No Residency Status – Protection for Asylum Seekers and Illegal Immigrants

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Despite attempts to harmonize asylum and immigration policies within the countries of the European Union, responses by the authorities of each state to the challenges posed by the flood of migration remain essentially influenced by the national context. The ombudsman's role is to clarify to Parliament and to society at large, without concession, the effects of administrative practices upon human rights. This paper reviews several investigations and recommendations of the Belgian Federal Mediator in this regard. It is up to authorities to deal with the risks of abuse of the immigration laws and uphold the requirements of good administration, while ensuring above all that they preserve the fundamental rights of individuals. In the battle against clandestine immigration, ombudsmen have a specific role of vigilance to ensure against a blurring of norms in our states.

The Belgian Context

Belgium, a country of about 10.5 million inhabitants, is distinguished by its geographical placement in the heart of Europe, and its status as the capital of the European Union. Because of this, the foreign population in Belgium is largely European. Moreover Belgium maintains special relations with its former colony, the Democratic Republic of the Congo, and more broadly, with French-speaking Africa.

In 2007, the foreign population in Belgium was comprised of: 76% European nationals (63% EU citizens, 15.5% citizens of other EU countries, 8% non-EU Europeans), 15% African nationals, 6% Asian (excluding Turkey), 1.5% North American and 1.5% Latin American.

The principal reasons for legal immigration are reuniting families (53%), study (24%) and work (15%).

Since 1990, Belgium has been part of the Schengen Area. Belgium no longer has any land borders, and border control therefore is concentrated in international airports, maritime ports and the Eurostar terminal at the Brussels-Midi train station (the United Kingdom is not part of the Schengen Area).

Asylum

Belgium experienced its greatest level of asylum requests at the end of the 1990s with a record peak of 42,000 requests in the year 2000 alone. The evo-

lution of the international context, along with the replacement of financial assistance accorded to asylum seekers during the evaluation of their request for protection by exclusively practical assistance, led to a massive reduction in the number of asylum requests made to Belgium during the following years, dropping to 11,115 requests in 2007. In 2008, the trend was rising, however, surpassing once again the 12,000 requests-per-year mark.

The rate of acceptance in 2008 was 28% (refugee status and subsidiary protection combined).

Illegal immigration

As with most immigration destinations, Belgium has a significant presence of "undocumented foreigners," some of whom are ex-asylum seekers who never left the country after their request for asylum was denied.

The only regularization project was carried out in 2000. It led to the granting of administrative status to 42,000 people.

Aside from this single regularization project, the Minister in charge of Migration and Asylum Policy may accord residency status, at his discretion, to foreign nationals staying illegally, on the basis of individual requests. With 19,371 requests for residency status lodged in 2008, they currently exceed the number of requests for asylum.

The principal ground for regularization is the excessive length of the asylum procedure. This ground has been written as such in the government's migration and asylum policy since 2005 and is intended to deal with the backlog that the regularization services inherited from asylum cases, unable to absorb the rise in requests at the beginning of the new century. The two other grounds are medical reasons and grave humanitarian circumstances. These criteria are only defined through administrative practice.

The department in charge of handling these requests (the Foreigners' Office) has been operating with a structural backlog for more than 10 years. Until 2005, the number of requests was greater than the number of decisions made, and the average length of processing time was more than 24 months.

In 2006, the Federal Mediator addressed six recommendations to the Foreigners' Office aimed at improving and accelerating the processing of requests for humanitarian regularization. Since then, and thanks in particular to the granting of significant supplementary resources by the government, the trend has reversed and the Foreigners' Office has achieved a gradual reduction in the backlog.

For three years, the issue of undocumented foreigners has been at the heart of public debate in Belgium, with strong demands for the adoption of clear and expanded regularization criteria. These demands are supported by repeated actions by groups of undocumented foreigners seeking media attention – the occupation of churches, of universities, of public spaces one after the other, with or without hunger strikes. These actions have had various outcomes.

