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COMMISSAIRE AUX DROITS DE L'HOMME



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# **REPORT BY NILS MUIŽNIEKS**

COMMISSIONER FOR HUMAN RIGHTS  
OF THE COUNCIL OF EUROPE

**FOLLOWING HIS VISIT TO BELGIUM  
FROM 14 TO 18 SEPTEMBER 2015**



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## SUMMARY

Commissioner Nils Muižnieks and his delegation visited Belgium from 14 to 18 September 2015. During the visit, the Commissioner held discussions with state authorities and non-governmental, national and international organisations. The present report focuses on the following major issues:

### **Human rights of migrants and asylum-seekers**

Faced with a considerable increase in the number of asylum-seekers in 2015, particularly as of August when 4 621 claims were registered, Belgium has bolstered its reception capacity and increased its regular resettlement quota for 2015 and 2016. The Commissioner welcomes this response and invites the Belgian authorities to continue to expand their reception capacity and open other avenues enabling persons in need of international protection to reach Belgium legally and safely. The authorities should also speed up the registration of newly arrived asylum-seekers and ensure that they are not left without accommodation while registration is pending. Furthermore the authorities should ensure that certain categories of asylum-seekers, notably those filing subsequent asylum claims and those subjected to a transfer order under the Dublin regulation, are not left without any social and material support leading to situations of extreme deprivation.

Detention of migrants on grounds of their immigration law status remains widespread in Belgium. The Commissioner expresses particular concern at the systematic detention of asylum-seekers without valid travel documents at the border. He recalls that if it is not used as last resort, for the shortest possible time and in close connection with the specific ground for which it is ordered, detention of asylum-seekers is unlawful. Moreover, while detention can be prolonged for up to eight months, there is no systematic and regular judicial review of the legality of detention. Vulnerable migrants have also reportedly been detained, as minority of age is the only ground for exemption from detention. The Commissioner welcomes that Belgium no longer places families of migrants with children in closed detention centres. Asylum-seeking families or families in a process of return are accommodated in family units. The Commissioner calls on the Belgian authorities to refrain from resuming the practice of detaining families of migrants with children in closed detention centres.

The Commissioner invites the authorities to improve the system for monitoring the conditions and treatment of migrants and asylum-seekers in detention. To this end, Belgium should ratify the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment of Punishment (OPCAT) and set up a National Preventive Mechanism for the Prevention of Torture (NPM), in accordance with the Protocol.

While the number of unaccompanied migrant minors has grown in 2015, the Commissioner welcomes that the authorities have taken measures to improve the protection of these particularly vulnerable migrants. Their detention has been prohibited since 2007. However, gaps have been reported in services provided to them by the authorities at different levels, due to a lack of coordination between the different levels of administration. As regards migrant children with a family, more could be done to ensure that their best interests are a primary consideration in all decisions concerning them, including targeted training of civil servants on this issue.

It has been possible to obtain a residence permit on medical grounds since 2006 in Belgium. Nonetheless, since 2012, access to this procedure has been restricted. The Commissioner is concerned that migrants could be returned to countries where they would face a real risk of being subject to treatment contrary to Article 3 of the European Convention on Human Rights, notably due to reported shortcomings in the assessment of the effective availability and accessibility of treatment to the returnees in their country of origin.

While acknowledging efforts made to facilitate the integration of refugees in Belgium, the Commissioner urges the authorities to refrain from enacting measures that limit access by refugees to a number of benefits on an equal footing with Belgian citizens, which can only hamper their integration. In order to promote the integration of newcomers, comprehensive integration policies should be further developed. The inclusion of children of foreign background in the educational system on an equal footing with others should be a key element of such policies.

## **Human rights of persons with disabilities**

Legal capacity is an important element supporting the right of persons with psychosocial and intellectual disabilities to live independently and be included in the community. A law of 2014 establishes the presumption of legal capacity of these persons and the possibility for a provisional guardianship regime to be ordered by a judge. While considering that it is not fully compliant with Article 12 of the UN Convention for the Rights of Persons with Disabilities, the Commissioner finds that the law constitutes an important step forward in promoting the equality of persons with disabilities before the law, if applied in line with the UN Convention for the Rights of Persons with Disabilities. It is therefore essential to ensure that judges in charge of implementing the law are trained and granted adequate support to this end.

The widespread institutionalisation of persons with disabilities is an issue of concern. There is a lack of alternatives to institutions and of community-based services available to persons with disabilities. Consequently, these persons have limited possibilities to lead an autonomous life and be included in the community, a right enshrined in the UN Convention for the Rights of Persons with Disabilities. The existing systems of budgets for personalised assistance reportedly do not fully meet their needs. It is therefore positive that Flanders is implementing a strategy aimed at moving from a model based on institutionalisation to a user-centred system, notably through a new system of personal funding.

The Commissioner is also seriously concerned at the high number of children with disabilities who are educated separately from other children in specialised schools in Belgium. While the authorities stress the high quality of education provided in the Belgian specialised education system, children enrolled in specialised schools do not obtain diplomas and are only rarely reintegrated into mainstream education. The Commissioner is concerned that separation in education has long-lasting detrimental effects on their inclusion in society. Flanders has started to address the problem through a reform aimed at promoting access for children with disabilities to mainstream education, but the Commissioner considers that it falls short of promoting the full inclusion of children with disabilities in mainstream education, in line with the UN Convention for the Rights of Persons with Disabilities. The German-speaking Community also initiated a transition towards inclusive education, starting with the closing down of geographically isolated specialised schools and increasing interactions between specialised and mainstream education. In the French Community, pilot projects for the integration of children with disabilities have been launched but there is a reported lack of a consistent policy for the promotion of inclusive education. The Commissioner calls for a firm nation-wide commitment in Belgium towards the inclusion of children with disabilities in mainstream education.

The detention of persons with psychosocial and intellectual disabilities in overcrowded psychiatric wards in Belgian prisons, without providing them with adequate treatment, is a long-standing human rights concern, as evidenced by the numerous cases in which the European Court of Human Rights found Belgium in violation of the European Convention on Human Rights in this area. Persons sentenced to treatment can spend several years in totally inadequate detention conditions, in psychiatric wards and at times in ordinary cells, pending transfer to a specialised psychiatric institution. A new specialised facility with 260 places was built in 2014 and the authorities plan to build another one and enhance the capacity of existing institutions. A law of 2014 also introduces welcome changes to the current system, in particular easing transfers from the penitentiary system to health care institutions. In order to remedy the serious human rights violations inflicted on detainees with psychosocial and intellectual disabilities, the Commissioner urges the authorities to implement the planned measures and ensure the entry into force of the 2014 law without further delay.

## **Human rights of Roma and Travellers**

Belgium is home to 7 000 Belgian Travellers, 1 500 Belgian Manouches/Sinti and 750 Belgian Roma. Around 30 000 Roma who are nationals of different EU and non-EU member states also live in Belgium. In 2012, the authorities adopted a national Roma integration strategy, which however lacks clear targets, timeframes for implementation and allocation of responsibilities, a credible system for monitoring progress and budgetary allocations. The federal authorities intend to set up a national consultation platform to review the current strategy.

Concerning Roma migrants, the marginalisation and acute destitution of a limited number of families is of serious concern. They are no longer provided with accommodation to which migrant families with children in an irregular situation are in principle entitled, on grounds that they originate from EU member states. Denials

of registration on municipal rolls of Roma living in substandard housing have been reported, which deprives them of access to a range of social services. Promising practices aimed at providing targeted social action and using mediators have been implemented in some cities, notably Ghent. The Commissioner recommends that, based on these examples, sustainable solutions are identified at the local level to prevent some Roma families from falling into homelessness and extreme destitution, which has a particularly detrimental impact on children belonging to these families.

Belgian Roma and Travellers with an itinerant or semi-itinerant way of life face important difficulties due to the lack of availability of encampment sites and a worrying tendency among local authorities in recent years to resort to forced evictions. The Commissioner deplores the fact that few local authorities make use of existing funds to build encampment sites. Caravans are still not recognised as housing throughout the country. Moreover, it is of deep concern that some municipalities reportedly deny domiciliation to Roma and Travellers, leading to important restrictions in the right of these persons to choose their residence and hampering their access to key services.

Both foreign Roma children and children of Belgian Roma and Traveller background are over-represented in specialised education, an issue of deep concern to the Commissioner. Moreover, children from families with an itinerant or semi-itinerant lifestyle are increasingly prevented from attending school due to frequent forced evictions. Manifestations of hostility against Roma and Travellers have frequently been reported, notably at the local level. The Commissioner stresses that all instances of hate speech and discriminatory practices, including by elected representatives and political leaders, should be firmly and unequivocally condemned by the authorities at the highest level.

## INTRODUCTION

1. The Commissioner for Human Rights of the Council of Europe, Nils Muižnieks (the Commissioner), conducted a visit to Belgium from 14 to 18 September 2015.<sup>1</sup> The visit focused on the human rights of migrants and asylum-seekers, persons with disabilities and Roma and Travellers.
2. In Brussels, the Commissioner met with Mr Koen Geens, Minister of Justice; Mr Didier Reynders, Minister of Foreign Affairs; Mr Theo Francken, State Secretary for Asylum and Immigration; and Ms Elke Sleurs, State Secretary for the Fight against Poverty, Equal Opportunities, Persons with Disabilities and Science Policy. He also held meetings with representatives of the government of the French Community (Mr Demotte, Minister-President of the Community; Ms Simonis, Minister of Social Advancement Education, Youth, Women's Rights and Equal Opportunities; and Mr Madrane, Minister of Youth Welfare, Community Justice Centres and the Promotion of Brussels), representatives of the Flemish Government (Ms Homans, Minister of Internal Administration, Civic Education, Housing, Equal Opportunities and the Fight against Poverty; Ms Crevits, Minister of Education; and Mr Vandeurzen, Minister of Welfare, Public Health and Family) and representatives of the Government of the German-speaking Community (Mr Paasch, Minister-President; and Mr Antoniadis, Minister for Family, Health and Social Issues). The Commissioner also met with representatives of the Brussels regional government and its Flemish and French Community Councils (Minister Vanhengel; State Secretary Debaets; and Minister Laanan).
3. The Commissioner also met with Ms De Bruecker and Mr Herman, the Federal Ombudspersons; Mr De Vos, the *Délégué Général aux droits de l'enfant* of the French Community; Mr Vannobergen, the Flemish Parliamentary Child Ombudsman; Ms D'Hondt, the Head of the National Commission for Children's Rights; and with representatives of the Inter-Federal Centre for Equal Opportunities (the Inter-Federal Centre) and the Federal Migration Centre (Myria). He also held discussions with representatives of UNHCR and of various civil society organisations.
4. The Commissioner visited a detention centre for migrants situated next to Brussels airport (Caricole centre) and family units in which migrant families with children are accommodated as an alternative to detention (Beauvechain). He also visited the psychiatric ward of the prison of Forest in Brussels, as well as living units for persons with disabilities (Brussels). Additionally, he visited Maximilien Park in Brussels, where at the time of the visit several hundred asylum-seekers were camping while awaiting the registration of their claims with the Aliens Office.
5. The Commissioner would like to thank the Belgian authorities in Strasbourg and Brussels for their assistance in organising his visit and facilitating its independent and smooth execution. He would also like to thank all his interlocutors for sharing their knowledge and insights with him.
6. The Commissioner notes that the aforementioned topics which he selected for specific examination in this report on Belgium (and more recently the human rights of migrants and asylum-seekers in particular) have been the subject of extensive public debate in the country. With the present report, the Commissioner hopes to contribute to this debate and wishes, in particular, to continue his constructive dialogue with the authorities on how to improve human rights protection in Belgium. Accordingly, the present report covers the human rights of migrants and asylum-seekers in Section I; the human rights of persons with disabilities in Section II; and the human rights of Roma and Travellers in Section III.

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<sup>1</sup> During his visit the Commissioner was accompanied by the Deputy to the Director of his Office, Mr Giancarlo Cardinale, and his Adviser, Ms Françoise Kempf.

