



Belgium, on the road to the United Kingdom

MyriaDoc 10



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Belgium, on the road to the United Kingdom



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1. INTRODUCTION

Myria was set up by the legislator to analyse the complex and expansive arena of international migration to and from Belgium, to defend the rights of migrants and to tackle trafficking and smuggling of human beings.

In this publication, Myria will focus on transit migration for the first time, and specifically on transit migrants who want to get to the United Kingdom.

Transit migration is not a new phenomenon - even in our regions - and is part of the major migration phenomena of our time. Transit migration is characterised by tragedy and hope, an arena where citizens demonstrate true generosity, and where seasoned criminals are active. It is a challenging issue for all stakeholders. As for the transit migrants themselves, it is an undertaking fraught with risk.

In this latest Myriadoc, we attempt to bring light to the phenomenon of transit migration, with the nuance that is required. We sketch a profile of the transit migrant in Belgium, as well as the national and international context of the phenomenon, and the cooperation on this matter.

Myria presents data and practices that will help to better understand and discuss government action with respect to transit migrants. The figures give a - distorted - picture of this broad movement of people who appear to have one destination, but who come from very different backgrounds. The lack of accurate and complete figures is a genuine obstacle. Broad interdisciplinary monitoring is therefore an important recommendation in this report.

Nonetheless, it is already clear that many transit migrants are in need of international protection, being nationals of countries for which there is a high recognition rate, such as Sudan and Eritrea.

Almost all transit migrants are affected by socio-economic marginalisation. For them, the period in transit is a period of vulnerability, uncertainty and lack of knowledge regarding their future and their legal status. Transit migrants are generally reluctant to claim their rights, and the government also takes a highly ambiguous stance.

The challenges and human needs are on such a scale that this Myriadoc needs to be sufficiently broad and in-depth if it is to contribute to effective solutions that respect human rights.

This Myriadoc delves deeper into the regulations and policy framework that apply to transit migrants, from the right to reception to the rules in terms of arrest, detention and removal. Some of the lessons learned in the arena of tackling smuggling of human beings will come under scrutiny again. Myria made use of its legal mandate to make recommendations to the government.

This is far from the final word on the issue. The impact of Brexit - which we will obviously cover - is also still very uncertain. And not only in terms of figures, but also in terms of protecting the fundamental rights of transit migrants, exceptional efforts and more sustainable solutions need to be worked out.

For Myria, it is clear that transit migrants must be regarded as the agents of their journey, with the capacity to make decisions, review residence strategies and, if necessary, claim protection. This requires an environment that is sufficiently safe and trustworthy, where the most pressing and serious needs are met, and smugglers of human beings do not have free rein.

With this publication, Myria hopes to demonstrate that the government has various opportunities to develop a sustainable policy on transit migration.

2. METHODOLOGY

To illustrate the situation of transit migrants in Belgium, Myria's approach was as follows:

- Literature study on the phenomenon of transit migration;
- Analysis of available data (reports, parliamentary questions, press releases, etc.);
- Requests for additional figures and data from the competent authorities;
- Interviews with transit migrants (in Maximilian Park and in detention centres);
- Interviews with the actors involved (see annex).

The problem of smuggling of human beings is intrinsically linked to transit migration, and must therefore also be covered in this publication. Nonetheless, it is not the focus of this Myriadoc. Myria publishes separate annual reports on this issue, in which transit migration is also discussed.¹

2.1 LIMITATIONS OF THE PRESENTED FIGURES

Myria analyses the make-up of the 'population group' of transit migrants, how often they are apprehended, and the administrative journey they go through. The Immigration Office provided Myria with data regarding:

- arrests, in general and in the context of transit migration;
- the administrative consequences of these arrests;
- general data regarding return.

The reports of the British *Independent Chief Inspector of Borders and Immigration* (hereinafter: ICIBI) and figures from the Federal Judicial Police of West Flanders, the Maritime Police and several NGOs are also used in this Myriadoc. Myria subsequently processed the data received.

¹ See: <https://www.myria.be/en/publications>.