The federal government elected in March 2008 now has, for the first time, a Minister of Migration and Asylum Policy – matters that formerly had de-

volved to the Minister of the Interior. The creation of this ministerial portfolio reflects an awareness of the importance of the migration issue.

The government's decision was to keep the principle of a regularization policy applied exclusively on an individual basis, subject to the discretionary power of the Minister of Migration and Asylum Policy, and carried out by his delegate, the Foreigners' Office. The decision anticipated, however, that the regularization criteria would be spelled out in a government directive. Both the Federal Mediator[1] and the State Council[2] have for some years pointed out the legal uncertainty generated by this method of governing.

The Federal Mediator

How does the activity of the Mediator (ombudsman) fit in this context?

The ombudsman has no competence in dealing with claims with regard to the content of legal decrees, nor those that have to do with general government policy. Complaints handled by the Federal Mediator therefore exclusively concern the execution of policy by executive authorities.

Claims

Aside from social security and taxation, the realm of asylum and immigration represents one of the three sectors that generate the most complaints received by the Federal Mediator in Belgium. For the last five years, it has been the principal source of cases handled by the ombudsman.

It should be noted that recourse to the ombudsman is not subject to any condition of nationality, nor residency – anyone who is confronted with a difficulty with a Belgian federal administrative authority can make a complaint. Claims with regard to asylum cases and immigration services are within his realm of action.

Asylum

In Belgium, the ombudsman is little consulted in matters of asylum, strictly speaking, unless it is to correct certain particularly long pre-hearing delays or to become involved in a procedure concerning certain vulnerable categories of complainants, such as minors.

Claims considered to be suitable principally concern the following issues:

- delay in processing cases;
- procedural safeguards with respect to minors;
- application of the Dublin Regulation – application of the sovereignty clause.

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[1] Federal Mediator, *Rapport annuel 2001*, General Recommendation 01/01, pp. 175-176.

[2] *Projet de loi modifiant la loi du 15 décembre 1980*, Avis du Conseil d'Etat n° 39.718 AG, *Parl, Doc.*, House of Representatives, regular session 2005-2006, doc. 51/2478/001, pp. 184-186, points 1.5.1 and 1.5.2.

Access to territory and residency

The vast majority of claims submitted to the Federal Mediator over the past 10 years concern access to territory and residency rights. The primary grievance concerns delays in treatment. After that, it is principally the absence of transparency in administrators' decision-making criteria in areas where the law provides them with a discretionary power. Essentially, it concerns the regularization of residency for humanitarian reasons, the other area being the delivery of short-term visas.

Since the government has discretionary competence, preserving citizens' trust requires that it exercise this in a predictable and consistent manner. This implies that it define its administrative policy and make it public. Unless it does this, it cannot rule out being arbitrary. In addition, it opens the door to speculation.

Experience shows that the absence of transparency in the exercise of discretionary power is accompanied by a multiplication in the number of requests, of which a large number will be doomed to failure, themselves followed by a multiplication in the number of appeals, leading to the accumulation of a backlog for all the authorities involved.

The Federal Mediator therefore has been recommending since 2001 that the government exercise greater transparency in the application of the law concerning the admission, residency and removal of foreigners.

Aside from these two grounds for claims, there are particular issues such as the handling of stateless cases, requests for protection for medical reasons, or the fate of requests made by parents of Belgian children. These touch on the respect for fundamental human rights.

Removal

As was the case with asylum, the Federal Mediator received few complaints in the matter of removal. However some key cases or unique issues were submitted to him, including:

- "liberation" in the transit zone at the national airport[3];
- the fate of people who cannot return to their home country;
- notification of a removal order while a request for residency status is still in process.

Investigations

Aside from handling complaints made by citizens, the Belgian Federal Mediator may be charged by Parliament with specific missions to investigate the functioning of designated public services. It is really a unique feature among the competencies generally assigned to an ombudsman. It makes less restrictive the rule that ombudsmen in Belgium do not have *ex-officio* powers of inquiry.