## 1 HUMAN RIGHTS OF ASYLUM SEEKERS AND MIGRANTS

### 1.1 SELECTED HUMAN RIGHTS ISSUES REGARDING ASYLUM-SEEKERS

#### 1.1.1 RECEPTION OF NEWLY ARRIVED ASYLUM-SEEKERS

7. Between January and August 2015, Belgium registered 16 754 asylum claims. In August alone, 4 621 claims were registered (an increase of more than 55% compared with July 2015), and 5 512 in September 2015.<sup>2</sup> Faced with this increasing number of asylum-seekers and the ensuing accommodation needs, the government decided to make use of the existing buffer places within the reception system (2 500 to 2 800 places) and to make 8 000 additional places available as a matter of emergency. The opening of 10 000 new places has also been announced for 2016.
8. The Commissioner welcomes this prompt reaction of the authorities, although he also notes that the recent difficulties experienced in meeting reception needs also resulted from earlier decisions to reduce both the number of places available (from almost 24 000 at the end of 2012 to 17 411 at the beginning 2015) and the budget of Fedasil, the federal agency in charge of the reception of asylum-seekers. The Commissioner also praises the important role played by Belgian civil society in providing comprehensive support to refugees who continue to arrive in Belgium. On 17 September 2015, he visited Maximilien Park in Brussels, where a few hundred asylum-seekers had been camping from the end of August until the end of September, pending their registration with the Aliens Office and subsequent access to state-run reception centres. He noted the effectiveness of the support provided by a range of NGOs and citizens' organisations on the spot.
9. The Commissioner notes that with the maximum number of registrations by the Aliens Office set at 250 per day, many asylum-seekers have been compelled to live in the park. At the time of the Commissioner's visit, alternative overnight accommodation was provided to asylum-seekers by the federal authorities in a building adjacent to the park. The Commissioner notes with satisfaction that the accommodation conditions in this building, which is now also open during the day, have improved since his visit and that the asylum-seekers now have access to meals and sanitary facilities. However, at the time of completing this report, the building had reached its full capacity with about 500 persons accommodated every night. Newly arriving asylum-seekers reportedly had to seek again the support of civil society organisations for accommodation or sleep rough.
10. The Commissioner welcomes that the Belgian authorities have decided to increase Belgium's regular resettlement quota to 550 persons (against 150 previously) for 2015 and pledged to resettle another 550 refugees in 2016. He also notes that in 2015, the authorities facilitated access to protection in Belgium for 244 Syrians through the granting of humanitarian visas. In the context of the relocation plans established by the European Commission in September 2015, Belgium is also due to receive some 3 800 refugees from other EU countries.<sup>3</sup> In the Commissioner's opinion, these steps demonstrate that Belgium is ready to play its part to ensure that Europe meets the challenges arising from current refugee movements. He was nonetheless informed that access to humanitarian visas, which is one of the safer avenues for persons in need of international protection to find refuge in Belgium, remains difficult, notably because of a lack of clear criteria for granting such visas.
11. The Commissioner also notes with appreciation that efforts have been made to prepare the general population for the new arrivals of asylum-seekers and to combat societal fears and prejudices. He notes with particular interest the campaign launched by the authorities of the German-speaking Community to prepare the population for the arrival of about 1 000 asylum-seekers in the three reception facilities located in that community. It includes the facilitation of direct contacts between asylum-seekers and the local population, as well as an information campaign to debunk prejudices about migrants, with the participation of local media.

<sup>2</sup> Commissariat général aux réfugiés et aux apatrides (CGRA), Statistiques d'asile, [Rapport mensuel](#) September 2015.

<sup>3</sup> See European Commission, State of play: Measures to address the refugee crisis, [Press Release](#) of 4 November 2015.



12. The Commissioner was informed that NGOs active in the field of migration and asylum currently face significant budgetary cuts, notably due to the transfer of a number of migration-related competencies to communities and regions. Yet these NGOs fulfil important tasks in the area of legal aid, assistance to asylum-seekers, reception and other key fields of integration. Community authorities are likely to need time before they can effectively carry out the tasks NGOs are currently fulfilling. Therefore, in the current context of significant numbers of new asylum-seekers arriving, the Commissioner finds it ill-advised to limit the capacity of NGOs to support asylum-seekers and refugees and to assist the authorities in providing essential services to them.
13. Lastly, the Commissioner finds it disquieting that Iraqi asylum-seekers, whose claims are currently frozen pending reassessment of the situation in the Baghdad region by the General Commissioner for Refugees and Stateless Persons (CGRA), have as of October 2015, been informed by a letter from the authorities that the outcome of their asylum claim is uncertain as the security situation in Iraq is being reassessed. The letter was accompanied by information on a programme for voluntary return. The Commissioner's interlocutors have underlined that such practices could deter Iraqi asylum-seekers from pursuing their asylum-claim or incite them to withdraw it. They also stressed that with 48.9% and 32.4% of the Iraqi asylum-seekers having been granted refugee status and subsidiary protection respectively between January and September 2015,<sup>4</sup> many Iraqi asylum-seekers have well-founded protection needs.

### 1.1.2 ACCESS OF CERTAIN CATEGORIES OF ASYLUM-SEEKERS TO SOCIAL SUPPORT

14. The Commissioner is concerned about the impact of limitations in access to material and social support on certain categories of asylum-seekers, in particular since the reception crisis between 2008 and 2012. He also notes that since 2012, co-operation in the asylum procedure is considered as a precondition for benefiting from support. Asylum-seekers introducing a second asylum claim can no longer be accommodated until their claim is considered admissible by the CGRA. The Commissioner notes that the stated aim of this measure is to avoid attempts by asylum-seekers to secure accommodation and support by introducing repeated claims. The same conditions apply to asylum-seekers regarding whom a transfer order under the Dublin Procedure is pending.
15. The Commissioner is informed that a number of asylum-seekers, including families with children, have been left without any support and in a state of acute destitution. In a case that went before the European Court of Human Rights (the Court), the applicants (a Serbian family with five children including a severely disabled one) had to sleep rough for four weeks while an appeal against their removal as part of a Dublin transfer order was pending. Consequently, they returned to Serbia before the completion of the appeal procedure. The Court judged that notwithstanding the context of reception crisis prevailing at the time of the facts (2011), the conditions in which the family was compelled to live were infringing on its dignity and amounted to inhuman and degrading treatment, especially bearing in mind the extreme vulnerability of the family.<sup>5</sup>

### 1.1.3 EFFECTIVENESS OF EXISTING REMEDIES

16. The Commissioner notes that Belgium has repeatedly been condemned by the Court for the lack of effective remedies in migration and asylum cases.<sup>6</sup> Following a 2014 decision of the Constitutional Court,<sup>7</sup> the Aliens' Act<sup>8</sup> was amended in April 2014 in order to set up an effective remedy with full judicial review and suspensive effect against decisions to deny asylum on grounds of originating from a safe country of origin and in case of multiple asylum claims. The same amendment corrected

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<sup>4</sup> CGRA, *ibid.*

<sup>5</sup> *V. M. and Others v. Belgium*, App. No. 60125/11, Judgment of 7 July 2015, referred to the Grand Chamber on 14 December 2015.

<sup>6</sup> See in particular *V. M. and Others v. Belgium*, *ibid.*, and *S.J. v Belgium*, App. No. 70055/10, Judgment of 27 February 2014, referred to the Grand Chamber and struck off the list on 19 March 2015.

<sup>7</sup> Constitutional Court, *Judgment No. 1/2014* of 16 January 2014.

<sup>8</sup> Law of 15 December 1980 on access to the territory, stay, residence and deportation of foreigners.

deficiencies identified by the Court in *M.S.S. v. Belgium and Greece*,<sup>9</sup> in which the Court found that the extremely urgent procedure to request a stay of execution against removal orders did not meet the requirements of Article 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR). The Commissioner welcomes these legislative developments and hopes that they will effectively strengthen the system of remedies, which remains, as repeatedly underlined by the Court, excessively complex.<sup>10</sup>

17. The government has announced a reform of the system of legal aid aimed *inter alia* at ensuring stricter control of the use of legal aid and establishing a system of co-payment. The Commissioner takes note of fears expressed by civil society organisations that the reform could limit the access of asylum-seekers to legal aid. He understands that legal aid is particularly important for them as the Belgian system of remedies remains complex, and as far as appeals before the Aliens Appeals Board are concerned, mostly written.

## CONCLUSIONS AND RECOMMENDATIONS

18. While praising the efforts already made by the Belgian authorities to respond to increasing arrivals of asylum-seekers, the Commissioner invites them to expand the reception capacity of the country in order to be able to respond to the corresponding needs in the months to come. He stresses the importance of providing the staff that will be hired to work in the reception system with adequate training. He also urges the authorities to speed up the process of registration of newly arrived asylum-seekers beyond 250 registrations per day, as necessary.
19. The Commissioner welcomes the decision of the authorities to increase Belgium's regular resettlement quota to 550 for the next two years. At the same time, he encourages them to open other avenues for persons in need of international protection to reach Belgium legally and safely, notably by granting more humanitarian visas. He invites the authorities to set clear and transparent criteria according to which persons in need of protection can apply for humanitarian visas.
20. The Commissioner calls on the Belgian authorities to refrain from any practice which could deter asylum-seekers from pursuing their asylum claim before any in-depth individualised assessment of their case has been carried out by the GCRA.
21. He encourages the authorities to continue to expand efforts to prepare Belgian society for the arrival of asylum-seekers and dispel fears and prejudices about refugees. He also urges the authorities to continue to provide support to NGOs active in the field of assistance to asylum-seekers and refugees as they play a crucial role, alongside the authorities, in ensuring that Belgium provides an adequate response to the current migratory challenges.
22. While acknowledging the current constraints on the Belgian reception system, the Commissioner calls on the authorities to ensure that persons making repeated asylum claims are not left without any social and material support, especially when they are in a situation of particular vulnerability. He reminds the authorities that persons filing subsequent asylum claims may have valid reasons for doing so. It is also important to ensure adequate support to asylum-seekers subjected to a transfer order under a Dublin procedure until their effective transfer, to avoid situations of extreme deprivation which can amount to violations of Article 3 of the ECHR (prohibition of ill-treatment).
23. The Commissioner invites the authorities to take all necessary steps to ensure that effective remedies are available in all asylum procedures, in accordance with the case-law of the Court. He also invites the authorities to make sure that the planned legal aid reform does not have an adverse impact on the right of asylum-seekers to have effective access to quality legal aid.

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<sup>9</sup> [M.S.S. v. Belgium and Greece](#), App. No. 30696/09, Judgment of 21 January 2011.

<sup>10</sup> See *V.M. and Others v. Belgium*, *ibid*, para.216 and *S.J. v. Belgium*, *ibid*, para.103-106.

## 1.2 ADMINISTRATIVE DETENTION OF ASYLUM-SEEKERS AND MIGRANTS

### 1.2.1 DETENTION OF ASYLUM-SEEKERS AND OTHER CATEGORIES OF MIGRANTS

24. The Commissioner notes the widespread use made in Belgium of detention with respect to non-nationals on grounds of their immigration law status, a concern already raised by the previous Commissioner in his 2009 report on Belgium.<sup>11</sup> In 2014, 5 631 non-nationals were detained in Belgium.<sup>12</sup> In September 2015, the government decided to increase the capacity of closed centres from 452 to 605 places.
25. The Commissioner is particularly concerned that asylum-seekers without valid travel documents are systematically detained at the border, mostly in airports, following amendments to the Aliens' Act introduced in 2007.<sup>13</sup> According to UNHCR, 896 of them were detained 2014.<sup>14</sup> Asylum-seekers detained at the border are considered not to have entered Belgium and are served with a removal order upon arrival. The Belgian authorities justify the practice of detaining all asylum-seekers by the need to comply with the Schengen Border Code and the 1944 Chicago Convention on International Civil Aviation, according to which inadmissible aliens and those under a deportation order shall be removed from the territory by the carrier that brought them to Belgium.<sup>15</sup>
26. Asylum-seekers who claim asylum inland can also be detained on various grounds, although this is not a systematic practice. Grounds for detention include *inter alia* a presumption of fraud in the asylum application; manifestly unfounded applications; having served a criminal sentence or being considered a threat to public order or national security; and the existence of an ongoing Dublin procedure aimed at determining whether another EU member state is responsible for the case.
27. In this last respect, the Commissioner notes with concern that asylum-seekers continue to be frequently detained in the context of Dublin procedures on the mere ground that a process of determination of the first country of asylum is under way, reportedly without sufficient assessment of the risk of absconding and consideration for alternative, less coercive measures. Thus for instance, the Commissioner is concerned at information indicating that Iraqi asylum-seekers have recently been detained on grounds that they might be subjected to a transfer order to another EU member state as part of a Dublin procedure.
28. The Commissioner understands that minority of age is the only explicit ground for exemption from detention (see section 1.2.2. below). All other categories of vulnerable persons can be detained. There is a reported lack of systematic examination of the individual circumstances of asylum-seekers in order to detect vulnerable persons who should not be held in detention. Information provided to the Commissioner indicates that heavily traumatised persons, persons with disabilities, older persons and pregnant women can at times be found in detention.
29. As for the duration of detention, asylum-seekers can be detained for an initial time-limit of two months (corresponding to the length of the asylum procedure), with possible extensions up to a maximum duration of eight months, where "necessary for reasons of public order or national security". In case of ongoing Dublin procedures, the maximum detention time is of one month, extendable for another month. During his visit to the Caricole detention centre near Brussels airport, the Commissioner was informed that, at the time of his visit, most of the persons in the centre had been detained for less than five months. Nonetheless, the maximum reported length of stay was about six months.
30. The Commissioner is concerned that judicial review of detention is neither systematic nor regular because it is for detainees to request it, while access to quality legal aid in detention is limited, a

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<sup>11</sup> [Report](#) by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, on his visit to Belgium, 15-19 December 2008, 17 June 2009, paras. 74-108.

<sup>12</sup> Source: Belgium Ministry of the Interior, Aliens' Office, September 2015.

<sup>13</sup> Aliens Act, Article 74 para.5.

<sup>14</sup> UNHCR, Soumission pour la compilation établie par le Haut-Commissariat aux Droits de l'Homme dans le cadre de l'examen périodique universel, 2è cycle, 24è session.

<sup>15</sup> Appendix 9 of the 1994 Chicago Convention on International Civil Aviation.

problem already raised by the Commissioner's predecessor in his 2009 report. During the visit, the Commissioner was informed that judicial review in closed centres occurs on average in one out of four detention cases. Moreover, the review simply covers the legality of detention, not its expediency or proportionality. With regard to persons detained in view of deportation, following the transposition of the EU "Return Directive"<sup>16</sup> into Belgian law in 2012, the detention of these persons is possible only as a measure of last resort and in case no other, less coercive measures are available to prevent a risk of absconding or to make it possible to implement an expulsion order. However, the Commissioner notes that the existing legislation does not provide similar safeguards with regard to detained asylum-seekers, for whom no individual assessment of the necessity of detention is reportedly carried out.

