to make an informed decision.

In general, the special procedure for unaccompanied minors has been well received by lawyers and other experts. Though some of them have pointed to certain deficiencies in the procedure – such as the lack of independence of the Immigration Office, the focus on family reunification as preferred durable solution, the lack of an effective remedy and the problem of minors reaching adulthood during the process –, the overall assessment of the procedure remains positive.<sup>(245)</sup>

In recent years, experts have argued that the interest of the child should also be taken into account in procedures involving accompanied minors. In most of these procedures, the point of view of the child is not taken into account in a systematic way. In 2016, the Federal Ombudsman therefore proposed to include an assessment of the interest of the child in examinations of applications for medical regularisation by one of the parents.<sup>(246)</sup> In 2018, the best interest of the child came to the fore following the detention of foreign families with minor children in special units. In the context of the civil society campaign “You don’t lock up a child. Period”<sup>(247)</sup>, advocates contended that a special process should be put in place to assess the interest of the child before taking return decisions.<sup>(248)</sup> Until today, however, no measures for minors have been adopted in these procedures. In the procedure for international protection, guarantees for accompanied minors have been introduced in 2018.<sup>(249)</sup>

#### Legal basis

The relevant provisions for the “durable solution” procedure are described in Chapter VII, **Art. 61/14 to Art. 61/25 Immigration Act** inserted by the Law of

12 September 2011. After the entry into force of this law on 8 December 2011,<sup>(250)</sup> the original Circular regarding the residence of unaccompanied foreign minors has been repealed.

245 See for instance Cécile Ghymers, ‘La procédure de séjour des mineurs étrangers non accompagnés : Quels constats après 7 ans d’application ?’, *Revue du droit des étrangers*, 2019, 202, p. 133-145.

246 The ombudsman emphasised this point in his review report (Federal Ombudsman, *Medische regularisatie*, p. 57) as well as during the parliamentary hearings on Art. 9ter in 2017 (Belgian House of Representatives, Report of the hearings on medical regularisation, p. 6).

247 See <http://www.youdontlockupachild.be/>.

248 See for instance the opinion by Dhondt, Benoit, ‘Kinderen opsluiten is geen noodzakelijk kwaad’, *Knack*, 23 August 2018.

249 Art. 57/1 Immigration Act, inserted by the Law of 21 November 2017 Law of 21 November 2017 modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals and the Law of 12 January 2007 regarding the reception of asylum seekers and certain other categories of foreign nationals, *Belgian Official Gazette*, 12 March 2018.

250 Law of 12 September 2011 modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals, *Belgian Official Gazette*, 28 November 2011.



Compared to the provisions contained in the Circular, the Law of 12 September 2011 has introduced several significant modifications to strengthen the protection of the minor. First, the law established a regulated application procedure replacing the previously existing ad hoc determination methods. Second, the law stipulated that a temporary residence permit valid for six months should be issued to the minor as long as no durable solution has been found. In the circular of 2005, the stay of the unaccompanied minor during the procedure was only covered by either a declaration of arrival (valid for three months) or an extension of a previously received order to return (valid for one month). Third, in order to be granted authorisation to stay as durable solution, the lack of a national passport is no longer used as ground for refusal. If the guardian cannot present the passport of his or her pupil, s/he needs to submit evidence of the steps that have been undertaken to prove the identity of the minor.<sup>(251)</sup>

The Law of 26 February 2015 has modified Art. 61/15 to ensure that the guardian of the unaccompanied minor can submit an application for this status regardless of other pending procedures for international protection or authorisation to stay.

The duties of the guardian of the minor are set out in Art. 9 to Art. 16 Guardian-

ship Act. The reception conditions for (un) accompanied minors are laid down in Art. 36 to Art. 42 Reception Act.

Apart from other provisions, the Law of 21 November 2017 inserted a list of elements that need to be taken into account when assessing the best interest of the child in the context of reception.<sup>(252)</sup> This provision transposed Art. 23 of Directive 2013/33/EU.<sup>(253)</sup>

Detailed provisions are set out in the **Royal Decree** implementing the Immigration Act as modified by the Royal Decree of 7 November 2011.<sup>(254)</sup>

## 4.2. DETERMINATION PROCEDURE

### Eligibility

In order to be eligible for this type of authorisation to stay, the applicant needs to be:

- national of a country that does not belong to the European Economic Area;<sup>(255)</sup> and
- under the age of 18 years; and
- unaccompanied by a person exercising parental authority or guardianship over him; and
- identified as unaccompanied minor by the Guardianship Service.<sup>(256)</sup>

251 Belgian House of Representatives, Legislative proposal modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals aimed at granting a temporary authorisation to stay to the unaccompanied foreign minor, 5 October 2010, DOC 53 0288/001.

252 Law of 21 November 2017 modifying the Law of 15 December 1980 and the Law of 12 January 2007.

253 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

254 Royal Decree of 7 November 2011 modifying the Royal Decree of 8 October 1981 regarding the entry, residence, settlement and removal of foreign nationals, Belgian Official Gazette, 28 November 2011.

255 Unaccompanied minors that are citizens of a country of the European Economic Area or Switzerland do not have access to this procedure. However, some of these minors do have a right to guardianship, for instance when they have been registered as victim of human smuggling or when they find themselves in a vulnerable situation (Art. 5/1 Guardianship Act).

256 Art. 61/14 Immigration Act.



The procedure determines a “durable solution” in the best interest of the unaccompanied minor concerned,<sup>(257)</sup> either:

- family reunification in the country where his or her parents reside legally; or
- return to the country of origin or the country where s/he is authorised to stay;<sup>(258)</sup> or
- authorisation to stay in Belgium.<sup>(259)</sup>

The Immigration Act stipulates that priority should be given to the principle of family unity as provided in Art. 9 and Art. 10 of the 1989 Convention on the Rights of the Child.<sup>(260)</sup> The Immigration Office, however, notes that these three possibilities are assessed at the very same time.<sup>(261)</sup>

### Access to procedure

Applications for authorisation to stay as durable solution should be filed **in the territory**.