[3] ECHR, 24 January 2008, *Riaad et Idiab c. Belgique*, req. n° 29787/03 and 29819/03.

This assignment was authorized by Parliament for the first time in February 2008 in the spheres of asylum and immigration. By unanimous vote, the Federal Mediator was charged with leading two investigations, one having to do with reception centres for asylum seekers, the other concerning retention centres for foreigners in the process of removal.

These investigations took more than a year. The reports were submitted to Parliament on June 29, 2009.[4] This was an important step in the development of the ombudsman's function in Belgium. The overall method used and the conclusions drawn from the investigation of the retention centres are examined below.

Analytical model

In carrying out these two competencies (handling of complaints and carrying out investigations), the approach of the Federal Mediator is based on a thorough analysis of methods related to standards of good administrative practice.

The definition of these standards has arisen from the evaluation of complaints over the 10 years the service has been in existence, further enhanced by the experience of our national and foreign colleagues. They are recorded in a model of "standards of good administrative practice."[5]

These standards include respect for the law, with particular vigilance for the respect of fundamental rights, respect for material requirements for good administration (such as judicial security, legitimate trust, the need for reasonable administrative action) and respect for the formal principles of good administration (such as reasonable timeframes, active information, accessibility).

However, behind the ignorance of these procedural norms – often attributed by administrative services to a lack of means at their disposal – is sometimes hidden the lack of respect for other fundamental norms, such as the need for reasonableness and proportionality, for proper motivation, for judicial security, or even equality of treatment.

In addition, the absence of transparency in the application of regulations is also too often considered by immigration authorities as a necessary tool for dealing with organized cases of trafficking, fraud, or attempted lawbreaking. The government justifies its refusal to reveal its administrative practice in the belief that if it divulges its decision-making criteria, it will allow criminal networks to organize themselves to satisfy the required conditions. It is important to note that a similar attitude can be found in other areas of sovereign state power, such as taxation.

Sometimes, the desire to control the flood of migration can lead the government to impose its own reading on the law, blurring the clarity of its provisions.

[4] Federal Mediator, *Rapports d'investigation 2009/1* and *2009/2*, available on the website www.mediateurfederal.be.

[5] The list is published at http://www.mediateurfederal.be/fr/normes.

Complaints: Respect for Children's Rights

The question of foreign parents visiting their Belgian children allows us to illustrate the above comments.

The Federal Mediator has received complaints concerning disturbing rulings by the Foreigners' Office with respect to separated families composed of one Belgian parent (usually the father), a foreign mother in illegal residence, and one or several children having acquired Belgian nationality on the basis of recognized paternity. When the mother requested regularization of her status on the basis of her right to family life with her Belgian child, the Foreigners' Office required her to provide proof that the Belgian father was in fact taking care of his child. The government was operating on the premise that if the Belgian father was not looking after his child, it was probably a case of recognition of paternity by convenience. It denied the mother any benefit in terms of residency.

This attitude constitutes, first of all, a manifest violation of Belgian legislation, which does not recognize the concept of recognition by convenience, and puts strict limits on the procedures for contesting paternity. It further constitutes a disproportionate interference with respect to the right of the mother to family life with her child and seriously impinges on the rights of the children concerned.

This practice also violates several rights guaranteed by the European Convention on Human Rights, and by the Convention on the Rights of the Child. It means that the foreign parent who looks after her child is not authorized to stay with the child in Belgium if the Belgian parent does not look after the child.

Even if the Belgian government affirms that it will not expel the Belgian child, its decision places the mother in an impossible position to make a decision based on the best interests of her child: Either she submits to the decision of the Foreigners' Office and she is required to take the child with her, if the other parent is not looking after the child, which amounts to a *de facto* violation of the prohibition against expelling one if its nationals and deprives the Belgian child of economic and social rights in Belgium – or she remains as an illegal resident, but her legal situation puts her in an impossible situation to satisfy the primary needs of her child.