31. The Commissioner also finds it problematic that detention can be prolonged by the authorities on grounds of different provisions of the Aliens Act, through appeals by the Aliens Office against decisions by judges to release detainees. This system results in detention times exceeding the limit of two months foreseen for the examination of asylum claims. No individual assessment of the situation of vulnerability of a person or of the risks of absconding is reportedly made in cases in which detention is prolonged. The Commissioner notes that Belgium was condemned by the Court twice in 2013 for lack of an effective possibility for detained asylum-seekers to have a court decision in due time on the legality of measures taken by the authorities to prolong their detention pending the execution of a transfer order under the Dublin procedure, leading to an excessive length of detention.<sup>17</sup>
32. Lastly, the Commissioner underlines that various independent human rights bodies, including the Federal Ombudspersons,<sup>18</sup> the Federal Centre for Migration (Myria),<sup>19</sup> and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatments (CPT)<sup>20</sup> have highlighted the lack of an effective complaint mechanism for persons detained on grounds related to their immigration status in case of alleged inhuman or degrading treatment. Since 2004, a complaints commission is available to detainees of closed detention centres, as well as an alternative procedure enabling detainees to complain directly to the head of detention facilities. However, the Commissioner is informed that only 373 complaints were made to the complaints commission between 2004 and 2014 out of a total number of 77 676 persons who were detained during this period. Of these 373 complaints, 226 were declared admissible and nine of them were considered to be partially founded.<sup>21</sup> These figures could indicate a lack of trust among detainees in the complaints mechanism on the one hand, and disproportionately strict admissibility criteria by the complaints mechanism on the other.

### 1.2.2 ALTERNATIVES TO DETENTION IN CLOSED FACILITIES FOR FAMILIES WITH CHILDREN

33. The detention by the Belgian authorities of children, whether alone or with their families, in closed facilities has long been criticised by international human rights bodies. The Court repeatedly found Belgium in violation of the ECHR with respect to the detention of children for immigration purposes.<sup>22</sup> In 2007, it was decided to enshrine in law the prohibition of detention of unaccompanied minor migrants, who are now channelled to orientation centres upon arrival, before being integrated in the reception system (see below section 1.3.1.). In 2008 and 2009, the authorities decided to accommodate families with children who are detained both inland and at the border outside

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

<sup>17</sup> ECtHR, [Firoz Muneer v. Belgium](#), App. No. 56005/10, Judgment of 11 April 2013 and [M.D. v. Belgium](#), App. No. 56028/10, Judgment of 14 November 2013.

<sup>18</sup> Federal Ombudspersons, Submission to the Universal Periodic Review, 2015.

<sup>19</sup> Myria, 2015, La migration en chiffres et en droits, pp. 165-168.

<sup>20</sup> CPT, report on the CPT visit to Belgium from 28 September to 7 October 2009, CPT-Inf (2010)24.

<sup>21</sup> Myria, 2015, *ibid.*

<sup>22</sup> See notably [Mubilanzila Mayeka and Kaniki Mitunga](#), App. No. 13178/03, Judgment of 12 October 2006; [Muskhadzhieva and Others](#), App. No. 41442/07, Judgment of 19 January 2010; and [Kanaqaratnam and Others](#), App. No. 15297/09, Judgment of 13 December 2011.

detention centres, in family units where they enjoy a certain degree of freedom of movement. However, accommodation in a family unit is, according to the law, considered as detention.

34. Both asylum-seeking families detained at the border and families in an irregular situation who are detained as part of a return process can be accommodated in the family units. The latter families can in principle remain in any private accommodation they may have, provided they respect certain requirements, including co-operation in the organisation of return and a reporting obligation.<sup>23</sup> If they fail to comply with these requirements, or do not have a personal home, they can be placed in a family unit. Since 2015, families in an irregular situation who are in need of social support can also be accommodated in these units, following the closing down of the Holsbeek return centre to which they used to be referred.
35. At the time of the Commissioner's visit, 10 of the 24 families (93 persons) accommodated in family units had claimed asylum at the border, two of them had made multiple asylum applications, eight were accommodated on grounds of their need for social support and/or as part of a return process and four families were detained on grounds of an irregular situation.<sup>24</sup>
36. The Commissioner visited one of the 26 family units (Beauvechain), where the living conditions clearly better fitted the needs of families with children than closed facilities. He was informed that eight coaches are assisting families in all practical aspects of their lives in Belgium, as well as in preparing either return to the country of origin or stay in Belgium, depending on their situation. He was informed of the positive role played by coaches in determining the best options for the families hosted in the units. However, he was also informed that the diversity of profiles and needs of the families concerned can make it difficult to provide adequate support to the different families.
37. Families are provided with material support and access to health care. The average length of stay is of one month. The Commissioner notes with interest that the estimated daily cost of a person in a family unit was, as of December 2012, 90€ against 180-190€ in a closed detention facility.
38. While the practice of systematically accommodating families with children in family units is a welcome step in the right direction, the Commissioner notes that gaps have been reported, notably regarding access to education for children. Family units can be located in a linguistic region different from the one in which children used to live prior to detention, which in practice results in children not having a command of the language used at school. Additionally, it appears that not all children are enrolled in schools. In 2014, out of 429 children accommodated in family units, only 59 of them were enrolled in school, mostly at pre-school and primary school levels.<sup>25</sup> Due to the lack of agreements with secondary schools, teenagers generally have no access to education.
39. Additionally, the Commissioner is informed of the increasing use, since September 2014,<sup>26</sup> of the possibility to detain a member of the family, usually the father, in a closed facility on various possible grounds, notably the risk of absconding. He stresses the negative impact that such a practice can have on the psychological well-being of children who are already in a precarious situation.
40. Lastly, the Commissioner is concerned about the plans of the government to resume detention of families in closed facilities, in accordance with a 2011 law which allows for the detention of families with underage children in such facilities, should the latter be adapted to the needs of families with children and should detention be of a limited duration. He understands from the authorities that they consider the rate of absconding as being far too high as it increased from 25% in 2009 to 41% in 2014. The rate of returns also decreased from 90% initially to 32% in 2014. The authorities have stated that only detention in a closed facility can make it possible to effectively implement returns of rejected asylum-seekers.

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<sup>23</sup> Arrêté royal du 14 septembre 2014 déterminant le contenu de la convention et les sanctions pouvant être prises en exécution de l'article 74/9, para.3, de la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

<sup>24</sup> Information provided by the authorities on 15 September 2015.

<sup>25</sup> See Myria, 2015, *ibid*, p. 175.

<sup>26</sup> Based on the Royal Decree of September 2014, see footnote 23.

## CONCLUSIONS AND RECOMMENDATIONS

41. The Commissioner calls on the Belgian authorities to ensure, in law and practice, that detention of asylum-seekers is used as a last resort, for the shortest possible period of time and is only ordered after first reviewing all other alternatives and finding that there is no effective alternative, in accordance with [Resolution 1707\(2010\)](#) of the Parliamentary Assembly of the Council of Europe<sup>27</sup> and [UNHCR's Guidelines](#) on the detention of asylum-seekers and alternatives to detention.<sup>28</sup> He reminds the authorities that, under the 1951 Geneva Convention relating to the Status of Refugees, asylum-seekers should not be detained solely on the basis of lodging a claim for asylum, nor for their illegal entry or presence in the country where they lodge a claim for asylum. The Commissioner therefore invites the authorities to adopt adequate legal safeguards against the arbitrary detention of asylum-seekers.
42. Moreover, the Commissioner wishes to stress that, according to the Court's case-law,<sup>29</sup> administrative detention of asylum-seekers is to be considered arbitrary if it is not closely connected to the ground of detention. In this respect, detaining asylum-seekers at the border on grounds that they might be removed is problematic, as they cannot be deported before their claim has been processed by the authorities.
43. The Commissioner calls on the authorities to review their practice as regards the detention of foreigners as part of Dublin procedures, especially in cases in which no country to which the asylum-seeker could be transferred has yet been identified. The risk of absconding should be effectively assessed in each individual case and less coercive alternatives than detention should be considered.
44. The Commissioner urges the authorities to ensure that a thorough assessment of potential vulnerabilities is carried out in all cases, in order to avoid detaining vulnerable persons whose needs cannot adequately be met in detention. Such an assessment should also be carried out in case of prolongation of detention. In this context, the Commissioner wishes to draw attention to the Court's judgment in the case of *Yoh-Ekale Mwanje* in which Belgium was found *inter alia* in violation of Article 3 on grounds of the applicant's detention conditions in a closed transit centre with a view to her deportation, while she was seriously ill.<sup>30</sup>
45. The Belgian authorities should improve the judicial review of immigration detention decisions, which should include a systematic verification of the legality, necessity, proportionality and expediency of detention. The authorities should also ensure effective judicial review on decisions to prolong detention.
46. Measures to ensure access for detained asylum-seekers to quality legal aid should be stepped up, on the basis of existing good practices, such as the permanent legal aid offices which have been opened in the Vottem and Bruges detention facilities.
47. The Commissioner also invites the authorities to improve the system for monitoring the conditions and treatment of migrants and asylum-seekers in detention. To this end, he calls on them to ratify the Optional Protocol to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and set up a National Preventive Mechanism for the Prevention of Torture (NPM), in accordance with the Protocol.
48. The Commissioner calls on the Belgian authorities to refrain from resuming the practice of detaining families with children. Like the Belgian national human rights institutions, he firmly believes that a prohibition of administrative detention of all children on grounds of their or their parents' migratory status should be enshrined in law. He draws attention to the view of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, that

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<sup>27</sup> Parliamentary Assembly of the Council of Europe, Resolution 1707 (2010), Detention of asylum-seekers and irregular migrants in Europe.

<sup>28</sup> UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012.

<sup>29</sup> See European Court for Human Rights, *Kanagaratnam and others v. Belgium*, *ibid*, para.93; *A. and Others v. the United Kingdom*, App. No. 3455/05, Grand Chamber Judgment of 19 February 2009, para.164.

<sup>30</sup> *Yoh-Ekale Mwanje v. Belgium*, App. No. 10486/10, Judgment of 20 December 2011.

deprivation of liberty of children based exclusively on migration-related considerations “can never be construed as a measure that complies with the child’s best interest”, as protected under Article 3 of the UN Convention on the Rights of the Child.<sup>31</sup>

49. Hence, he invites the authorities to maintain and further develop existing alternative arrangements to detention of families with children in closed facilities. Reported problems, notably with regard to access to education for all children, should be remedied in close co-operation between the various competent levels of authorities.

### 1.3 CHILDREN’S RIGHTS IN MIGRATION AND ASYLUM

#### 1.3.1 HUMAN RIGHTS OF UNACCOMPANIED AND SEPARATED MINOR MIGRANTS

50. The Commissioner welcomes the commitment of the current government to strengthening the protection of unaccompanied migrant children, including through the allocation of additional financial means.<sup>32</sup> He also notes that an increasing number of unaccompanied minors have entered Belgium in 2015; in September 2015, 482 unaccompanied minor migrants claimed asylum, compared with 152 in July 2015, a more than threefold increase.<sup>33</sup>
51. The Commissioner welcomes that legal safeguards for unaccompanied minors were strengthened in February 2015. Since then unaccompanied minors can simultaneously initiate an asylum procedure, any other migration-related procedure, as well as a special procedure for the identification of a sustainable solution. The identification of a sustainable solution under the special procedure comprises the following steps: identification of a family reunification option in the parents’ country of origin or residence; return in adequate conditions to the country of origin; and a permanent residence permit in Belgium should the two previous options be impossible to implement.<sup>34</sup> The Commissioner’s interlocutors have underlined, however, that a strict application in practice of this order of priorities is not always in the child’s best interests.
52. The Commissioner welcomes the fact that the detention of unaccompanied children is, since 2007, prohibited by law. Upon arrival, unaccompanied minors are accommodated in “orientation centres” for two weeks and then channelled into the mainstream reception system. He was also informed by the authorities that the latter refrain from detaining unaccompanied minors once they reach the age of 18 and that every effort is made instead to promote their regularisation. However, he still notes that, in 2014, 64 unaccompanied children were expelled after turning 18, many of them reportedly without having been able to complete their studies.
53. The Commissioner is informed that unaccompanied minors can still be detained should they be subjected to age determination tests. He is concerned at information indicating that age determination is carried out according to a mostly medical screening. The Commissioner reiterates that age determination of unaccompanied minor migrants is a complex process involving physical, social and cultural factors and that incorrect age assessments may result in detrimental consequences for the child concerned, including wrongful detention.
54. Additionally, the Commissioner notes that, in practice, once unaccompanied minors obtain refugee status or any other residence permit, it is for communities, regions and municipalities to take care of their subsequent needs in the field of education, accommodation, access to health care, etc. However, it is reported that the lack of a comprehensive agreement between the federal and community/regional/local levels on the treatment of unaccompanied minors sometimes results in complex procedures to access support, lack of consistent support over time and the children’s best interests not always being a primary consideration in all decisions regarding them.

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<sup>31</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 28<sup>th</sup> session of the Human Rights Council, doc. A/HRC/28/68, 5 March 2015, para.80.

<sup>32</sup> See Government’s Agreement (*Accord de gouvernement*), October 2014, pp. 156-157.