The special procedure for unaccompanied minors can be initiated **at all times**. Until 2015, unaccompanied minors could not apply for authorisation to stay if another procedure, such as an asylum application,

had already been opened. To strengthen the protection of these minors,<sup>(262)</sup> the Law of 26 February 2015 modifying the Immigration Act provided that the guardian of the minor can file an application for this special authorisation to stay regardless of other pending procedures.<sup>(263)</sup> In practice, however, applications for authorisation to stay as durable solution and for international protection are not handled simultaneously if the Immigration Office needs to collect further information on the situation of the minor or the family from the authorities of his or her country of origin. In these cases, the Immigration Office will wait until the CGRS and the CALL have taken a decision on the minor’s request for international protection before resuming the examination of the file.<sup>(264)</sup>

Even though the procedure can be accessed by unaccompanied minors staying in Belgium at any point in time, very few of these minors actually file an application for authorisation to stay as durable solution (cf. Figures). This may be due to the fact that many guardians are not familiar with the various steps and requirements of the durable solution procedure. Since 2018, the Immigration Office and the Guardianship Service organise special trainings for

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257 To determine this durable solution, the Immigration Office takes into account the Convention on the Rights of the Child, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and other relevant international and European instruments and recommendations (Veerle Peters, *Niet-begeleide minderjarige vreemdelingen in de praktijk van de Dienst Vreemdelingenzaken: de bijzondere verblijfsprocedure*, in *Rechten van niet-begeleide minderjarige vreemdelingen*, ed. Steven Bouckaert, Ellen Desmet and Jinske Verhellen, Brugge, die Keure, pp. 262-263).

258 This durable solution requires guarantees for adequate reception and care in the light of the age and degree of independence of the minor, provided by parents or other adults who take care of the child, or governmental or non-governmental bodies (Art. 74/16, §2 Immigration Act).

259 Art. 61/14 Immigration Act.

260 Art. 61/17 Immigration Act.

261 United Nations High Commissioner for Refugees (UNHCR), *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België. Stand van zaken en aanbevelingen*, April 2019, p. 57.

262 Belgian House of Representatives, Legislative proposal modifying the Law regarding the entry, residence, settlement and removal of foreign nationals, DOC 54 0377/001, pp. 1-4.

263 Art. 61/15 Immigration Act, inserted by the Law of 26 February 2015 modifying the Law of 15 December 1980 regarding the entry, residence, settlement and removal of foreign nationals.

264 Cécile Ghymers, ‘La procédure de séjour des mineurs étrangers non accompagnés : Quels constats après 7 ans d’application ?’, *Revue du droit des étrangers*, 2019, 202, p. 143.



guardians to provide more information on the topic.<sup>(265)</sup>

### Rights during procedure

Unaccompanied minors applying for authorisation to stay on the basis of Art. 61/14 to Art. 61/25 receive a certificate of registration (orange card) as long as no durable solution has been found. This temporary residence permit is valid for six months and can be extended by six months at a time.<sup>(266)</sup>

One month prior to the expiration of the certificate, the guardian needs to submit evidence related to the proposal for a durable solution, the family situation and specific situation of the minor and proof of regular school attendance. If no durable solution can be found, the temporary residence permit is extended for six months.<sup>(267)</sup> In the international protection procedure, by contrast, applicants do not need to submit evidence regarding their personal situation to extend their certificate of registration.

Unaccompanied minors staying in Belgium have access to material aid, regardless of their residence status (cf. Content of protection).

### Outline of procedure

The guardian of the unaccompanied minor needs to submit a **written application** to the Immigration Office.<sup>(268)</sup>

The application should include the personal data of the guardian and of the minor. For the guardian, these are his or her name, first name, telephone or mobile number, fax number or e-mail and chosen place of residence. If no place has been chosen, it is assumed that the guardian has chosen the Guardianship Service as place of residence.<sup>(269)</sup> The personal data of the minor include his or her name, first name, place and date of birth, nationality, file number of the Immigration Office (if applicable), elected domicile and address.

The application also needs to contain a copy of the *national passport* or equivalent travel document of the minor. If s/he does not have a passport, the guardian should undertake the necessary steps to obtain this document.

In addition, the guardian of the minor needs to clarify the steps undertaken in relation to the minor's *family members and acquaintances* in the country of origin or the host country and the results obtained.

S/he moreover has to submit *all relevant evidence* supporting the veracity of the elements mentioned in the application.

To organise the *hearing* by the Immigration Office, the application needs to mention the address for communication and

265 UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België. Stand van zaken en aanbevelingen*, April 2019, p. 58.

266 Art. 61/18 Immigration Act; Art. 110undecies Royal Decree implementing the Immigration Act.

267 Art. 61/19 Immigration Act.

268 Art. 61/15 Immigration Act. Standard forms are available on the website of the Immigration Office: <https://dofi.ibz.be/sites/dvzoe/NL/Gidsvandeprocedures/Pages/NBMV%20die%20geen%20asiel%20aanvraagt.aspx>.

269 Art. 16, §1 and §2 Guardianship Act.



information related to language and interpretation.<sup>(270)</sup>

The written application is then **assessed** by the MINTEH Unit of the **Immigration Office**. The Unit analyses the documents and elements in the file (and if relevant, in related files), verifies the national register and possible visa information, and consults Country of Origin Information reports.<sup>(271)</sup>

This Unit organises a *hearing* with the minor, accompanied by his or her guardian and/or lawyer, in order to find a durable solution. This hearing takes place in the buildings of the Immigration Office in circumstances that should guarantee confidentiality. The migration officer hearing the minor needs to explain the roles of the persons present, the structure and the aim of the hearing. S/he asks questions about the personal data of the minor, his or her parents, family members and acquaintances, his or her history and the reasons for his or her travel. If the officer detects contradictions between the minor's statements and elements contained in the file, s/he needs to inform the minor and guardian and take note of their answers. The guardian receives a copy of the hearing report.<sup>(272)</sup>

After the hearing, the MINTEH Unit examines the case to determine a durable solution for the minor. In some cases, the examination is based on rather limited

evidence, due to the absence of available information networks in the country of origin,<sup>(273)</sup> or because of limited information provided by the minor. The latter can have a variety of reasons, such as the age and maturity of the minor, his or her unwillingness to cooperate due to pressure of family, or lack of trust.

The unaccompanied minor may be excluded from the special procedure if s/he committed acts contrary to public order or national security.<sup>(274)</sup>

If the durable solution is found to be *return* to or *family reunification* in another country, the Immigration Office instructs the municipality to issue an "order to return" (annex 38) to the guardian of the minor.

If no durable solution has been found, the Immigration Office instructs the municipality to issue a *certificate of registration* to cover the minor's residence during the procedure.<sup>(275)</sup> This temporary residence permit can be extended as long as no durable solution is found (cf. *supra*).

In this case, the guardian needs to submit evidence related to the proposal for a durable solution, the family situation and specific situation of the minor and proof of regular school attendance. The Immigration Office may organise another hearing to discuss the elements that have been introduced.<sup>(276)</sup>

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270 Art. 110sexies Royal Decree implementing the Immigration Act.

271 Veerle Peters, *Niet-begeleide minderjarige vreemdelingen in de praktijk van de Dienst Vreemdelingenzaken: de bijzondere verblijfsprocedure*, in *Rechten van niet-begeleide minderjarige vreemdelingen*, ed. Steven Bouckaert, Ellen Desmet and Jinske Verhellen, Brugge, die Keure, pp. 266.