The Federal Mediator submitted a recommendation to the Foreigners' Office to put an end to this practice. Initially, the Office refused to follow up. The Federal Mediator informed the government and the relevant ministry that he was putting this recommendation on the agenda for discussion with the European Commissioner for Human Rights during his official visit to Belgium in December 2008.

In March 2009, during the presentation of his annual report to Parliament and to the media, the Federal Mediator denounced the continuation of this practice, which is manifestly contrary to human rights. Only one newspaper carried it, but on a whole page. The next day, the Minister announced that instructions had been given to the administration to put an end to this situation. Since then, the parent of a Belgian child has needed only to prove that he

or she is the effective caregiver of the child in order to receive residency status.

The government has committed to review all cases included in official recommendations by the Federal Mediator. Other persons in the same situation may introduce new claims, which will be examined according to the latest directive.

Investigation

Method

As mentioned before, in 2008, the federal Parliament instructed the Federal Mediator to undertake two performance-related investigations – of reception centres for refugee seekers, and retention centres for foreigners waiting removal.

The field of the investigations was not limited in the warrant: it focused on the *functioning* of the centres. In order to ensure the quality of the procedure, an advisory committee was formed, composed of external experts.

The method followed by the Federal Mediator was structured in 10 stages:

1. Pre-investigation by analyzing all available sources;
2. Interviews with people in the field (monitoring institutions, NGOs, children's rights delegates, etc.) to identify the main problems;
3. Definition of the terms of the inquiry;
4. Definition of the standards of reference (international/national, hard law/soft law);
5. Written inquiry;
6. On-site visits (first announced, later unexpected):
    - systematic examination of all sites of the centre;
    - selection of interviews by the investigation team;
    - consultation of sampled files;
    - verification of records;
7. Analysis of results, additional information;
8. Writing of a provisional report and recommendation proposals;
9. Discussions with the government and then with the appropriate minister; and
10. Submission of the report to Parliament.

Three critical factors had to be taken into consideration: Time management; gradual adjustments made by the government; distancing from the political debate on confinement.

Given the number of reception centres, the inquiry was carried out by means of sampling, thereby limiting the written inquiry and site visits to 12 of the 42 centres. Because there are only six retention centres, and specific risks associated with confinement, the investigation team thoroughly examined all of them.

Retention centres – principal conclusions of the inquiry

The report started from the premise that personal liberty is the rule, and deprivation of liberty the exception – an exception that, in matters of administrative detention of foreigners awaiting removal, should only be a measure of last resort.

The conclusions were structured around seven critical reflections concerning the holding of foreigners in retention centres:

1. Confinement in a closed centre – a deprivation of freedom

Closed centres have the sole purpose of maintaining foreigners *humanely* in a closed space, where they are placed by administrative decision, awaiting either being granted permission to enter the country, or being prepared for their return to their country of origin, or a third country. Closed centres are not, therefore, penitentiaries.

Nonetheless, these centres constitute places of deprivation of freedom. Confinement in these centres therefore constitutes a violation of the fundamental right of each individual to live in freedom. From this perspective, confinement must be accompanied by significant safeguards for preserving all the other fundamental human rights of those confined, and must ensure that this infringement of personal freedom is strictly limited.

On several occasions, the report draws parallels with the legal and regulatory framework governing the status of detainees held in penitentiaries. In fact, the 2002 regulation is based on the principle that rules within retention centres cannot be more strict than those in penitentiaries. Meanwhile, an in-depth reform of the penitentiary system was completed in 2005. Regulations concerning retention centres, should, therefore, at a minimum include improvements made to the conditions of those held in prisons.

REGULATING LIFE – THE DISCIPLINARY SYSTEM – SECURITY AND MAINTENANCE OF ORDER

The way of life within centres is in principle group living, not a system of cells as in a prison. A person's freedom of movement and autonomy are, however, very limited there. The investigation concluded that the extent of the restriction on personal freedom imposed on occupants of the centres actually makes them detention places rather than closed reception places, contrary to the spirit that prevailed at the time of their inauguration, and to the image held by much of society.