<sup>33</sup> CGRA, *ibid.*

<sup>34</sup> Article 61/14 of the Aliens’ Act.



### 1.3.2 ASSESSMENT OF THE BEST INTERESTS OF CHILDREN IN MIGRATION AND ASYLUM PROCEDURES

55. The Commissioner notes that Belgian legislation prescribes that the best interests of children should be a primary consideration in all decisions concerning them, including in the asylum procedure, in line with Article 3 of the UN Convention on the Rights of the Child (UNCRC).<sup>35</sup> Moreover, it is positive that children's rights in asylum and migration processes are high on the agenda of independent human rights institutions in Belgium, including the Flemish Parliamentary Ombudsman, the *Délégué général aux droits de l'enfant* of the French Community, the Federal Mediators and the Federal Centre for Migration (Myria). As mentioned above, good practices regarding alternatives to detention in closed centres for families with children are also in place (see section 1.2.2.).
56. However, the Commissioner's interlocutors have stressed that more work is required to ensure the adequate consideration of the child's best interests in all migration and asylum procedures. There is a reported lack of coordination between various stakeholders, including parents, tutors, social workers and immigration officers in defining the child's best interests and, as mentioned above, an overall lack of coordination between various levels of administration at the time of taking decisions regarding migrant children. The Commissioner therefore welcomes the CGRA's project, initiated in 2014, aimed at improving the consideration given to the child's best interests in asylum processes.
57. The UNCRC also guarantees the right for children to express their views freely in all matters affecting them and to have these views taken into account. While unaccompanied migrant children aged six or more are in principle heard in asylum procedures, the Commissioner is informed that this is not always the case for children in a family whose specific interests in the asylum procedure are not necessarily considered. Yet the Commissioner stresses that in asylum procedures, children may have serious grounds for claiming asylum in their own right, as they can be confronted with persecution, fear of persecution and risks of a child-specific nature, such as under-age military recruitment, trafficking, sexual exploitation or genital mutilation. He notes that some children have been granted asylum in Belgium on grounds that they feared genital mutilation in their countries of origin.
58. The treatment of children of rejected asylum-seekers and other categories of migrants in an irregular situation is reported to often depend on the legal status of their parents, without sufficient consideration being given to the children's best interests. This is for example the case of children of EU migrants and rejected asylum-seekers subject to a Dublin transfer order who have been denied social support and left in a situation of acute destitution (see sections 1.1.2. and 3.2.1).

### CONCLUSIONS AND RECOMMENDATIONS

59. While praising progress achieved in recent years with regard to the protection of migrant children's rights, the Commissioner calls on the Belgian authorities to ensure that in all their actions and decisions in the context of migration and asylum policies, the best interests of children constitute a primary consideration with respect to all other considerations, including migration control, in line with the principles enshrined in the UNCRC and the Council of Europe Committee of Ministers' [Guidelines on Child Friendly Justice](#). The Commissioner reiterates that migrant and asylum-seeking children must be treated first and foremost as children, and not as migrants. The Commissioner also stresses the importance, in assessing the child's best interests, of effectively involving all the relevant stakeholders.
60. In order to ensure that adequate and continuous consideration is given to the child's best interests throughout migration and asylum proceedings, the Commissioner encourages the Belgian authorities to take resolute steps to ensure structured coordination and co-operation between all the relevant levels of administration, especially when dealing with unaccompanied minor migrants. He also recommends additional training of civil servants on the practical implications of the principle of the best interests of the child, in line with the interpretation provided by the UN Committee on the Rights

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<sup>35</sup> See *inter alia* Article 22 bis of the Belgian Constitution and Article 14 of the Royal Decree of 11 July 2003 establishing the procedure before the General Commissioner for Refugees and Stateless Persons.



of the Child.<sup>36</sup> More awareness should also be raised about the important work carried out by national human rights bodies on this issue.

61. As regards age determination, the Commissioner calls on the authorities not to rely only on a medical assessment of age but to establish multidisciplinary procedures and to ensure that minors are always given the benefit of the doubt where there is uncertainty as to their age. He draws the attention of the authorities to the view expressed by the UN Committee on the Right of the Child that age assessment should not only take into account the physical appearance of the individual, but also his or her psychological maturity and should be conducted “in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child”.<sup>37</sup>
62. The Commissioner calls on the Belgian authorities to ensure that children be recognised as “active subjects of rights” in asylum proceedings,<sup>38</sup> whether unaccompanied or with their family, and that a child-sensitive approach to asylum is in place, allowing for any particular protection needs of children as a specific social group to be identified. Useful guidance can be found in the 2009 UNHCR Guidelines on processing child asylum claims.<sup>39</sup>
63. The Commissioner also reiterates the importance of the views of the child being heard and duly taken into account in asylum and other migration proceedings, in accordance with Article 12 of the UNCRC. The authorities should also ensure that asylum and migration procedures are accessible and child-friendly, in line with the Committee of Ministers’ [Guidelines on Child Friendly Justice](#).

#### 1.4 LEAVE TO RESIDE ON MEDICAL GROUNDS

64. Since 2006 the Aliens Act has provided the possibility for rejected asylum-seekers and other foreigners in an irregular situation to obtain a residence permit on medical grounds.<sup>40</sup> Should the person face a real risk to his/her physical integrity or a risk of inhuman and degrading treatment as a result of the lack of availability of adequate treatment in his/her country of origin or return, s/he can request leave to reside in Belgium.
65. The Commissioner understands that, since 2012, restrictions in access to residence permits on health grounds have been introduced in order to combat alleged abuses and fraud. A prima facie medical assessment of the claims by doctors of the Aliens Office was introduced at the level of admissibility, based on which a claim can be considered unfounded and rejected. If the claim is considered admissible, a second evaluation is carried out by the Aliens Office taking into account the actual state of health of the person and the situation in the country of origin. The Commissioner notes that 5% of requests for residence permits were successful in 2011 and 1.6% in 2013.<sup>41</sup> Between January and June 2015, 3.47% of such requests were successful.<sup>42</sup>
66. The Commissioner notes that in 2014, more than a hundred HIV specialists launched an appeal to the then Secretary of State for Immigration, in which they expressed deep concerns regarding the evaluation by the Aliens Office of claims for leave to reside on medical grounds. He also notes that the federal Ombudspersons have initiated an investigation into the treatment of such claims by the Aliens Office in 2015.
67. The main reasons for concern brought to the attention of the Commissioner include: an excessively strict application of formal requirements for introducing a claim; a restrictive interpretation of the criterion of risk for the life of the person (the Aliens Office reportedly requiring an imminent risk for the life of the persons concerned to consider the claim admissible); and a lack of in-depth assessment

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<sup>36</sup> UN Committee on the Rights of the Child, General Comment N°14(2013) on the right of the child to have his or her best interests taken as a primary consideration.

<sup>37</sup> UN Committee on the Rights of the Child, General Comment N°6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, para. 31.

<sup>38</sup> UNHCR Executive Committee, Conclusion on Children at Risk, 5 Oct. 2007, No. 107 (LVIII) -2007, para. (b)(x)(viii).

<sup>39</sup> UNHCR, Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugee, 22 December 2009.

<sup>40</sup> Article 9 ter of the 1980 Aliens’ Act.

<sup>41</sup> Myria, 2015, *ibid*, pp. 142-146.

<sup>42</sup> Aliens’ Office, statistical data for May 2015.

of the individual circumstances of each claimant, including insufficient assessment of the effective availability of treatment for the claimant in the country of origin. It is reported that the Aliens' Office assessment is limited to the general availability of treatment in the country, based on sources allegedly not accessible to the public.

68. Procedural aspects are also of concern. Doctors in charge of evaluating the risks in the phase of admissibility do not examine the ill foreigners concerned as the procedure is written and non-adversarial. The claimant's doctor cannot provide the Aliens' Office with information or challenge its opinion. Moreover, the Commissioner has been informed of cases of persons who were granted leave to reside on health grounds and have had their residence permit (initially valid for one year) revoked because their health status was stable -thanks to treatment- or because they were working. Decisions of revocation of residence permits are reportedly taken without hearing the foreigner concerned.
69. Pending admissibility of their claims, the persons concerned are deprived of any material and social support, including the right to accommodation. Access to health care is limited to emergency medical assistance. The same situation applies during the phase of appeal against a negative decision. The Commissioner notes with satisfaction that a change of practice regarding access to material support was initiated in 2015, following a judgment of December 2014 of the European Court of Justice (ECJ),<sup>43</sup> and a subsequent judgment by the Appeal Court of Liège, which stated that an ill foreigner should be provided with basic material and social support during the entire appeal procedure before the Aliens Appeals Board against a denial of residence permit on medical grounds and an expulsion order.
70. The appeal procedure also raises concerns as it is not suspensive of expulsion orders. The claimant can only obtain a stay of execution through the extremely urgent procedure against removal decisions, in cases where expulsion is imminent (see section 1.1.3). The Commissioner notes that Belgium has repeatedly been condemned by the Court for lack of effective remedies against decisions to expel seriously ill non-nationals following denial of leave to reside on medical grounds.<sup>44</sup> He also draws attention to the fact that in the above-mentioned judgment, the ECJ also considered that remedies available to seriously ill non-nationals against removal orders, where such removal would expose them to a serious risk of grave and irreversible deterioration in the state of their health, should be suspensive.<sup>45</sup>

## CONCLUSIONS AND RECOMMENDATIONS

71. The Commissioner calls on the Belgian authorities to ensure that the right of persons not to be returned to countries where they would face a real risk of being subject to treatment contrary to Article 3 of the ECHR is thoroughly respected. Therefore, he urges the Belgian authorities to ensure the fair and in-depth assessment of all claims for leave to reside on medical grounds, in line with the relevant provisions of the Aliens' Act. He strongly encourages them to consider the effective availability and accessibility of the medical treatment to the returnee in the country of destination.
72. Additionally, the authorities should improve the effectiveness of existing remedies against denials of leave to reside on medical grounds. Moreover, he stresses that during appeal procedures, ill foreigners should not be left without social and medical support, all the more as they usually are in a situation of extreme vulnerability due to their illness. He draws attention to the view of the European Committee on Social Rights that "States Parties are under an obligation to provide foreign migrants who are in an irregular situation of stay in the territory of the State with urgent medical assistance and such basic social assistance as is necessary to cope with an immediate state of need (accommodation, food, emergency care and clothing)."<sup>46</sup>

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<sup>43</sup> European Court of Justice, Grand Chamber [Judgment](#) of 18 December 2014, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida*.

<sup>44</sup> See *S.J. v Belgium*, *ibid* and *Yoh-Ekale Mwanje v. Belgium*, *ibid*.

<sup>45</sup> European Court of Justice, Grand Chamber Judgment of 18 December 2014, *ibid*, para. 63.

<sup>46</sup> European Committee of Social Rights, Conclusions 2013, General introduction.

## 1.5 INTEGRATION OF REFUGEES

73. The Commissioner notes that, in 2014, Belgium ranked 7<sup>th</sup> out of 38 states on the Migrant Integration Policy Index ([MIPEX](#))<sup>47</sup>. During his visit, he raised with his interlocutors the crucial question of how the authorities will tackle challenges arising from the need to promote the integration of a large number of newcomers. In this context, he notes with interest measures adopted to speed up the access of asylum-seekers to the labour market by making it possible to work before the previous requirement of six months of stay in Belgium.
74. However, the Commissioner notes with concern the plans announced by the government to impose stricter conditions for family reunification of recognised refugees and limit the duration of residence permits. Regrettably, since the reform of the Nationality Code in 2012, measures providing for easier access to naturalisation for recognised refugees were also abolished. The authorities also plan to impose on any newcomer the obligation to sign a declaration of commitment towards fundamental values enshrined in the Belgian Constitution. Failing to do so would reduce their chances of obtaining asylum or Belgian nationality.<sup>48</sup> He is also aware of proposals made by some politicians aimed at limiting the access of refugees to social benefits, by tying benefits to the number of years spent in Belgium and postponing access to child benefits.
75. Moreover, the Commissioner is concerned about reported gaps in the support provided to refugees once they leave the initial reception system, due to a fragmentation in the distribution of competencies between the federal, community, regional and local levels. The complexity of the system and sometimes lack of coordination reportedly makes it difficult for refugees to access swiftly the support and services they are entitled to at different levels.
76. As regards integration policies, Flanders imposes a compulsory integration programme on all non-EU foreigners since 2006, focusing on learning the Dutch language, support to access the labour market and general knowledge about the functioning of society through a citizenship course. In the Walloon Region, participation in the existing integration programme is voluntary. The authorities have recently initiated a reform aimed at making participation in the programme compulsory. During his visit, the Commissioner discussed with the authorities the need for integration programmes to be comprehensive enough in order to ensure that newcomers are provided with all the necessary tools to integrate in a multicultural society.
77. The Commissioner believes that education will play a key role in integrating newcomers into Belgian society. He is informed that measures have already been taken by the authorities to open new classes in order to meet the education needs of newly arrived asylum-seekers. At the same time, he notes that children of immigrant background are reportedly over-represented in specialised education in Belgium (see also Section III) due to a number of factors, including disadvantage connected to a lack of proficiency in the language of education. He notes for example that, in Flanders, during the school year 2014-2015, 11,12% of the children of foreign nationality were enrolled in specialised primary education and 11,23% in specialised secondary education.<sup>49</sup>

## CONCLUSION AND RECOMMENDATIONS

78. The Commissioner underlines that the durable integration of refugees and other beneficiaries of international protection into Belgian society requires a reasonable degree of stability, a longer-term perspective of life in the country and fair access to social and economic rights. He therefore urges the Belgian authorities to refrain from hampering integration by limiting the access of these persons to a range of social and other rights on an equal footing with others, as prescribed by the 1951 Convention relating to the Status of Refugees. He also highlights the need for increased coordination of the various levels of administration in providing support and services to refugees.
79. The Commissioner encourages the authorities to develop further comprehensive integration policies, in order to strengthen respect for diversity and social cohesion over the long-term. He invites the

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<sup>47</sup> Migrants Integration Policy Index, report on Belgium.