272 Art. 61/16 Immigration Act; Art. 110octies and Art. 110novies Royal Decree implementing the Immigration Act.

273 UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*. Stand van zaken en aanbevelingen, April 2019, p. 58-59.

274 Art. 61/25 and Art. 3, first paragraph, 7° Immigration Act.

275 Art. 61/18 Immigration Act and Art. 110undecies Royal Decree implementing the Immigration Act.

276 Art. 61/19 Immigration Act.





If staying in Belgium has been identified as durable solution, the Immigration Office grants authorisation to stay upon presentation of the minor's national passport. If the guardian cannot present his or her pupil's passport, s/he has to submit evidence of the steps that have been undertaken to prove the identity of the minor.<sup>(277)</sup> These steps should be proved by official documents of the competent foreign authorities of the country of origin, country of residence or country of transit. The documents should allow to establish a physical link with the minor and should not have been drafted on the basis of mere statements. If the guardian cannot obtain official documents proving the identity of the minor, s/he needs to provide sufficiently serious, objective and corresponding evidence. The Immigration Office assesses this evidence on a case-by-case basis.<sup>(278)</sup>

The final decision of the Immigration Office is sent to the chosen place of residence of the guardian.<sup>(279)</sup> In general, the **notification** takes place by registered letter or courier.

If the applicant has been authorised to stay, the municipality issues a **residence permit** (cf. Content of protection).<sup>(280)</sup>

There are no legal time limits for the determination procedure, but the Immigration Office should take a decision within a reasonable period of time.

## Appeal procedure

In case of refusal of authorisation to stay, the applicant can lodge an appeal before the federal administrative court Council for Alien Law Litigation (CALL).<sup>(281)</sup>

The CALL only verifies the legality of the administrative decision and then either dismisses the appeal or annuls the decision. Its competences are thus more restricted than in the appeal procedure for international protection, in which the Council can reassess the file and can confirm, annul or reform the decision by the CGRS.<sup>(282)</sup>

Unlike the appeal procedure for applicants for international protection, the appeal before the CALL moreover does not have an automatic suspensive effect. To request suspension of removal measures, the foreign national needs to lodge a separate appeal in the same petition.<sup>(283)</sup>

There are no legal time limits for the appeal decision. The CALL, however, should take a decision within a reasonable period of time.

Against a judgment by the CALL, both the foreign national and the Immigration Office can lodge an appeal on points of law (cassation) before the Council of State.<sup>(284)</sup>

277 Art. 61/20 Immigration Act.

278 Art. 110decies Royal Decree implementing the Immigration Act.

279 Art. 62, §3, second paragraph Immigration Act.

280 Art. 12 Immigration Act.

281 Art. 39/2, §2 Immigration Act.

282 Art. 39/2, §2 Immigration Act.

283 Art. 39/82 Immigration Act.

284 Art. 39/67 Immigration Act.

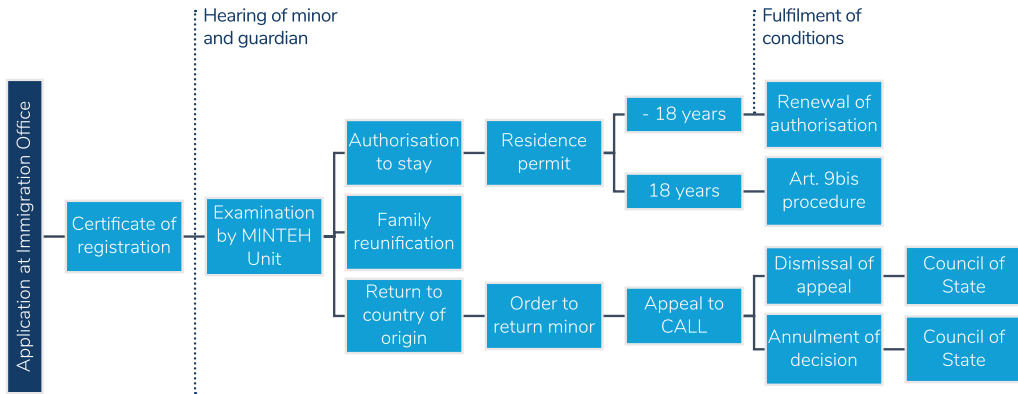


Figure 11: Application procedure for authorisation to stay as durable solution for unaccompanied minors

### 4.3. CONTENT OF PROTECTION

#### Residence permit

If authorisation to stay has been identified as durable solution, the unaccompanied minor is granted a residence permit for limited duration (A-card) valid for **one year**.<sup>(285)</sup>

The unaccompanied minor can **renew** his or her residence permit for limited duration for one year at a time. One month prior to the expiration date of the authorisation to stay for limited duration, the guardian of the minor needs to submit evidence regarding his or her pupil’s life plan in Belgium to the Immigration Office. This should include elements related to the family situation and specific situation of the minor, as well as proof of regular school attendance and proof of knowledge of one of the na-

tional languages.<sup>(286)</sup> The Office decides or refuses to extend the authorisation to stay on the basis of this information.<sup>(287)</sup>

After three years, the unaccompanied minor authorised to stay is entitled to a residence permit for **unlimited duration** (B-card). If the Immigration Office refuses to grant this authorisation, the reasons for the decision should be stated.<sup>(288)</sup> Remarkably, the right to unlimited stay after three years is only offered to minors in the special procedure. In fact, other categories of foreign nationals are either entitled to unlimited stay five years after the application or granted authorisation to stay for unlimited duration on a discretionary basis.<sup>(289)</sup>

In contrast to unaccompanied minors in the special procedure, refugees and beneficiaries of subsidiary protection receive residence permits respectively valid for

285 Art. 61/20 Immigration Act.

286 UNHCR notes that minors with educational and/or mental problems face particular difficulties in meeting the criteria related to school attendance and language knowledge (UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België. Stand van zaken en aanbevelingen*, April 2019, p. 58).

287 Art. 61/21 Immigration Act.

288 Art. 61/23 Immigration Act.

289 See for instance authorisation to stay on the basis of Art. 9ter and Art. 9bis respectively.



five years and two years (after a first permit valid for one year) and do not have to meet specific criteria for renewal.<sup>(290)</sup> However, they need to wait five years to be entitled to a residence permit for unlimited duration.<sup>(291)</sup>

### Travel document

To apply for a travel document, the unaccompanied minor authorised to stay has to prove that s/he does not hold and cannot obtain a national passport or travel document.<sup>(292)</sup> The special travel document with red cover is valid for two years.<sup>(293)</sup>

Beneficiaries of subsidiary protection can obtain the same type of travel document with red cover if they fulfil the same conditions. Refugees, by contrast, do not have to meet specific criteria and are granted a travel document with blue cover.<sup>(294)</sup>

### Family reunification

Unlike parents of unaccompanied minors with an international protection status,<sup>(295)</sup> parents of unaccompanied minors authorised to stay in Belgium as durable solution do not have a right to family reunification. This less favourable treatment is explained by the rationale behind the special procedure to determine a durable solution for unaccompanied minors. In this procedure, au-

thorisation to stay in Belgium is only granted if the preferred solution of family reunification in the country of the parents has been excluded (cf. Determination procedure).