The Federal Mediator therefore recommended that the group way of life be fundamentally reviewed in order to accord greater autonomy to the occupants. Restrictions on the personal freedom of those held in the centres should be limited to what is strictly necessary in order to organize community life.

In four of the centres, the complete separation of men and women, even in daytime, and the prohibition of contact between occupants of different wings or living units, accompanied by sanctions, was found to contribute to an ag-

gravation of an imprisoning atmosphere, and prevent any kind of normal way of life within the centres.

The inquiry also revealed an indirect use of solitary security confinement as a disciplinary measure, which allows the administrators of the centres to escape the strict conditions surrounding solitary confinement for disciplinary reasons. The Federal Mediator recommended that the regulation be amended in order to clearly distinguish security measures from disciplinary measures, and avoid any risk of confusion between the two procedures – and that measures should be taken, including staff training, to introduce a stress-reduction approach within the centres. It was also recommended that detainees' have at least the same guarantees of contact with the outside world as those accorded to prison inmates.

VULNERABLE GROUPS

While the stress of detention is felt by all occupants, the psychological weight of confinement – and the loss of freedom – has repercussions that are even greater for families with children, as well as other vulnerable groups, in particular those persons suffering from psychological disorders. The Federal Mediator found that the confinement of children was neither legally nor medically defensible and recommended that it be ended immediately.

During the inquiry process, the government decided to end the practice of detaining families that are illegal residents, and to send them from now on to open accommodation locations under the supervision of a coach. This is an encouraging development, but remains insufficient for two reasons:

- It only targets a portion of the families held in closed centres. Families arrested at the border are still held in the centres. They have neither the conditions nor the structure sufficiently adapted to the needs of their children.
- It is a political decision that carries with it no guarantee of permanence. A return to the previous practice remains foreseeable.

The Federal Mediator recommended that the confinement of families with children in retention centres be legally prohibited, as it has been for unaccompanied minors since 2007. It was also recommended that alternatives be sought to confinement for people with psychological disorders. The conditions of detention of these people were found to be susceptible to becoming inhumane or degrading treatment, and that the centres' authorities could not provide adequate supervision. The presence of such people within the centres was also found to weigh heavily on the well-being and security of the other occupants, and the staff.

2. Confinement in a closed centre – a measure of last resort?

While the investigation permitted us to conclude that it is technically legal to detain people in closed centres under the authorization of a removal order, the inquiry found that nothing in Belgian law stipulates there be an evaluation of

the proportionality of the recourse to detention with regard to the objective of removal, nor of its fairness in individual situations.

The very high percentage of detainees whose request for asylum needs to be handled by another member state seemed to indicate that there is a systematic confinement of this category of asylum seekers, without a reasonable and objective examination of the particular situation of each foreigner concerned.

Among the undocumented, a large number resent their loss of liberty and see the inspection that led to their being sent to a closed centre as a matter of chance. For many, the only measure taken before being placed in detention was their being notified of an expulsion order, without having been previously offered the removal option, or to be escorted in order to make a voluntary return.

Except for those whose request for asylum has been denied, and who, in theory, would have received information relative to voluntary return at the time of the rejection of their request, the other occupants are often not provided with return information until the time of their arrival at the closed centre. The loss of liberty is therefore not experienced as a measure of last resort, but as a bureaucratic measure within the process of removing those found to be illegal residents.

The Federal Mediator therefore invited the authorities to enter the zone hitherto unexploited, between the notification of the requirement to leave the country and its forcible execution accompanied by detention measures.

3. Confinement in a closed centre – a measure with no time limit

Belgian law provides a maximum timeframe during which a foreigner may be administratively held in a detention centre. These times vary according to categories, from 1-8 months, the upper limit being in cases of severe threats to national security or public order.

In exceptionally grave circumstances, the Minister may, however, detain an occupant at the disposition of the government, in which case the person may be held for more than eight months. Our inquiry found one case where, through a combination of provisions, the person ran the risk of remaining in a retention centre for more than two years. The person has since been placed in a system of supervised residence.