<sup>48</sup> [Report](#) of the Ministerial Council of 23 October 2015.

<sup>49</sup> Source: Flemish Ministry of Education.

authorities to pay particular attention to the integration of children of foreign background in the educational system, on an equal footing with other children. He draws attention, in this regard, to [Recommendation CM/Rec\(2008\)4](#) of the Committee of Ministers on strengthening the integration of children of migrants and of immigrant background.<sup>50</sup>

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<sup>50</sup> Recommendation CM/Rec(2008)4 of the Committee of Ministers to member states on strengthening the integration of children of migrants and of immigrant background, adopted on 20 February 2008.

### 2.1 THE RIGHT TO LEGAL CAPACITY

80. The Commissioner notes with satisfaction the entry into force, in June 2014, of a law reforming the legal capacity regime of persons with psychosocial and intellectual disabilities. The new law abolishes the previous status of “prolonged minority”, under which persons could be considered as minors of age and, on that basis, entirely stripped of their legal capacity. It introduces a presumption of capacity and replaces previous categories of legal capacity deprivation with a unified system, in which temporary legal incapacity can be established by a judge. A guardianship regime based on the capacity of the person concerned, as identified by a judge, can be ordered for a maximum period of two years, after which it has to be reviewed. Guardianship is entrusted to a ‘provisional administrator’, who can take decisions to protect the person declared incapable and his/her assets. The revised law also affords a greater role to ‘trustees’ chosen by the protected persons who act as an intermediary between them and the provisional administrator.
81. While acknowledging that the new law is an important step forward to protect the right of persons with disabilities to equal recognition before the law, the Commissioner notes that it falls short of establishing a fully-fledged system of supported decision-making, “which respects the person’s autonomy, will and preferences”.<sup>51</sup> The right for persons with disabilities to access support so that they are able to make their own decisions and directly exercise their legal capacity, which is established by Article 12 paragraph 3 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), is not foreseen by the law.<sup>52</sup>
82. Additionally, all interlocutors of the Commissioner have underlined that achieving the main goal of the law, i.e. promoting legal capacity, might be seriously hampered by the lack of training and human and financial resources of the judges of the peace, who are now in charge of implementing the law and determining the legal capacity of persons. He welcomes the openness of the authorities to addressing some of these shortcomings.

### CONCLUSIONS AND RECOMMENDATIONS

83. The Commissioner wishes to recall the importance of legal capacity for the enjoyment by persons with psychosocial and intellectual disabilities of key human rights, such as the rights to liberty and property, to access to justice, to get married or to vote. While considering that the 2014 law on legal capacity is not fully compliant with Article 12 of the UNCRPD, he underlines that proper implementation of this law could substantially improve possibilities for these persons to make their own choices in key areas of life such as housing, employment, family life and health care.
84. The Commissioner encourages the authorities to ensure that adequate training, in line with the UNCRPD provisions, is provided to the judiciary in charge of implementing the law on legal capacity. Judges should also be provided with sufficient means and resources to adequately implement the law. He draws attention to his predecessor’s [Issue Paper](#) on the right to legal capacity for persons with intellectual and psychosocial disabilities, which contains practical guidance on how to promote the right of persons with disabilities to equal recognition before the law, in line with the provisions of the UNCRPD.<sup>53</sup>
85. The Commissioner also invites the Belgian authorities to take measures with a view to replacing substituted decision-making with supported decision-making, to fully comply with the requirements of Article 12 paragraph 3 of the UNCRPD.

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<sup>51</sup> UN Committee on the Rights of Persons with Disabilities, Draft General Comment on Article 12 of the Convention-Equal Recognition before the Law, June 2013, para. 7.

<sup>52</sup> See also UN Committee on the Rights of Persons with Disabilities, Concluding Observations on Belgium, 28 October 2014, para. 23-24.

<sup>53</sup> Council of Europe Commissioner for Human Rights, Issue Paper: Who gets to decide? The right to legal capacity for persons with intellectual and psychosocial disabilities, 20 February 2012.

## 2.2 DEINSTITUTIONALISATION AND THE RIGHT TO LIVE INDEPENDENTLY AND TO BE INCLUDED IN THE COMMUNITY

86. The Commissioner is concerned about the persisting high rate of institutionalisation of persons with disabilities. The placement in institutions has long been considered in Belgium as the only lasting option for persons with disabilities, as underlined by the UN Committee on the Rights of Persons with Disabilities.<sup>54</sup> The problem is reportedly compounded by the lack of accessible and affordable housing for persons with disabilities and a serious lack of community-based services.
87. While support in the form of budgets for personalised assistance (BPA) was introduced in Flanders and in the Walloon region, only a limited number of persons have had access to it so far. Moreover, persons with psychosocial and intellectual disabilities are, in the Walloon region, excluded from this scheme. The Commissioner is also informed that a number of persons with disabilities are *de facto* compelled to opt for institutions due to the overall lack of adaptation of BPAs to the needs of beneficiaries, including limited amounts available and lack of possibilities for persons with disabilities to make their own choices among service providers.
88. Additionally, the Commissioner takes note of the concern expressed by representative organisations of persons with disabilities with whom he met that the lack of a coordinated and transparent approach at the various levels of administration makes it difficult for persons with disabilities to access information on opportunities to live in the community, and reduces their possibilities of exercising life choices, a key element of the right to live independently and be included in the community enshrined in Article 19 of the UNCRPD.
89. Against this background, the Commissioner welcomes the shift recently introduced in Flanders with a view to moving from a model based on institutionalisation to a user-centred system, as part of an action plan for the support of persons with disabilities. The adoption, in April 2014, of a law on personal funding was an important step in this transition. It foresees a twin-track system of allocation of funding to persons with disabilities: first, all of them will be entitled to a basic support budget (of €300) which they can use freely to access available services; second, persons in need of greater support can request an additional personal budget, based on a needs assessment, which they can use to cover the cost of services or institutions. Persons with disabilities will be able to choose service providers themselves. The Commissioner notes that the law is to be gradually implemented as of 2016.
90. The Commissioner also notes with interest that some good practices aimed at promoting deinstitutionalisation and inclusion in the community of persons with disabilities already exist in various parts of the country. He visited a housing project of community living in Brussels, implemented under the auspices of the Flemish Agency for Disability.<sup>55</sup> He also notes that in the German-speaking Community, a system of supervised apartments, community living, accompanied individual housing and other forms of autonomous living has been set up, with a view to increasing possibilities for persons with disabilities to choose their way of life and accommodation.
91. However, living in institutions remains reportedly the main option available to persons with disabilities in the Walloon region, as indicated by the share of expenditures devoted to residential care by the Walloon Agency for Disability.<sup>56</sup> The Commissioner is concerned at the reported lack of a proactive policy to promote independent living and a continuing perception of institutions as a cost-effective solution to meet the needs of persons with disabilities.
92. Furthermore, while alternatives to institutionalisation are lacking country-wide, there is also a long-standing shortage of places in institutions and increasingly long waiting lists. Many persons with disabilities are reportedly turned down by institutions on grounds of behavioural problems, need for heavy treatment or lack of funds. Therefore, persons with disabilities who are most in need of urgent

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<sup>54</sup> UN Committee on the Rights of Persons with Disabilities, 2014, *ibid*, para. 32-33.

<sup>55</sup> V.Z.W De Lork.

<sup>56</sup> See Agence wallonne pour l'intégration des personnes handicapées, rapport annuel 2014, p. 73. In 2014, close to €100 000 000 were spent for residential care for children, and €229 000 000 for residential care for adults, out of a total budget of expenditures of €681 597 495.

solutions for care often have no access to institutions, as deplored by the European Committee of Social Rights in a Decision of 2013. The Committee found that Belgium violated several provisions of the European Social Charter as a result of a severe lack of day and night care facilities.<sup>57</sup>

93. Moreover, the Commissioner is informed that an estimated 6 500 persons with disabilities from France are accommodated in –mostly private- institutions in the Walloon region. While the root cause of this situation lies with the lack of support and accommodation options provided to these persons in France,<sup>58</sup> the Commissioner is concerned that their placement in Belgian institutions prevents them from enjoying a range of rights protected under the UNCRPD, notably their right to be included in the community (article 19) and to respect for their home and family (Article 23) as these persons are separated from their families, local communities and usual environment. The enjoyment of their right to equal recognition before the law (Article 12) is also seriously affected by the fact that they mostly lack legal capacity and their guardians are based in France.
94. Lastly, interlocutors of the Commissioner voiced concerns about the lack of consultation and involvement of representative organisations of persons with disabilities at various levels of decision-making, which often resulted in inadequate assessments of their needs.

## CONCLUSIONS AND RECOMMENDATIONS

95. The Commissioner stresses that the isolation of persons with disabilities in institutions, like isolation in separate schools, contributes to increasing their marginalisation and stigmatisation. Moreover, it prevents them from enjoying a range of human rights on an equal footing with other persons in society. He therefore urges the Belgian authorities to devise and implement a comprehensive deinstitutionalisation strategy so that all persons with disabilities can fully enjoy their right to live independently and be included in the community, as enshrined in Article 19 of the UNCRPD. It should include, as a first step, a moratorium on new admissions to institutions and a transition period for phasing out institutional options and replacing them with alternative, more human rights compliant options. The strategy should be based on sound data and be regularly monitored and evaluated.
96. The Commissioner welcomes the shift introduced by the 2014 Flemish law on personal funding. He stresses the importance of rerouting funding from institutions to persons with disabilities themselves. He also invites the authorities to ensure that support for inclusion in the community, through personal funding and other similar individualised schemes, adequately meets the needs of the persons concerned, both in terms of quantity and quality. Moreover, persons with disabilities should, as a principle, be able to decide on the way they use funding allocated to them.
97. At the same time, substantial resources should be allocated to developing the availability of community-based services. The Commissioner underlines that community-based services include individualised support services tailored to the needs of persons with disabilities as well as general services accessible to all in society. He wishes to draw the attention of the authorities to the [Issue Paper](#) he published in 2012 on the right of people with disabilities to live independently and be included in the community, which contains practical guidance on how to implement Article 19 of the UNCRPD effectively.<sup>59</sup>
98. The Commissioner notes the authorities' efforts to reduce waiting lists for institutions. However, he considers that the priority should be on devising more human rights compliant solutions, namely the creation of alternatives to institutions and the development of support services in the community, including for persons who are most in need of care.

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<sup>57</sup> European Committee of Social Rights, *International Federation for Human Rights v. Belgium*, [Decision on the merit](#) of 18 March 2013.

<sup>58</sup> See [Report](#) of the Commissioner for Human Rights following his visit to France from 22 to 26 September 2014, paragraphs 228-230.

<sup>59</sup> Council of Europe Commissioner for Human Rights, Issue paper on the right of people with disabilities to live independently and be included in the community, June 2012.



99. The Commissioner calls on the authorities to enhance the involvement of persons with disabilities in decision-making on issues of concern to them, not least as a way of ensuring that the services provided adequately meet their needs.
100. With reference to the accommodation of persons with disabilities from France in Belgian institutions, the Commissioner stresses the responsibility of Belgium to ensure that all the persons concerned enjoy the full range of rights protected under the UNCRPD. This includes the right of persons to choose their place of residence and where and with whom they live and not to be obliged to live in a particular living arrangement.

## 2.3 THE RIGHT TO EDUCATION AND TO INCLUSIVE SCHOOLING

101. The Commissioner is deeply concerned about the high number of children with disabilities who are educated separately from other children in specialised education in Belgium. This was the case in 2014 for about 70% of them in Flanders and 94% in the French Community.<sup>60</sup> This situation is at odds with the UNCRPD which provides for a number of measures to be taken by states to ensure the right to education of persons with disabilities.<sup>61</sup> In particular, Article 24 paragraph 2 of the UNCRPD obliges states to ensure that children with disabilities can access “an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.”
102. The Commissioner takes note of the fact that a generally high –and growing– number of children are enrolled in the specialised education system, set up in the 1970’s. Between 4 and 6% of all Belgian students (from nursery school to secondary education) are educated in specialised schools. Eight different categories of specialised education have been defined, based on types and levels of disability. They include categories such as learning difficulties and behavioural problems.
103. During the Commissioner’s visit to Belgium, the authorities insisted on the high quality of education provided to children enrolled in specialised schools. However, the Commissioner believes that, irrespective of the quality of education provided in specialised schools, separate education leads to a lack of equal opportunities that has long-lasting detrimental effects on the lives and possibilities to be included in society of persons with disabilities. He notes in particular that specialised education does not provide children with any diploma at the end of their studies. He was also informed that freedom of choice in secondary education is limited for children with disabilities as scarce options are available in the few schools adapted to each type of disability. Additionally, most children must spend a long time in transportation to attend school due to the geographical distribution of specialised schools. Despite the lack of comprehensive data, the Commissioner also notes with concern that few children enrolled in specialised education manage to reintegrate mainstream education.
104. The high number of complaints of discrimination on grounds of disability relating to the area of education addressed to the Inter-Federal Centre in 2014 illustrates some of these problems. Disability represented the second largest ground for complaints of discrimination, with 726 complaints and 372 files opened by the Centre, and education was the area affected in 20% of these claims.<sup>62</sup> They included refusals by schools to provide reasonable accommodation and enrolment denials.<sup>63</sup>
105. While the overall number of children with disabilities in specialised education is worrying, the situation differs in the three communities. In Flanders, since 1986, children with disabilities can be integrated in mainstream education, under the guidance of a specialised school. However, the number of children who were able to integrate into mainstream education through this scheme is, reportedly, limited. In March 2014, a decree aimed at promoting the inclusion of children with disabilities in mainstream schools was adopted (referred to as the “M decree”).<sup>64</sup> It establishes a conditional right to integration in mainstream education. Conditions include sufficient capacity of the child to follow the mainstream

<sup>60</sup> Inter-Federal Centre for Equal Opportunities, [Annual report 2014](#), p. 39.