### Socioeconomic rights

Unaccompanied minors authorised to stay in Belgium as durable solution enjoy conditions as favourable as other foreign minors, including beneficiaries of international protection.

All unaccompanied minors staying in the reception network have access to **material aid** until they reach the age of 18<sup>(296)</sup> and irrespective of their residence status.<sup>(297)</sup> This material aid includes housing, food, clothing, medical, social and psychological support and pocket money, as well as access to legal aid, interpretation services, trainings and voluntary return programmes.<sup>(298)</sup> Applicants for international protection of 18 or older are equally entitled to material aid, but only during their procedure.<sup>(299)</sup>

If an unaccompanied minor is no longer entitled to reception (for instance after the third and final reception stage cf. *infra*), but does have certain needs, s/he is entitled to social aid provided by the local Public Social Welfare Centre. This type of aid can be provided in kind or through financial support in case of material, social, medical

290 Art. 49, §1, second paragraph and Art. 49/2, §2 Immigration Act.

291 Art. 49, §1, third paragraph and Art. 49/2, §3 Immigration Act.

292 Art. 60 Consular Code of 21 December 2013.

293 Art. 57, 3° Consular Code of 21 December 2013.

294 Circular of 15 September 2017 on travel documents for non-Belgians.

295 EMN Study on 'Family Reunification with Third Country National Sponsors in Belgium', July 2017.

296 In case of specific needs, reception can be provided beyond the age of 18. Some reception facilities offer accommodation and support to adolescents with such needs until they reach the age of 21 or 25.

297 Art. 2, 4° Reception Act.

298 Art. 2, 6° Reception Act.

299 Art. 11, §1 Reception Act.



and/or psychological needs.<sup>(300)</sup> Unaccompanied minors do not have access to social integration, i.e. employment and integration income.<sup>(301)</sup>

In terms of **accommodation**, various reception stages and specialised centres have been put in place to ensure that reception conditions are adapted to the individual needs of the minor.

The *first reception stage* takes place in an Observation and Orientation Centre (OOC) of Fedasil, the Federal Agency for the Reception of Asylum Seekers.<sup>(302)</sup> The personnel of this centre establishes a first medical, psychological and social profile of the minor and detects possible vulnerabilities in order to direct him or her to a suitable reception structure.<sup>(303)</sup> If the Immigration Office or the police expressed doubts about his or her declared age, the Guardianship Service may conduct an age assessment in this stage of the procedure.<sup>(304)</sup> The minor stays in the OOC for a period of up to 15 days (or at most 30 days).<sup>(305)</sup>

In the *second stage*, the unaccompanied minor moves to a collective reception structure of Fedasil or one of its partners. In these centres, unaccompanied minors live in a separate area surrounded by a team of social workers and educators. Those who are under the age of 15, are particularly vulnerable or have special needs can be referred to the Youth Care Services of the Communities. These services provide

alternative forms of accommodation, such as small-scale reception centres, assisted living and foster care.

Unaccompanied minors of 16 or older can move on to the *third reception stage* in smaller, individual reception structures if they hold a residence permit for more than three months and are able to function semi-autonomously. This reception stage intends to guarantee a high-quality transition from material aid to social aid, and to facilitate the integration of the minor in society. The minor stays in this structure for an (extendable) period of up to six months.<sup>(306)</sup>

The unaccompanied minor staying in Belgium has access to the mainstream **health care** services.<sup>(307)</sup> In case of special needs, adequate medical, psychological and social support is provided. Depending on his or her situation, the minor with special needs is monitored by a social worker, physician or psychologist, either in the reception centre or in a specialised institution or organisation. At school, assistance centres are responsible for conducting a medical examination of all pupils and for referring them to (mental) health care providers if necessary. As such, these centres can also reach minors residing outside the reception network.

The foreign minor has full access to the **education systems** organised or subsidised by the Communities. As newcomer, s/he is moreover enrolled in one of the

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300 Art. 1, Art. 57, §1 and Art. 60, §1 Organic Law of 8 July 1976 regarding the PSWC.

301 Art. 3, 3<sup>e</sup> Law of 26 May 2002 regarding the right to social integration.

302 Art. 40 Reception Act.

303 Art. 2 Royal Decree of 9 April 2007 establishing the system and operating rules of the observation and orientation centres for unaccompanied foreign minors, *Belgian Official Gazette*, 7 May 2007.

304 Art. 41, §2 Reception Act.

305 Art. 7 Royal Decree of 9 April 2007.

306 Fedasil, Instruction of 23 July 2015 on the transition procedure for unaccompanied minors.

307 EMN Study on 'Migrant Access to Social Security: Policy and Practice in Belgium', March 2014, p. 10-11.



existing reception programmes. In the Flemish Community, s/he can participate in special reception classes or language immersion organised at the level of the primary school,<sup>(308)</sup> or attend one year of Dutch language classes in secondary education.<sup>(309)</sup> After this introduction, the minor is guided by a personal coach.<sup>(310)</sup> The French Community created reception classes for newly arrived children in primary and secondary education, to be attended for a period of up to one year.<sup>(311)</sup> These classes prepare children to enter the regular education system.<sup>(312)</sup>

The unaccompanied minor authorised to stay in Belgium as durable solution is exempted from the requirement to hold a work permit to access the **labour market**.<sup>(313)</sup> Like Belgian citizens, s/he has limited access to the labour market from the age of 15, provided s/he can prove to have completed the first two years of secondary education.<sup>(314)</sup> S/he can also participate in internships, traineeships and vocational trainings.<sup>(315)</sup>

## Citizenship

In Belgium, the acquisition of citizenship does not depend on the type of residence status, but on the duration of legal stay

and the specific situation of the foreign national.

The unaccompanied minor authorised to stay as durable solution may apply for citizenship if s/he has reached the age of 18. In order to acquire citizenship as an adult, most foreign nationals need to have resided in Belgium on the basis of legal stay for at least five years and need to meet several other criteria, such as social integration, language knowledge and economic integration.<sup>(316)</sup>

To minors under the age of 18, citizenship is only granted in specific circumstances, such as adoption by a Belgian citizen, birth in Belgium and statelessness.<sup>(317)</sup> The specific criteria and exceptions are discussed in more detail in the upcoming EMN Study on 'Pathways to Citizenship'.