In addition, according to their established practice, the immigration services may make a new detention decision when an occupant opposes a removal attempt. The setting of the detention timer is then reset to “zero.” This practice was upheld by the Belgian High Court of Appeal on August 31, 1999. However, data published by the Foreigners’ Office on the effectiveness of incarceration is based solely on measuring the length of time of each confinement, and not on the actual length of confinement time per occupant. This data is indispensable in terms of public management to be able to gauge the efficacy of a confinement policy with respect to the goal of removal. In addition, it is the actual detention time that can, in terms of the conditions in which it takes place, be considered inhuman or degrading treatment, contrary

to Article 3 of the European Convention on Human Rights, even while the detention has legal status.

The Federal Mediator recommended, therefore, that the government put in place a relevant, trustworthy and transparent system of data collection based on the real detention times per occupant.

Moreover, considering the infrastructure and actual physical conditions within the centres, and the way of life established therein, the Federal Mediator was of the opinion that a detention of more than two months may in certain cases, risk violating human dignity and lead to consequences disproportionate to the goal intended by confinement.

4. Confinement in a closed centre – a mix of diverse populations

Our inquiry also found that the mixing of diverse categories of people (inadmissibles, asylum seekers, undocumented foreigners and among the latter, common law ex-detainees) leads to tension. The operation of the centres does not adequately meet the specific needs of the various groups, particularly in terms of legal aid, social assistance and medical attention. The Federal Mediator recommended, in particular, that the removal of common law ex-detainees proceed after the end of their prison sentence.

He also recommended reviewing the organization of the medical service.

5. Confinement in a closed centre – infringements on human dignity

When human dignity is threatened in the centres, material problems were found to be partly to blame. For example, we found one centre where the degradation and wretchedness of the infrastructure, conceived initially as temporary, combined with the cramped nature of the centre and the prohibition of visits, created a standard of living incompatible with human dignity. The Federal Mediator recommended the closing of this centre and called for the necessary work required to preserve the occupants' right to privacy in the centre's sanitary spaces to be carried out on an urgent basis. He also recommended that when families are kept in a centre as a last resort, they absolutely must be accommodated in individual living spaces adapted to the fundamental needs of the children.

6. Confinement in a closed centre – unequal treatment

The inquiry showed that the same category of occupants may be subjected to different regimes according to the centres in which they are maintained. Inequalities in treatment that were noted could be attributed to three principal factors:

- insufficient or erroneous information on the part of the occupants concerning their rights and duties while in the centre;
- differences in infrastructure;
- absence of uniform rules (notably concerning living regulations, exterior contacts, isolation prior to the occupant's actual removal, transfer from one centre to another, search methods).

7. Confinement in a closed centre – is there a right to lodge a complaint?

A Complaints Commission charged with handling individual occupants' complaints was set up in January 2004. While recourse to this commission was conceived by the legislature as a quick and easy mechanism for resolving problems encountered by the occupants, and as a tool for improving the operation of the centres, the investigation showed that the commission failed to meet either objective. The Federal Mediator recommended a review of the method of operation and the decision-making practice of the commission. Moreover, given detainees' extreme vulnerability to the risks of inhuman treatment or degradation, the Federal Mediator stated that it was imperative to make provision for an independent control mechanism over the detention centres.

Conclusions

Despite attempts to harmonize asylum and immigration policies within the countries of the European Union, responses by the authorities of each state to the challenges posed by the flood of migration remain essentially influenced by the national context.

While the ombudsman cannot ignore the reality of the phenomena that accompany the management of the migratory flow, his role is to clarify to Parliament and to society at large, through reports and recommendations, without concession, the effects of certain administrative practices and the transgressions they engender. It is up to the authorities to organize themselves adequately to deal with the risks of abuse, while ensuring they conform to the law and the requirements of good administration, but above all to preserve the fundamental rights of individuals. What is at stake for our states in the battle against clandestine immigration cannot lead to a blurring of norms, and ombudsmen have a specific role of vigilance in this matter.