<sup>61</sup> UN Committee on the Rights of Persons with Disabilities, Observations on Belgium, 2014, *ibid*, paragraphs 36 and 37.

<sup>62</sup> Inter-Federal Centre, *ibid*, 2014, p. 22.

<sup>63</sup> [Inter-Federal Centre](#).

<sup>64</sup> Decree on measures for pupils with specific education needs, adopted on 21 March 2014.



curriculum, including with individual support. Children who need a tailor-made programme can enrol in mainstream education provided that the school considers that the accommodation required is reasonable. The decree entered into force on 1 September 2015. The Commissioner notes with interest that prior to the entry into force of the decree, enrolment in specialised primary education had already slightly decreased.

106. The Commissioner acknowledges that the “M decree” represents a significant step forward as it establishes the duty for mainstream schools to provide reasonable accommodations to children with disabilities. However, he considers that the guarantees provided in the decree are insufficient to promote the full inclusion of children with disabilities in mainstream education. He notes in particular that it is for mainstream schools to assess whether the accommodations required for a child to be included in a class are reasonable and that the decree lacks clarity as to how this assessment will be made. This may provide schools with too much discretion to refuse the enrolment of children with disabilities.
107. Additionally, the Commissioner finds it disquieting that an additional type of disability is established by the “M decree”, aimed for children without psychosocial or intellectual disability but with autism. He observes that despite the intention expressed by the authorities to move towards a social model of disability, in line with the UNCRPD, the fact that existing categories within the system of specialised education are still based on types and levels of disability indicates the predominance of a mostly medical approach to disability.
108. He also notes with interest that an increasing number of teachers have already been transferred from specialised education into mainstream schools. However, they continue to be employed by specialised education. Similarly, the Commissioner understands that no specific funding mechanism has been set up to cover the costs of inclusion in mainstream education. Additional funding to support integration into mainstream education will be transferred from specialised education only as the number of pupils in, and costs of, specialised education decrease. He is afraid that a lack of funds for reasonable accommodation might result in schools finding the required accommodation to be disproportionate, and thus refusing enrolment to children with disabilities.
109. Several of the Commissioner’s interlocutors have also underlined the need to develop the availability of support for extra-curricular activities for children integrated in mainstream education as well as for additional needs they may have, such as therapeutic needs, which are covered in specialised education. Failing to do so could result in families who cannot afford to cover these additional costs favouring the enrolment of their children in specialised education. Additionally, the Commissioner finds it important that the authorities closely monitor the tendency observed for some years to refer all children with disabilities enrolled in mainstream education to a limited number of schools, resulting in renewed forms of segregation.
110. The Commissioner is pleased to note that in the German-speaking Community, a transition from segregated education towards inclusion was undertaken as of 2009. Geographically isolated specialised schools were banned and rebuilt close to ordinary schools in order to develop interactions between the two types of schools. Additionally, some schools provide both mainstream and specialised education under one roof. A pedagogical centre to support the inclusion of children with disabilities in mainstream education was established. The objective expressed by the authorities is to progressively limit the need for specialised education, following a period of transition during which inclusion in mainstream education is promoted. The Commissioner was pleased to learn that an estimated 50% of children with disabilities are enrolled in mainstream education in this community.
111. In the French Community, the Commissioner notes that a decree of 2011 obliges mainstream schools to demonstrate willingness to integrate children with specific needs. He is also informed of the existence of pilot projects aimed at promoting the integration of pupils with disabilities in several schools. He was nonetheless informed that the implementation of these projects was left to the schools’ discretion and that there was a lack of guidance provided to them on inclusive education. He takes note of the intention expressed by the authorities of this community to develop a new educational policy and he hopes that this will lead to a clear commitment towards inclusive education. In the Brussels region, the Commissioner was informed that, although pre-school education is inclusive, there is currently no plan to support inclusion in mainstream education for children with

disabilities as specialised education is considered to be of high quality, and thus a suitable option to meet the needs of these children.

112. Additionally, the Commissioner has received worrying information according to which a number of children with disabilities throughout the country are left without access to school at all, because they can access neither mainstream education nor a specialised school, due to long waiting lists or lack of physical accessibility of schools.<sup>65</sup> Children left out of school reportedly attend day care centres, in which integration into school is usually not a goal. The Commissioner stresses that this situation violates the right of these children to education.

## CONCLUSIONS AND RECOMMENDATIONS

113. The Commissioner highlights that the segregation of children with disabilities in education is a serious form of discrimination. It perpetuates the marginalisation of persons with disabilities in society and reinforces prejudices against them. The right of children with disabilities to receive quality education on an equal footing with other children is firmly entrenched in international treaties to which Belgium is a party, including the UNCRC, the UNCRPD and the European Social Charter.
114. While acknowledging the positive steps already taken in some parts of the country, the Commissioner calls for a firm nation-wide commitment in Belgium towards the inclusion of children with disabilities in mainstream education, on an equal footing with other children. He stresses that inclusive education places the responsibility on the state to educate all children without any discrimination within the mainstream system and to eliminate barriers. Such an approach requires a national action plan with clear targets and appropriate funding.
115. The Commissioner also reiterates that reasonable accommodation, defined under the UNCRPD as the necessary adjustments to ensure that persons with disabilities can enjoy on an equal basis with others all human rights, is an obligation and that denying it constitutes discrimination. The provision of reasonable accommodation should therefore be enshrined in law throughout the country and its implementation should be clearly regulated. The Commissioner invites the authorities to take all necessary measures to ensure that the “M decree” is implemented in line with the provisions of the UNCRPD, in particular as regards the application in practice of the right to reasonable accommodation.
116. Pending the full implementation of inclusive policies, the authorities should, based on existing good practices, take measures to close as much as possible the gap between specialised and mainstream education, geographically, in terms of curricula, and by promoting interactions between children educated in mainstream and specialised schools. The Commissioner reminds the authorities that such a policy is not only beneficial to children with disabilities, but also to all other children and the community as a whole. The Commissioner also invites the authorities to ensure regular monitoring and to collect data on the inclusion of children with disabilities in education, so as to gain better knowledge of their needs and of the overall situation.
117. The Commissioner urges the authorities to ensure that no child is denied his/her right to education, irrespective of his/her disability, by making sure that all children can access mainstream schools. Resolute steps should therefore be taken to improve the accessibility of schools and ensure that children placed in institutions have access to school.

## 2.4 THE RIGHTS OF DETAINED PERSONS WITH PSYCHOSOCIAL AND INTELLECTUAL DISABILITIES

118. The Commissioner is deeply concerned about the long-standing human rights violations experienced by persons with psychosocial and intellectual disabilities detained in Belgian prisons. This serious concern has repeatedly been addressed by international human rights monitoring bodies, including

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<sup>65</sup> See UN Committee on the Rights of the Child, Concluding Observations on Belgium, 2010, *ibid*, para. 54 and 55.

the CPT and the Commissioner's predecessor.<sup>66</sup> In addition to the fact that detention conditions are mostly inadequate, as repeatedly stressed by the Court in several judgments against Belgium,<sup>67</sup> it is of deep concern that persons considered not criminally responsible by courts and sentenced to treatment can be detained for unlimited periods of time in prison, before being transferred to a specialised institution. The dire lack of care provided to them in prison prevents any improvement of their condition, which is a requirement not only for their release but also for their transfer to a specialised institution. While visiting the prison of Forest in Brussels, the Commissioner was for example informed of the case of an elderly detainee suffering from dementia who was not eligible for release as his condition would not improve and who consequently died in custody.

119. The Court has judged in several cases that Belgium violated Article 5 paragraph 1 because of the incompatibility between the purpose and the conditions of the detention.<sup>68</sup> The Commissioner shares the view expressed by all his interlocutors that the penitentiary system is not the adequate framework to provide treatment to persons who should instead be taken care of by health care institutions and he believes that the lack of means cannot be used as a justification for the lack of care and treatment provided to detainees.
120. The Commissioner finds it very disturbing that, in 2014, several detainees requested euthanasia, arguing that their detention in psychiatric wards of Belgian prisons amounted to long-lasting inhumane treatment and that, in the absence of the possibility of receiving treatment in an appropriate facility, they preferred to die.
121. Around 1 000 persons with psychosocial disabilities are currently detained in Belgium, a number which is constantly increasing. In 2014, detainees with psychosocial disabilities represented 9.4% of the total number of detainees.<sup>69</sup> They are either persons sentenced to treatment after having been declared irresponsible for the crime they have committed because of their mental disability, or detainees who became mentally ill in prison, often due to substandard detention conditions. They are usually placed in one of the 11 psychiatric wards located within prisons, pending transfer to a "social defence institution" (high security detention centres specialised in the treatment of detainees with psychosocial problems) or psychiatric hospital. They are often held for prolonged periods of time (up to 3-4 years) in mostly inadequate conditions.
122. The Commissioner visited the psychiatric ward of the prison of Forest in Brussels. He was informed that 100 persons were detained in this ward, which has a total capacity of 48 places, and that the overcrowding rate was on average 200%. Following a reduction of 10% of the staff, about 30 persons working in shifts of six to seven persons are responsible for detainees. Treatment and care is provided by a team of four persons, including two nurses, one social assistant and one educator, in addition to three psychiatrists working in turns. Consequently, detainees are provided with an average of 15 minutes of psychiatric medical attention per week, which appears to be completely insufficient to meet their needs. No medical staff is present at night and repeated strikes by prison staff often leave detainees without the most basic services in the absence of any system of minimal service provision, a problem repeatedly stressed by the CPT. The director of the prison informed the Commissioner that during strikes, the lives of detainees could be at risk. The Commissioner furthermore understands that the shortage of means to provide adequate treatment to detainees generally leads to their over-medication.

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<sup>66</sup> Report of the Commissioner for Human Rights, Thomas Hammarberg, following his visit to Belgium, 15-19 December 2008, doc CommDH(2009)14 of 17 June 2009.

<sup>67</sup> See for example [Claes v. Belgium](#), App. No. 43418/09, Judgment of 10 January 2013. The Court found *inter alia* a violation under Article 3 due to the inhuman and degrading conditions in a psychiatric ward in which the applicant had to live for 15 years.

<sup>68</sup> See *inter alia* [L.B. v. Belgium](#), App. No. 22831/08, Judgment of 2 October 2012; [Claes v. Belgium](#), App. No. 43418/09, Judgment of 10 January 2013; [Smits and Others v. Belgium](#), App. No. 49484/11, 53073/11, 4710/12, 15969/12, 49863/12 and 70761/12, Judgment of 3 February 2015 and [Vander Velde and Soussi v. Belgium](#), App. No. 49861/12 and 49870/12, Judgment of 3 February 2015. The execution of 14 cases in the group of cases L.B. is being monitored by the Committee of Ministers under the enhanced supervision procedure, see footnote No. 72 below.

<sup>69</sup> Direction Générale des Établissements Pénitentiaires, [Rapport annuel 2014](#).