## End of protection

For various reasons, the Immigration Office can decide to end the authorisation to stay of the unaccompanied minor and issue an order to return or an order to leave the territory.

First, the authorisation to stay ends when the Immigration Office **refuses to extend** the authorisation to stay previously grant-

308 Art. 3, 4° and Art. 11ter, §1, second paragraph Decree of the Flemish Government of 25 February 1997 on primary education, *Belgian Official Gazette*, 17 April 1997.

309 Onthaalklas voor Anderstalige Nieuwkomers or OKAN.

310 Art. 3, 2° /1, Art. 115/1 and Art. 135 Secondary Education Code of the Flemish Government of 17 December 2010, *Belgian Official Gazette*, 24 June 2011.

311 Dispositif d'Accueil et de Scolarisation des élèves Primo-Arrivants or DASPA.

312 Art. 2, §1, 2°, Art. 2, §2 and Art. 8 Decree of the French Community of 18 May 2012 setting up reception and education arrangements of newly arrived pupils in education organised or subsidised by the French Community, *Belgian Official Gazette*, 22 June 2012.

313 Art. 10, 7° of the Royal Decree of 2 September 2018.

314 Art. 2 Labour Act of 16 March 1971, *Belgian Official Gazette*, 30 March 1971.

315 See for instance the work-linked trainings put in place at the level of the Communities (French: *formation en alternance*; Dutch: *alternerende opleidingen*).

316 Art. 12bis Belgian Nationality Code of 28 June 1984.

317 Art. 9 to Art. 11 Belgian Nationality Code.



ed to the unaccompanied minor on the basis of the evidence submitted by the guardian related to the minor's life plan in Belgium (cf. supra).

Second, in the first three years the authorisation to stay as durable solution comes to an end when the minor **reaches adulthood**. However, if the minor holds a residence permit for limited duration and is nearing the age of 18, the Immigration Office does inform him or her about the required criteria for an authorisation to stay as an adult.<sup>(318)</sup> These criteria are established by the Office on a case-by-case basis, important factors being education and employment. If these conditions are met, the Office issues an authorisation to stay on the basis of Art. 9bis.

Third, the unaccompanied minor authorised to stay can lose his or her status if it turns out that the authorisation to stay has been **fraudulently acquired**. Special rules apply to the revocation of authorisations to stay of foreign nationals in the durable solution procedure in case of fraud. The Immigration Act provides that an order to leave the territory can be issued if misleading or false information has been given, false or falsified documents have been submitted, or fraud or other illegal means have been used to prove the alleged minor age of the applicant, and if it results that s/he is aged 18 years or more. In addition, the durable solution can be changed if one of these actions have been undertaken in order to prove his or her alleged (family) situation. In its decision process, the Office

should take into account the role of the minor and of the guardian in the use of the false information or falsified documents in light of the minor's maturity.<sup>(319)</sup>

Fourth, like other categories of authorisation to stay, the authorisation to stay as durable solution for unaccompanied minors may also be revoked for reasons of **public order** and **national security**.<sup>(320)</sup> After at least ten years of authorised and uninterrupted stay, serious reasons of public order and national security are required to revoke the authorisation.<sup>(321)</sup> Decisions to end residence rights for these reasons should be based solely on the personal behaviour of the foreign national and not on economic grounds.<sup>(322)</sup>

Unlike unaccompanied minors authorised to stay, beneficiaries of international protection maintain their protection status and admission to stay upon reaching adulthood. They do not have to meet specific criteria to obtain a subsequent authorisation to stay. In addition, their residence rights can only end if the protection status itself has been revoked or ended by the CGRS on the basis of specific grounds listed in the 1951 Geneva Convention and the Immigration Act.<sup>(323)</sup>

#### 4.4. FIGURES

As the most recent data from the Immigration Office and Eurostat demonstrate, relatively few unaccompanied minors have recourse to the durable solution procedure in comparison to the procedure for inter-

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318 Art. 61/24 Immigration Act.

319 Art. 61/22 Immigration Act.

320 Art. 21 Immigration Act.

321 Art. 22 Immigration Act.

322 Art. 23, §1 Immigration Act.

323 Art. 55/3, 55/3/1 and 55/5, 55/5/1 Immigration Act.



national protection. The nationalities of the minors in this special procedure clearly differ from those of their peers applying for international protection.

In 2018, 750 unaccompanied minors lodged an application for international protection in Belgium.<sup>(324)</sup> By contrast, the

authorities issued only 142 first temporary residence permits (so-called “certificates of registration”) for unaccompanied minors in the durable solution procedure (cf. Figure 12).<sup>(325)</sup> That same year, 75 minors were granted a first authorisation to stay for limited duration, and another 30 obtained a status for unlimited duration.<sup>(326)</sup>

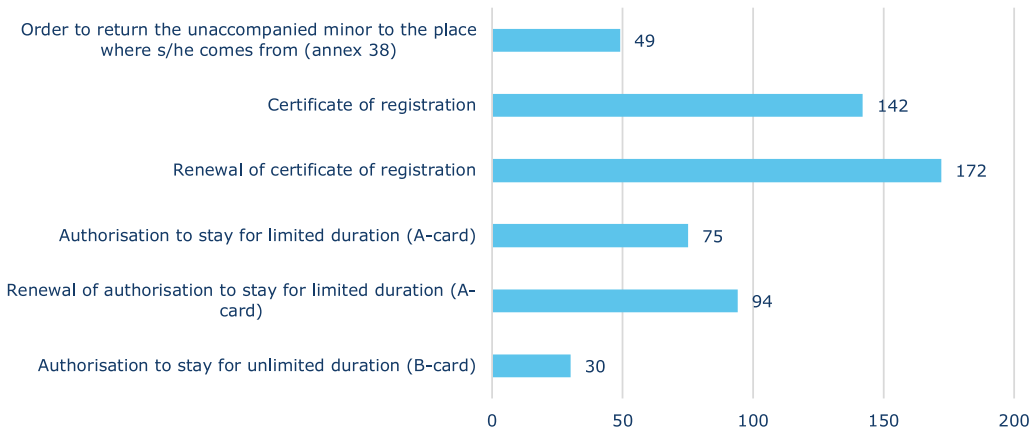


Figure 12: Types of decisions in the durable solution procedure for unaccompanied minors in 2018 (data source: Immigration Office)

Between 2010 and 2019, each year on average 70 first authorisations to stay for limited duration were granted to unaccompanied minors staying in Belgium. The annual number of authorisations granted on the basis of Art. 61/20 and Art. 61/24 Immigration Act has remained relatively stable since 2015-16, with a recent increase in 2019 (cf. Figure 13).