123. The Commissioner was dismayed by the state of extreme dilapidation of the prison, including the psychiatric ward. The buildings are in some areas on the verge of collapsing, sanitary facilities are dilapidated and hygienic conditions in the building are inadequate. The Commissioner found conditions in the solitary confinement cell to be particularly unacceptable. The Commissioner understands from the staff that the safety of detainees is currently at risk due to substandard conditions, which are so bad that they can no longer be improved. He notes with concern that, while the authorities plan to close this and other prisons in a similar condition in Brussels, this should not happen before 2018 or 2019 when a new prison is built to replace existing old institutions.
124. Moreover, the Commissioner finds it problematic that overcrowding has resulted in detainees having to be detained in ordinary cells, in Forest as in other prisons, together with ordinary law detainees, a situation which contradicts domestic legislation and has been considered as totally inappropriate by the Federal Ombudspersons.<sup>70</sup> He draws attention to a 2011 Court judgment which found Belgium in violation of Article 2 and 5 paragraph 1 of the ECHR because of the detention of a person with known mental problems in an ordinary cell, leading to this person's suicide.<sup>71</sup>
125. The Commissioner understands that this situation is generated by the reluctance of Belgian psychiatric institutions to integrate some detainees with psychosocial disabilities and a lack of places in "social defence institutions". The Commissioner notes that in 2014, a new facility with a capacity of 260 places opened in Ghent. However, he is informed that 683 persons with psychosocial or intellectual disabilities are currently detained in psychiatric wards of prisons in Flanders. The Commissioner thus welcomes the plans of the government to open another facility in Flanders in 2016 (in Antwerp) and to enhance the capacity of existing institutions in the Walloon region.
126. Additionally, the Commissioner notes with concern that serious shortcomings have been reported in the psychiatric evaluation procedure based on which persons are sentenced to treatment. There is a reported lack of psychiatrists available for this task, and a lack of means to support adequate expertise, with patients only seen once and for a very short time by the experts. Moreover, it is worrying that the principle of adversarial proceedings does not apply to psychiatric expertise.
127. Against this background, the Commissioner welcomes the adoption, in May 2014, of a law<sup>72</sup> introducing increased clarity regarding the purpose of detention of persons with mental disabilities. The new law emphasises that, in addition to protecting society, the main goal of detention is to provide detainees with care in order to promote their social reintegration, an element that was not sufficiently clear in previous legislation. However, the Commissioner regrets that the law does not abolish the placement of detainees with psychosocial and intellectual disabilities in psychiatric wards of prisons, which anchors the fate of these persons to the criminal justice system.
128. The law should ease the transfer of detainees with mental disabilities from the penitentiary to the care system. Additional legal safeguards, including the principle of adversarial proceedings, will also be introduced in the placement procedure, which is a welcome development. The Commissioner notes nonetheless that the entry into force of the law has been postponed.
129. The Commissioner notes with interest the measures announced by the authorities to remedy existing problems and implement a series of judgments of the Court.<sup>73</sup> As already mentioned above, new institutions are to be opened to increase the capacity to provide care to detainees with intellectual and psychosocial disabilities. Moreover, the authorities informed the Commissioner of the growing co-operation between the ministries of Justice and Health in tackling this issue, including the transfer as of 2016 of costs for health care of detainees to the Ministry of Health.
130. Lastly, the Commissioner is concerned by the lack of an effective and independent system of monitoring of institutions in which persons with intellectual and psychosocial disabilities are detained. While monitoring commissions were put into place in all penitentiary establishments in 2003, their

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<sup>70</sup> Médiateur Fédéral, [Rapport annuel 2013](#), p. 75.

<sup>71</sup> [De Donder and De Clippel v. Belgium](#), Application No. 8595/06, Judgment of 6 December 2011.

<sup>72</sup> [Loi sur l'internement des personnes](#), adopted on 5 May 2014.

<sup>73</sup> Council of Europe Committee of Ministers, [Action Plan](#), Communication from Belgium concerning the L.B. group of cases against Belgium (Application No. 22831/08), 8 September 2015.

competence is reportedly limited. Moreover, the Commissions are made up of volunteers and have a limited budget.

## CONCLUSIONS AND RECOMMENDATIONS

131. The Commissioner strongly urges the Belgian authorities to take more resolute measures to put an end to the severe and long-standing violations of the human rights of persons with psychosocial and intellectual disabilities detained in psychiatric wards of prisons, in compliance with the Court's judgments against Belgium related to this problem and the recommendations of the CPT. He firmly believes that psychiatric wards of prisons should not be used to detain persons sentenced to treatment as these persons should be provided with adequate care in an adapted environment, with a view to promoting their reintegration in society. Severely dilapidated psychiatric wards, such as that in the Forest prison, should be closed down as a matter of urgency.
132. The Commissioner calls on the authorities to fully and swiftly implement the measures foreseen in their Action Plan as regards the creation of new specialised institutions and the enhancement of existing ones. It is also essential that the law of 5 May 2014 on the detention of persons enters into force with no further delay so that indispensable reforms to the system can be put in place and detainees are provided with minimum legal safeguards in the procedure leading to their placement in psychiatric wards and forensic psychiatric institutions.
133. Pending access to the new institutions, additional support should be provided to medical and other support staff so that persons detained in existing psychiatric wards are provided with adequate care. The Commissioner also urges the authorities to ensure that no detainee sentenced to treatment is accommodated in cells together with ordinary law detainees.
134. The Commissioner invites the authorities to establish an effective and independent permanent monitoring system for places of deprivation of liberty. He reiterates his call for Belgium to ratify OPCAT and set up a National Preventative Mechanism (see also section 1.2.2 above).

## 3 HUMAN RIGHTS OF ROMA AND TRAVELLERS

### 3.1 INSTITUTIONAL AND POLICY FRAMEWORK

135. Belgium is home to 7 000 Belgian Travellers, 1 500 Belgian Manouches/Sinti and 750 Belgian Roma. Around 30 000 Roma who are nationals of different EU and non-EU member states also live in Belgium.<sup>74</sup>
136. Like other EU member states, Belgium adopted a [national Roma integration strategy in 2012](#), as part of the EU Framework for National Roma Integration Strategies. The strategy includes actions in the areas of education, employment, housing and health care. As part of the strategy, Roma “help desks” within local social centres have been set up and Roma mediators have been recruited in Flanders and in Brussels.
137. However, the Commissioner notes that no specific funding is allocated for the implementation of the strategy and that the latter does not include precise objectives, timeframes and monitoring tools. He takes note of the view of several of his interlocutors that the strategy should be more ambitious, serve to stir a debate in society on the situation of Roma and Travellers and should focus more on combating stereotypes and prejudices against Roma and Travellers.
138. The Commissioner finds it positive in this context that the federal authorities intend to set up a national Roma platform to stimulate consultation and active dialogue on Roma issues and on reviewing the current strategy. He also notes Belgium’s involvement in the Council of Europe’s [Romed](#) programme of training for mediators.

### CONCLUSIONS AND RECOMMENDATIONS

139. The Commissioner invites the Belgian authorities to strengthen the implementation of the national Roma integration strategy and, as appropriate, to update it, in close co-operation with all the relevant stakeholders, and in particular with Roma representatives. A revised strategy should include clear targets, timeframes for implementation, the allocation of responsibilities, a credible system for monitoring progress and budgetary allocations. He wishes to draw attention to the Committee of Ministers [Recommendation \(2008\)5](#) on policies for Roma and/or Travellers,<sup>75</sup> which contains detailed guidance on the elaboration, adoption and implementation of national strategies for Roma and Travellers.
140. The authorities should also take measures to combat stereotypes and prejudices against Roma in society more actively, notably by raising awareness of the history of Roma in Europe. The Commissioner invites the authorities to make use of the Council of Europe’s extensive work in this respect.<sup>76</sup>

### 3.2 HUMAN RIGHTS OF MIGRANT ROMA

141. The Commissioner notes that a significant number of Roma have migrated to Belgium from other EU and non-EU member states since the 1990’s, in particular to Brussels and Ghent. Estimated numbers of Roma migrants vary between 7 000 and 10 000 for Brussels and are of about 10 000 for the whole of Flanders and 8 000 for the Walloon region.

#### 3.2.1 ACCESS TO SOCIAL RIGHTS OF MIGRANT ROMA

142. The Commissioner was informed during his visit that some Roma migrants from other EU countries who cannot meet the requirement of financial self-sustainability (with which all EU citizens wishing to reside in another EU country must comply) face significant difficulties in accessing housing and social

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<sup>74</sup> Belgian National Roma Integration Strategy, 6 March 2012.

<sup>75</sup> Committee of Ministers’ Recommendation (2008)5 on policies for Roma and/or Travellers, adopted on 20 February 2008.

<sup>76</sup> *Inter alia*, the Council of Europe [Factsheet on Roma history](#) and the book “Roma in Europe”, Council of Europe Publishing, 2008.

support. Between 200 and 300 persons are reported to be in this situation in Brussels, with more cases having been reported to the Commissioner in other parts of the country. Since 2004, families of irregular migrants with children have access to social and material support and emergency medical assistance. However, families of EU citizens with children are, since 2009, no longer provided with accommodation by Fedasil. Against this background, the Commissioner takes note of the Constitutional Court ruling of June 2014,<sup>77</sup> which judged that limitations imposed by Fedasil in the provision of support should be based on an individual assessment of the situation of the persons concerned and should thus not automatically apply to certain categories of non-nationals.

143. The most vulnerable and marginalised families of Roma migrants often live in very precarious conditions and are obliged to constantly move from one accommodation (which often includes squats) to another, in particular in Brussels and Ghent. This situation, which is compounded by the fragmentation of relevant responsibilities between the various levels of Belgium's administration, precludes any possibility of integration. It has a particularly negative impact on children, who cannot attend school and do not have regular access to health care.
144. It has also been reported to the Commissioner that Roma, particularly those living in substandard housing, are often denied enrolment on municipal registers, in contravention of Belgian law. Registration denials can lead to withdrawals of residence permits and deprive the persons affected of access to a range of essential services. Several shortcomings in the procedure leading to denials of registration have been highlighted by national human rights institutions.<sup>78</sup> The Commissioner notes that the Inter-Federal Centre has invited cities to monitor registration refusals and that the city of Ghent has undertaken such monitoring, in co-operation with the Centre.
145. The Commissioner notes with interest that a number of cities, notably Ghent and Saint Niklaas, have developed their own policies to deal with the integration of EU migrants, including Roma.<sup>79</sup> Strategies developed in Ghent in particular have often been referred to as promising practices, as a considerable share of the Roma migrating from other EU member states have managed to find housing and employment and to integrate in the city. The strategy provides for efforts in the provision of information, better coordination between the local administration and NGOs and relies on the work of mediators, who are widely reported to play an important role in facilitating the integration of Roma. However, the Commissioner understands that the Flemish authorities might discontinue the funding of the mediators programme in 2016. As for Brussels, the Commissioner notes that the regional government has set up a task force to coordinate action regarding Roma migrants living in poverty, but understands that its impact has so far been limited.
146. The Commissioner notes that the number of Roma families in a situation of extreme deprivation is relatively low, and has reportedly remained stable over the last few years. Therefore, it should be possible to identify sustainable solutions at the local level for the families concerned, so as to avoid the development of shanty-towns and other similar situations leading to human rights infringements, which will also be more difficult for the authorities to tackle.

### 3.2.2 ACCESS TO EDUCATION

147. The Commissioner is seriously concerned about the situation of migrant Roma children with regard to education. He is informed that a large proportion of them are not enrolled in school at all. Interlocutors of the Commissioner during his visit reported frequent enrolment denials of Roma children, notably in the Brussels region, on grounds that the schools cannot cater for the needs of these disadvantaged children. Other children from very deprived families cannot regularly attend school due to homelessness, associated frequent changes of place of residence and extreme poverty.
148. Extremely high dropout and absenteeism rates have also been reported among Roma children. Some tools are in place to facilitate the integration of foreign children into Belgian schools, including preparatory classes and support for language learning, but these reportedly do not suffice to meet the existing needs. The Commissioner also understands that more mediators would be needed to build

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<sup>77</sup> Constitutional Court, Judgment 95/2014 of 30 June 2014.

<sup>78</sup> Myria, 2015, *ibid*, pp. 211-217.

<sup>79</sup> The Flemish Community has also developed since 2012 an action plan for intra-EU migrants, including Roma.



bridges between Roma families and children, teachers and school administrations.<sup>80</sup> He notes with interest the view expressed by civil society organisations involved in work with Roma that families are increasingly interested in their children attending school.

149. The Commissioner notes with concern that according to various studies, children belonging to the most disadvantaged groups of society, which often includes many children with a migrant background, are over-represented in specialised education, as already mentioned in Section 1.<sup>81</sup>
150. Despite a lack of comprehensive data and in-depth research on this issue, it is alarming that the percentage of Roma children who are assigned to specialised schools seems to be very significant. Reasons for placement in specialised education can reportedly include socio-economic disadvantage, lack of proficiency in Dutch or French or behavioural and learning difficulties. High rates of placement of Roma children in specialised schools have for instance been reported in Ghent, the only city which has until now undertaken to investigate this problem. The municipality published figures indicating that among children enrolled in specialised primary schools, 19% were of Slovak nationality and 22% of Czech nationality, whereas Belgian children made up only 7% of the population of these schools. In specialised secondary education, 33% of the students were of Slovak origin and 8% of Bulgarian nationality.<sup>82</sup>

## CONCLUSIONS AND RECOMMENDATIONS

151. The Commissioner calls on the Belgian authorities to take resolute steps to tackle the situation of extreme deprivation, including homelessness, with which a limited number of Roma families living in Belgium are faced. In doing so, the best interests of children should be a primary consideration of the authorities. The Commissioner recalls that Article 27 of the UNCRC grants all children the right to a standard of living adequate for their physical, mental, spiritual, moral and social development, and places a corresponding duty on states to “take appropriate measures to assist parents and others responsible for the child to implement this right and [...] in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”<sup>83</sup> He also stresses that Belgium, as a party to the European Social Charter, should secure for migrant Roma, as for all persons living in Belgium, the right to protection of health, the right to social and medical assistance and access to education.
152. Targeted social support should be provided through coordinated action between the various levels of administration and the contribution of relevant civil society organisations, including Roma representatives. In this context, the work of the task force set up by the region of Brussels to this end should be resumed. Existing promising practices by civil society organisations should be further supported and integrated in the work of local administrations. In this connection, the Commissioner calls on the authorities to continue to expand the mediators’ programmes and ensure that they can carry out sustainable, long-term work. He invites the authorities to refer to Committee of Ministers’ [Recommendation \(2012\)9](#) on mediation as an effective tool for promoting respect for human rights and the social inclusion of Roma.<sup>84</sup>
153. The Belgian authorities should investigate allegations of unlawful denials of registration on municipal registers opposed to Roma migrants at the local level and provide clear guidance on the rules governing registration, in line with the recommendations made by national human rights institutions.<sup>85</sup>
154. The Commissioner urges the Belgian authorities to prevent the placement of Roma children in specialised education on grounds of their socio-economic background and linguistic and learning

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<sup>80</sup> School mediators are available in Flanders and in the Brussels region.