As regards gender, a small majority (51%) of the minors that have obtained a status are girls (cf. Figure 13). Unfortunately, there are no data available on the age of the minors.

324 2018 Eurostat data on “Asylum applicants considered to be unaccompanied minors”.

325 Unfortunately, there are no data available on the number of applications for authorisation to stay as durable solution. The data mentioned here are not entirely comparable, because the Immigration Office may issue an order to return the minor even before issuing a certificate of registration. The figures nevertheless give an idea of the large difference between the international protection and durable solution procedures.

326 At the time of writing, no data were available on the types of decisions taken in 2019.

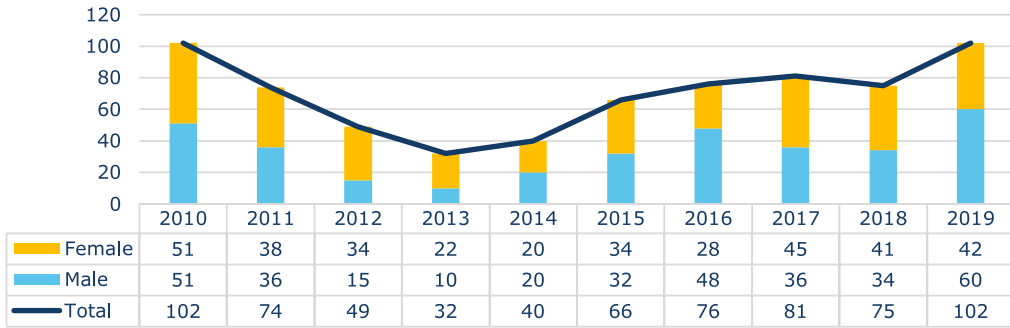
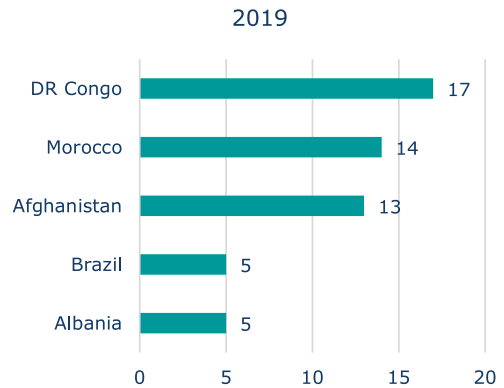
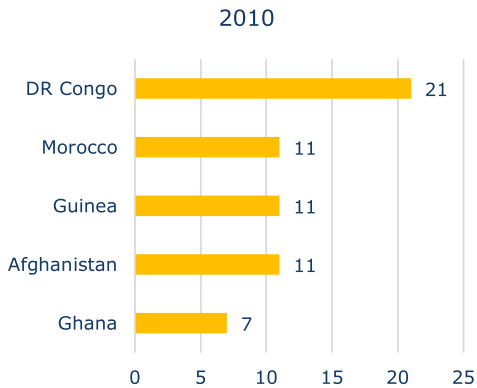


Figure 13: First authorisations to stay for limited duration (A-card) on the basis of Art. 61/20 and Art. 61/24 Immigration Act (data source: Immigration Office)

The most prominent nationality of these minors is the Democratic Republic of the Congo, with 168 authorisations to stay granted between 2010 and 2019. Unaccompanied minors from Morocco and – to a lesser extent – Guinea, also account for an important share (cf. Figures 14 and 15). A smaller number of minors comes from other sub-Saharan countries (most notably Ghana, Cameroon and Angola), the

Balkan (Serbia, Macedonia and Albania), Russia, Brazil and Afghanistan. Remarkably, Afghanistan is the only country of origin that also features in the top nationalities of beneficiaries of international protection. Other such countries of origin, like Syria, Iraq or Somalia, do not appear in the data on the procedure for unaccompanied minors.<sup>(327)</sup>



Figures 14 and 15: Top nationalities of unaccompanied minors granted authorisation to stay on the basis of Art. 61/20 and Art. 61/24 in 2010 and 2019 (data source: Immigration Office)

327 Data source: Immigration Office.







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## CONCLUSIONS



In Belgium, the authorisations to stay for humanitarian reasons, for medical reasons and as durable solution for unaccompanied minors provide three **protection alternatives** to foreign nationals – in addition to the EU-harmonised protection statuses – that fall within the scope of the present study.<sup>(32B)</sup> In the past decade, these three forms of “regularisation” have undergone several (mostly procedural) modifications and have led to debates among practitioners and decision-makers.

### EU-harmonised versus national protection statuses

As a general rule, applicants and beneficiaries of humanitarian and medical regularisation enjoy clearly less favourable conditions than their counterparts in the standard procedure for international protection. Only unaccompanied minors in search of a “durable solution” have access to procedures and rights that come close to the guarantees of EU-harmonised protection statuses.

Authorisation to stay for **humanitarian reasons** is granted by the Immigration Office on a discretionary basis in case of “exceptional circumstances” (Art. 9bis Immigration Act), a deliberately vague concept devoid of any concrete criteria. Foreign nationals applying for this status moreover have less procedural safeguards, as there are no opportunities to be heard by the administration or to request the appeal judge to reform a negative decision. During the procedure, they do not receive a temporary residence permit and do not have access to material aid.

Authorisation to stay for **medical reasons** can be requested by foreign nationals suffering from a “serious illness”, a concept more clearly defined in Art. 9ter Immigration Act. The limited procedural guarantees, however, also apply to applicants of medical regularisation, the sole difference being that they receive a temporary residence permit if and once their request has been declared admissible. In the other stages of the procedure, these foreign nationals are equally considered to be in irregular stay.

The residence rights of foreign nationals authorised to stay for humanitarian and medical reasons are much more precarious, since they receive a residence permit of one year that is only renewable under specific conditions. Like beneficiaries of international protection, they have access to the mainstream health care, education, integration and employment services, yet are excluded from certain social benefits. Lastly, persons authorised to stay on the basis of Art. 9bis are not entitled to a “grace period” for family reunification, during which more favourable conditions apply.

The situation of unaccompanied minors seeking a **durable solution** is more favourable. As long as the authorities do not determine a durable solution – either family reunification in the country of origin, return or authorisation to stay –, these minors obtain a temporary residence permit and are entitled to material aid. They moreover have a right to be heard by the Immigration Office, accompanied by their guardian and/or lawyer. By contrast, they cannot appeal for reform in the event of

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<sup>32B</sup> Are excluded from this study: stateless persons, victims of smuggling and trafficking in human beings, holders of humanitarian visa and non-removable persons are excluded (cf. Introduction).



a negative decision, have to meet specific criteria to renew their residence permit, and do not have a right to family reunification.

An overview of the key differences between EU-harmonised and national statuses in terms of procedures and content of protection can be found in Annex 1 of this study.

### Changes in national protection statuses 2010-2019

The authorisations to stay for humanitarian reasons, for medical reasons, and as durable solution for unaccompanied minors were introduced between 1980 and the early 2000s. In the last decade, these national protection statuses remained largely unchanged in terms of eligibility requirements and rights granted, but did undergo several procedural changes. These were motivated by the explicit policy choices of the successive federal governments rather than shaped by the case law of (inter)national courts.

First of all, the **protection of unaccompanied minors was strengthened** by means of a legal determination procedure for authorisation to stay as durable solution. In 2011, the procedure – until then only circumscribed in a ministerial circular – was enshrined in the Immigration Act. Art. 61/14 to 61/25 of the Immigration Act now give a detailed overview of the special mechanism for unaccompanied minors, including provisions on the required documents, the hearing with the minor and the roles of the guardian and the Immigration Office. In addition, access to the procedure is ensured by allowing minors

in other asylum and migration procedures to file a separate application for authorisation to stay as durable solution. Until today, these measures have not led to a significant increase in the number of applications.

By contrast, the procedures for authorisation to stay for humanitarian and medical reasons were mainly adapted to **reduce the number of applications** following the regularisation campaign of 2009. Since then, the federal governments did not only agree to refrain from such ‘collective’ measures, but also tightened the admissibility criteria for authorisation to stay based on Art. 9bis respectively Art. 9ter Immigration Act. Since 2015, applicants for humanitarian regularisation need to pay an administrative fee – at the time of writing set at € 358 – before introducing a request. Applicants for medical regularisation are exempt from this requirement, but have to meet other strict admissibility criteria since 2012. The “medical filter”, in particular, now allows the Immigration Office to declare non-admissible applications by foreign nationals invoking illnesses deemed to be “manifestly not serious”. In addition, in both procedures, the authorities examine requests only on the basis of the most recent application of the same type submitted by the foreign national, disregarding elements invoked in earlier requests. These various measures may explain the remarkable decrease in the number of applications for both humanitarian and medical regularisation over the last decade.

Compared to these policy choices, **national and European case law** only had a minor impact on certain aspects of humanitarian and medical regularisation. The Constitutional Court, for example, judged

that the right to social aid should be extended to a previously excluded category of persons authorised to stay on the basis of Art. 9bis. Importantly, in 2019 the Council of State also annulled two Royal Decrees introducing and increasing the administrative fee. At the time of writing, it is unclear whether these last rulings will have a significant impact on current applications. As for foreign nationals authorised to stay on the basis of Art. 9ter, the administrative court CALL recently required the government to reintroduce a “grace period” for family reunification, during which no material conditions are required. By contrast, the judgments by both the CJEU and the ECtHR on the right to an effective remedy in the procedure for medical regularisation did not lead to important changes in law or practice.

From 2010 to 2019, the federal government did not create any new permanent protection statuses, nor did it adopt any temporary protection schemes for sudden large influxes of foreign nationals.<sup>(329)</sup>

## Public debates on national protection statuses

Since 2010, the Belgian protection statuses have produced several short-lived debates in national media and more in-depth discussions among government officials, practitioners and experts. This is particularly the case for medical regularisation based on the amended Art. 9ter.

The procedure for the special status for unaccompanied minors, set out in law since 2011, is generally considered to be a **good practice**. In recent years, some experts have argued that the assessment of the best interests of the child, characteristic of this process, should be extended to other migration procedures involving accompanied minors.

Regularisation, by contrast, has proven to remain a **sensitive topic** in the current political context. On a number of occasions over the last years, national media have reported on stories of young adults and families with children in irregular stay using this procedure as last resort. These stories led to ad hoc debates between advocates requesting a right to stay – and more structural guarantees for accompanied minors – and opponents arguing that this residuary status should only be granted on a discretionary basis. However, these debates did not lead to a fundamental reform of Art. 9bis.

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329 In the 1990s, such ad hoc national solutions had been put in place for persons fleeing the conflicts in Yugoslavia, Rwanda, Bosnia-Herzegovina and Kosovo. See EMN Study on ‘EU and Non-EU Harmonised Protection Statuses in Belgium’, May 2011 (update).

By contrast, the **stricter rules** for medical regularisation on the basis of Art. 9ter did give rise to a series of debates among stakeholders, especially between 2015 and 2017. These experts repeatedly pointed to existing lacunae in the Immigration Act, related in particular to the precarious situation of (seriously ill) foreign nationals applying for authorisation to stay. In fact, these persons do not have residence rights nor access to mainstream health care during large parts of the procedure. The government, these critics argued, also had to enhance procedural safeguards, for example by empowering the appeal judge to reform the original decision by the Immigration Office. Along with these legal recommendations, some experts targeted the administrative practice of the Office itself, deemed to be overly rigid in its assessment of cases. The administration responded to this criticism on several occasions, most recently during the parliamentary hearings in the Spring of 2017. Since these last discussions, no significant changes have been reported in law or practice.

At the time of writing, no new measures have been announced by the federal government – acting in a caretaker capacity since December 2018 –, and no legislative proposals have been filed by members of the federal parliament. It is therefore unlikely that the protection statuses identified in this study will undergo major changes in the near future.







# ANNEXES

## ANNEX 1: SCHEMATIC OVERVIEW

	EU-harmonised statuses		
	Refugee Protection	Subsidiary Protection	Temporary Protection
<b>Rights during procedure</b>			
Legal stay during procedure?	Yes	Yes	Yes
Duration of residence permit?	4 months	4 months	-
Extension of duration?	Yes, for 4 months during first 2 years and then every month	Yes, for 4 months during first 2 years and then every month	-
Access to material aid?	Yes, during procedure	Yes, during procedure	Yes, during procedure
<b>Determination procedure</b>			
Eligibility criteria?	Well-founded fear of persecution	Real risk of serious harm	
Competent authority?	CGRS	CGRS	Immigration Office
Hearing of applicant included?	Yes	Yes	-
<b>Appeal procedure</b>			
Competence to reform decision?	Yes	Yes	-
Automatic suspensive effect of appeal?	Yes	Yes	-
<b>Residence permit</b>			
Validity of first residence permit?	5 years	1 year	1 year
Possibility to renew permit?	n/a	Yes, renewal every 2 years	Yes, up to max. 2 additional years
Specific criteria for renewal?	n/a	No	No
Residence permit for unlimited duration?	After 5 years	After 5 years	n/a
<b>Family reunification</b>			
Right to family reunification?	Yes	Yes	Yes
Grace period for material requirements?	Yes, one year	Yes, one year	-
<b>Travel document</b>			
Possibility to obtain travel document?	Yes	Yes, if no national passport	-
Type of travel document?	Blue cover	Red cover	-
<b>Socioeconomic rights</b>			
Access to social insurance?	Yes, same as nationals	Yes	Yes
Access to social assistance?	Yes	Yes	Yes