<sup>81</sup> Observatoire belge des inégalités, [Le spécialisé en Communauté française, un enseignement spécial... pour les pauvres](#) », 10 April 2015.

<sup>82</sup> Elias Hemelsoet, Whose problem is it anyway? Realising the right to education for Roma children in Ghent, Belgium, *Romani Studies*, Vol; 25, No. 1 (2015), 1-21.

<sup>83</sup> UN Convention on the Rights of the Child, Article 27.

<sup>84</sup> Committee of Ministers’ Recommendation (2012)9 on mediation as an effective tool for promoting respect for human rights and social inclusion of Roma, adopted on 12 September 2012.

<sup>85</sup> See Myria, 2015, *ibid*, pp. 216-217.



difficulties. A crucial step in this endeavour is the collection of reliable data. As already stressed in Section 2, he strongly believes that the Belgian authorities should focus on building an inclusive education system in which adequate support would be provided for the inclusion of all children, including migrant Roma children, in mainstream education.

155. The Commissioner also invites the authorities to investigate all allegations of school enrolment denials opposed to Roma migrant children, which infringe the right of children and young persons to access education on an equal footing with others, as protected under the European Social Charter and the UNCRD.

### 3.3 HUMAN RIGHTS OF BELGIAN ROMA AND TRAVELLERS<sup>86</sup>

#### 3.3.1 AVAILABILITY OF ENCAMPMENT SITES

156. The Commissioner notes with concern that there is a persisting and substantial lack of temporary and permanent encampment sites for Roma and Travellers who travel part of the year. Little progress appears to have been achieved since the 2012 [Decision](#) of the European Committee of Social Rights,<sup>87</sup> which found Belgium in violation of various articles of the European Social Charter on grounds *inter alia* that it failed to provide adequate living conditions to Belgian Travellers/Roma and that the number of sites available was insufficient to meet their needs.
157. According to the authorities, for an estimated 1 000 families in need of encampment places, Flanders currently provides 490 places on 30 public residential sites and 77 places on transit sites. In the Walloon region, for an estimated 1 000-1 500 families, five residential sites are available, while 10 municipalities provide transit sites and about 30 municipalities host Roma and Travellers on the basis of informal agreements. In the Brussels region, the only existing site has been closed since 2012.
158. Moreover, according to several of the Commissioner's interlocutors, local authorities, which until now had regularly allowed Roma and Traveller families to stop and stay on their territory, increasingly proceed to evictions. Evictions are carried out all year round, including in winter, and irrespective of the number of years spent on a site. The recent increase in evictions has apparently compelled a growing number of families throughout the country to be on the move all year long, a circumstance which generates serious difficulties, in particular as regards access to health care and education for children.
159. Evictions also occur on private sites owned by Roma and Traveller families on grounds that planning requirements and housing quality standards are not met, as also criticised by the European Committee of Social Rights in its 2012 decision.
160. In Belgium, municipalities are not obliged by law to provide encampment sites and receive Roma and Travellers living in caravans. The Commissioner is informed that the authorities favour incentives for local authorities to act on a voluntary basis rather than imposing obligations. Since 2014, the Flemish authorities cover 100% of the costs of setting up a site. They recently sent a letter to all local authorities in Flanders encouraging them to make use of this option. Some support for building sites is also available in the Walloon region.
161. However, only a few municipalities seem to have made use of the existing possibilities to set up new sites. Civil society representatives with whom the Commissioner met are in favour of an obligation for municipalities to host Roma and Travellers in order to overcome this problem. They contend that it is not always necessary to provide fully equipped sites for short-term stays. However, they believe that it is essential to stop the current practice of constant evictions and to guarantee the possibility for Roma and Travellers to stay for determined and foreseeable periods of time in the same place so that they can enjoy stability and lead a normal life with access to rights and basic services.

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<sup>86</sup> The persons referred to in this section are Belgian Roma, Sinti/Manouches and Travellers.

<sup>87</sup> European Committee of Social Rights, Decision on the Merits of 21 March 2012 in *International Federation of Human Rights v. Belgium*, Complaint No. 62/2010,

162. The Commissioner notes with appreciation the important role played by mediators, such as the Mediation Centre for Roma and Travellers in the Walloon region. In addition to facilitating contacts of Roma and Travellers with schools, health care services and other local administration departments, they play a crucial role in negotiating with local authorities the possibility of staying on designated sites and in preventing forced evictions.

### 3.3.2 LEGAL RECOGNITION OF CARAVANS

163. Caravans have been recognised as housing in Flanders since 2004 and in the Brussels region since 2013,<sup>88</sup> but not in the Walloon region. However, the Commissioner understands that the housing regulations have not been adapted to mobile housing and that as a result Roma and Travellers are often refused recognition of their caravans as housing for not meeting technical requirements.
164. The lack of recognition of caravans as housing generates legal uncertainty and practical insecurity for Roma and Travellers. It heightens the risks of evictions and limits legal protection in case of eviction. It also hampers possibilities of improving their living conditions as local authorities are not likely to grant them planning permission. Moreover, they cannot access housing benefits or bank loans.

### 3.3.3 DOMICILIATION

165. By law, persons living in a caravan can register with any municipality in which they spent more than six months per year, or in a municipality in which they have a “reference address”, often in a local social support centre (CPAS). However, the Commissioner received information indicating that families requesting formal registration by municipalities in which they spend prolonged periods of time often face refusals, and in some cases, legal proceedings against them on different grounds, should they appeal against negative decisions. In many municipalities, there is a shortage of institutions providing for the registration of reference addresses. The status and situation in practice of the persons concerned therefore greatly depends on the discretion of local authorities.
166. The Commissioner notes that the lack of a registered address (domiciliation) has serious consequences for the persons concerned. It prevents them from enjoying a number of rights, due to difficulties in registering on voters’ lists, accessing welfare support provided by the CPAS or obtaining an identity document, and accessing services such as opening a bank account or subscribing car insurance.

### 3.3.4 RIGHT TO EDUCATION

167. The Commissioner is seriously concerned about the low participation of Roma and Traveller children in education. Very high dropout and absenteeism rates are reported, as well as a growing number of children not attending school at all. The constant risk of housing eviction seriously affects the access of an increasing number of children to education, as highlighted by the Flemish Parliamentary Ombudsman for Children. In a report of February 2015, he drew attention to the fact that in Flanders, about 100 children from travelling families have no access to school due to frequent evictions. They are also deprived of access to leisure, a right protected under the UNCRC, and prevented from developing a normal social life.
168. Enrolment denials have been reported to the Commissioner, despite some incentives for schools to enrol children from Roma and Traveller families, notably in Flanders where schools receive additional funding to this end. In general, he understands that no specific provisions are in place to ensure access of children from families with an itinerant lifestyle to education. A project aimed at providing education to families on the move during the travelling season (from spring to autumn) was developed in the French Community but had to stop due to the eviction of the mobile education facility in which education was provided.

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<sup>88</sup> Regulatory statutes to the law recognising caravans as housing in Brussels region have, however, not yet been adopted.

169. Moreover, it is worrying that the rate of Roma and Traveller children enrolled in specialised education also appears to be disproportionately high. According to a 2010 study carried out in the city of Leuven, 27% of the Roma and Traveller children surveyed were enrolled in specialised schools.<sup>89</sup>

### 3.3.5 INTOLERANCE AND ANTI-GYPSYISM

170. The Commissioner is concerned about persisting manifestations of hostility against Belgian Roma and Travellers as illustrated, in the spring of 2015, by the request of the Walloon municipality of Mouscron to a neighbouring French municipality (Wattrelos), in which a site for Travellers is going to be created, to build a wall to discourage the arrival of French Travellers. In another display of open hostility towards Roma and Travellers, a municipality in Flanders decided in 2014 to drive Roma and Travellers away using very loud music. These and other examples, coupled with refusals to host encampment sites and the growing numbers of evictions, have reinforced the feeling among Roma and Travellers that they are not equal citizens. They also contribute to strengthening prejudices in society.
171. The Commissioner notes that in April 2015, it was disclosed that the federal police used a “Gypsy” tag (later replaced by a “Traveller” tag) to describe suspected or convicted offenders in its internal database. The Commissioner understands that these tags were used well beyond the context of a specific suspect description and stored for indefinite periods of time.

### CONCLUSIONS AND RECOMMENDATIONS

172. The Commissioner calls on the Belgian authorities to strengthen their efforts to ensure full respect for the human rights of Roma and Travellers, including their right to freedom of movement, to choose their residence and to preserve their cultural identity. He recalls that the Court has repeatedly stressed that the “vulnerable position of Gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle [...]” and that “there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the Gypsy way of life.”<sup>90</sup> He also wishes to refer the Belgian authorities to Committee of Ministers’ [Recommendation \(2004\)14](#) on the movement and encampment of Travellers in Europe,<sup>91</sup> which contains useful guidance for member states on these issues.
173. The Commissioner therefore urges the Belgian authorities to ensure that a sufficient number of reception sites is available to non-sedentary or semi-sedentary Roma and Travellers in accordance with the decision of the European Committee of Social Rights. Incentives for municipalities to provide such sites can be useful to this end, but the establishment of a legal obligation should rapidly be pursued if such incentives do not fully meet the needs. Moreover, it is important to ensure that no undue obstacles are imposed on Roma and Travellers who want to reside on their own land. Additional support should be given to the work of mediators as they play a crucial role in solving problems at the local level.
174. The Commissioner calls on the authorities to take all measures necessary to ensure that Roma and Travellers are never evicted from sites occupied by them, especially in the case of long-standing occupation, without provision of adequate alternatives and in-depth assessment of the situation and specific vulnerabilities of the sites’ occupants, in accordance with the criteria and legal safeguards set down by the European Committee of Social Rights.<sup>92</sup> As reiterated by the Court in *Winterstein v. France*,<sup>93</sup> evictions should be carried out in accordance with the law, pursue a legitimate aim and be necessary in a democratic society, i.e. meet a “pressing social need.”

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<sup>89</sup> The study covered a sample of 176 Travellers in Leuven, quoted in Franet National Focal Point Belgium, [the situation of Roma](#), 2012, p. 15.

<sup>90</sup> See [Connors v. the United Kingdom](#), App. No. 66746/01, Judgment of 27 May 2004, para.84 and [Winterstein and Others v. France](#), App. No. 27013/07, Judgment of 17 October 2013, para.160.

<sup>91</sup> Committee of Ministers’ Recommendation (2004)14 on the movement and encampment of Travellers in Europe, adopted on 1 December 2004.

<sup>92</sup> See European Committee of Social Rights, Decision on the Merits of 21 March 2012, *ibid*, para. 163.

<sup>93</sup> *Winterstein v. France*, *ibid*, para. 147.

175. It is important that caravans be effectively recognised in law as housing throughout Belgium. Furthermore, where caravans are recognised as housing, the Commissioner invites the authorities to consider adapting housing regulations to caravans to ensure that Roma and Travellers can effectively enjoy their right to housing and access a range of services linked to this recognition, on an equal footing with the rest of the population. The Commissioner also wishes to draw attention to the Court's case-law, which indicates that the concept of "home" and the related protections afforded by the ECHR are not limited to residences which have been lawfully established.<sup>94</sup>
176. The Commissioner calls on the Belgian authorities to ensure the practical enjoyment by Roma and Travellers of their right to choose their residence, protected, inter alia, by Article 2 of Protocol No. 4 to the European Convention on Human Rights. To this end, all Roma and Travellers should be able to obtain domiciliation in municipalities in which they regularly reside. Possibilities to register with local public administrations should be significantly extended to guarantee that Roma and Travellers can enjoy human rights, such as the right to vote, and avoid exclusion from key services.
177. The Commissioner calls on the authorities to monitor and act against enrolment denials at school, as well as over-representation in specialised education. He also invites them to support the development of alternatives to conventional schooling for non-sedentary or semi-sedentary families and to employ more school mediators. He invites the authorities to refer to Committee of Ministers' [Recommendation \(2009\)4](#) on the education of Roma and Travellers in Europe,<sup>95</sup> which contains useful guidance in this regard.
178. The authorities should intensify the fight against anti-Gypsyism and prejudices against Roma and Travellers. All instances of hate speech and discriminatory practices, including by elected representatives and political leaders, should be firmly and unequivocally condemned by the authorities at the highest level.
179. Practices of ethnic profiling of Roma and Travellers by the police should also be acknowledged and addressed, at the federal and local levels. The Commissioner draws attention to ECRI's General Policy Recommendation No. 11, which provides extensive guidance on how to address racial profiling.<sup>96</sup> In particular this Recommendation clarifies that the use by the police of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities "can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity".<sup>97</sup>

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<sup>94</sup> See for example [Buckley v. the United Kingdom](#), App. No. 20348/92, Judgment of 29 September 1996, para.52-54.

<sup>95</sup> Committee of Ministers' Recommendation (2009)4 on the education of Roma and Travellers in Europe, adopted on 17 June 2009.

<sup>96</sup> [ECRI General Policy Recommendation No.11](#), 2007.

<sup>97</sup> *Ibid*, para. 29.