National statuses			
Humanitarian Regularisation	Medical Regularisation	Unaccompanied Minors	
No	Only if application has been declared admissible	Only if no durable solution has been found	
n/a	3 months	6 months	
n/a	Yes, 3 times for 3 months and then every month	Yes, for 6 months, if guardian of minor submits evidence related to durable solution	
No	No	Yes, during and after procedure until the age of 18	
Exceptional circumstances	Serious illness	Durable solution	
Immigration Office	Immigration Office	Immigration Office	
No	No	Yes	
No, only appeal for annulment	No, only appeal for annulment	No, only appeal for annulment	
No	No	No	
1 year	1 year	1 year	
Yes, renewal every year	Yes, renewal every year	Yes, renewal every year	
Yes, individual conditions	Yes, medical circumstances	Yes, life plan in Belgium	
After 5 years at the earliest	After 5 years	After 3 years	
Yes	Yes	No	
No	Yes, one year	n/a	
Yes, if no national passport and residence permit for unlimited duration	Yes, if no national passport and residence permit for unlimited duration	Yes, if no national passport	
Red cover	Red cover	Red cover	
Yes, but stricter rules may apply	Yes, but stricter rules may apply	No, but access to material or social aid	
Yes, but excluded from certain programs	Yes, but excluded from certain programs	Yes, access to social aid if minor does not stay in reception centre	

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- Immigration Office

### ANNEX 3: PUBLICATIONS BY EMN BELGIUM (2009-2019)

The present annex lists the studies and reports published by EMN Belgium between 2009 and 2019. The other EMN National Contact Points produced similar reports on these topics for their (Member) State. For each study, the EMN Service Provider, in cooperation with the European Commission and the EMN NCPs, produced a comparative Synthesis Report, which brings together the main findings from the national reports and places them within an EU perspective.

The Belgian reports mentioned below are available for download on [www.emnbelgium.be](http://www.emnbelgium.be).

The reports from the other NCPs as well as the Synthesis Reports are available on: [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm).

2009	
April 2009	The Organisation of Asylum and Migration Policies in Belgium
June 2009	Annual Report on Asylum and Migration Policy in Belgium – 2008
July 2009	Unaccompanied Minors in Belgium - Also available in French and Dutch
October 2009	Programmes and Strategies in Belgium Fostering Assisted Voluntary Return and Reintegration in Third Countries - Also available in French and Dutch
December 2009	EU and Non-EU Harmonised Protection Statuses in Belgium
2010	
January 2010	Annual Report on Asylum and Migration Policy in Belgium – 2009
August 2010	Satisfying Labour Demand Through Migration in Belgium
2011	
January 2011	Temporary and Circular Migration in Belgium: Empirical Evidence, Current Policy Practice and Future Options
March 2011	Annual Report on Asylum and Migration Policy in Belgium – 2010
May 2011	EU and Non-EU Harmonised Protection Statuses in Belgium (update)
October 2011	Visa Policy as Migration Channel in Belgium

**2012**

January 2012	Practical Measures for Reducing Irregular Migration in Belgium
March 2012	Annual Report on Asylum and Migration Policy in Belgium – 2011
April 2012	Misuse of the Right to Family Reunification: Marriages of Convenience and False Declarations of Parenthood in Belgium - Also available in French and Dutch
September 2012	Establishing Identity for International Protection: Challenges and Practices in Belgium - Also available in French and Dutch
September 2012	The Organization of Migration and Asylum Policies in Belgium (update)
October 2012	Migration of International Students to Belgium, 2000-2012
December 2012	Intra-EU Mobility of Third-Country Nationals to Belgium - Also available in French

**2013**

May 2013	Annual Report on Asylum and Migration Policy in Belgium – 2012
July 2013	Attracting Highly Qualified and Qualified Third-Country Nationals to Belgium
August 2013	Organisation of Reception Facilities in Belgium
October 2013	Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures in Belgium

**2014**

February 2014	Migrant Access to Social Security – Policy and Practice in Belgium - Also available in French and Dutch
June 2014	Good Practices in the Return and Reintegration of Irregular Migrants: Belgium's Entry Bans Policy and Use of Readmission Agreements
June 2014	Use of Detention and Alternatives to Detention in the Context of Immigration Policies in Belgium
July 2014	Annual Report on Asylum and Migration Policy in Belgium – 2013
October 2014	Policies, Practices and Data on Unaccompanied Minors in Belgium (2014 Update)
December 2014	Admitting Third-Country Nationals for Business Purposes in Belgium

2015	
June 2015	Determining Labour Shortages and the Need for Labour Migration from Third Countries in Belgium - Also available in French
July 2015	Annual Report on Asylum and Migration Policy in Belgium – 2014
August 2015	Dissemination of Information on Voluntary Return: How to Reach Irregular Migrants Not in Contact with the Authorities in Belgium

2016	
May 2016	Changes in Immigration Status and Purposes of Stay in Belgium
May 2016	Integration of Beneficiaries of International Protection into the Labour Market in Belgium
June 2016	Annual Report on Asylum and Migration Policy in Belgium – 2015
December 2016	Returning Rejected Asylum Seekers: Challenges and Good Practices in Belgium
December 2016	Resettlement and Humanitarian Admission in Belgium

2017	
June 2017	Annual Report on Asylum and Migration Policy in Belgium – 2016
July 2017	Family Reunification with Third Country National Sponsors in Belgium
August 2017	Illegal Employment of Third Country Nationals in Belgium
November 2017	Challenges and Good Practices for Establishing Applicants' Identity in the Migration Process in Belgium

**2018**

May 2018	Changing Influx of Asylum-Seekers in 2014-2016
July 2018	Effectiveness of Return in Belgium: Challenges and Good Practices Linked to EU Rules and Standards
August 2018	Annual Report on Asylum and Migration Policy in Belgium – 2017
September 2018	Labour Market Integration of Third-Country Nationals in Belgium
September 2018	Impact of Visa Liberalisation on Countries of Destination
December 2018	Socio-Economic Profile and Socio-Economic Careers of People Granted International Protection in Belgium, 2001-2014

**2019**

June 2019	Annual Report on Asylum and Migration Policy in Belgium – 2018
July 2019	Beneficiaries of International Protection Travelling to their Country of Origin: Challenges, Policies and Practices in Belgium

**2020**

Forthcoming	Attracting and Retaining International Students and Researchers in Belgium
Forthcoming	Migratory Pathways for Start-ups and Innovative Entrepreneurs in Belgium
Forthcoming	Pathways to Citizenship in Belgium
Forthcoming	Annual Report on Asylum and Migration Policy in Belgium – 2019









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