The figures in this publication ought to be treated with caution. Transit migrants are not registered, or only inadequately registered, in transit countries, including Belgium. This should come as no surprise, given that transit migrants usually intend to stay in transit countries for very short periods of time. Many of them prefer to stay under the radar of government agencies in transit countries. By definition, there is a significant *dark number* of transit migrants who do not come into contact with government agencies, nor do they come into contact with NGOs.

Available data on migrants detained at the borders, such as in the Frontex database² for example, are limited, often unreliable and open to (mis)interpretation, whether for political or other reasons.³ On the other hand, figures are often treated as confidential and remain inaccessible to the public. Moreover, transit migration is a very broad and diffuse concept, and transit migrants move about in both regular and irregular ways. The figures from parliamentary questions do not always appear to be reliable, and sometimes blatantly contradict each other.⁴

The figures in this Myriadoc do not reflect individual persons. No conclusions can be drawn as regards the average number of transit migrants in Belgium.

² For example, the figures on detections of irregular border crossings, see: <https://data.europa.eu/euodp/en/data/dataset/detections-of-illegal-border-crossings>.

³ E. CASTAGNONE, "Transit migration: a piece of the complex mobility puzzle. The case of Senegalese migration", *Cahiers de l'Urmis* 2011, 3.

⁴ For example, on 18 June 2018, the then State Secretary stated in the answer to question 1381 that it had been possible to count the number of individual transit migrants since 2016. The figure was 7,029 persons in 2016, and 6,115 in 2017. However, on 7 September 2018, the Minister of the Interior replied to question No 3431 that it was impossible to determine the number of individual persons.

Nevertheless, by drawing on a range of sources of information and exercising the necessary caution, Myria is able to provide an overview of the phenomenon of transit migration in the Belgian context. To enable this, a working definition of the concept of 'transit migrant' has been developed.

2.1.1 FIGURES RELATING TO BELGIUM

Local and federal policy on transit migration is largely influenced by the trends inferred from the figures. Many of the measures taken are therefore aimed at highly visible transit migrants who are often found at car parks, in the Northern Quarter of Brussels, the port of Zeebrugge, etc.

Nevertheless, the figures need to be nuanced. It is extremely difficult to paint an accurate picture of a population group that is not systematically registered anywhere. The various police units, the Immigration Office, Fedasil and the Guardianship Service do not use a uniform working definition to define who exactly is a transit migrant. The government institutions are guided by the registration of transit migrants by police officers in RAAVIS⁵ which is done on the basis of the interrogation of the intercepted person. The figures therefore depend on the - not always consistent - implementation by individuals or an internal guideline that is open to interpretation. Comparisons between the number of arrests over different years are therefore difficult to make. The Immigration Office warns against the lack of representativeness of the figures that they themselves provide.

In recent years, attention for the phenomenon of transit migration has grown, especially for Eritrean, Iraqi and Sudanese transit migrants. It is possible that these groups are over-represented in interception statistics. Eritreans, Sudanese and Iraqis apprehended by the police without valid residence or identity documents might be registered as

transit migrants much more quickly due to media attention. It is also possible that they are repeatedly arrested as they generally have a more limited budget and therefore cannot travel under the radar (see 3.2.5). Moreover, the nationality as shown in the interception statistics is the nationality as stated by the transit migrant. It is possible, for example, that the proportion of Eritreans is overestimated in the interception figures and that the individuals are actually Ethiopians, for example, who are trying to avoid forced return to Ethiopia.

Transit migrants who do not attract attention in public, for example because they are less conspicuous or because they stay in *safehouses* via smugglers of human beings, remain under the radar.

Moreover, many of the figures pertain to the number of interceptions and not to the number of individuals arrested. It is therefore delicate and inaccurate to draw general conclusions about the population group of transit migrants in Belgium from the available arrest figures.⁶

Given the lack of reliable and representative data, it is impossible to estimate how many transit migrants there are (on average) in Belgium. Nor is any representative information available on the demographic characteristics of transit migrants.

The fact that the data available to Myria are not representative is illustrated by the tragic case of the 39 Vietnamese transit migrants, including 8 women, found in a truck in Grays in the United Kingdom (hereinafter: UK). However, Vietnamese do not often appear in the interception figures of transit migrants or in NGO reports (see 3.2).

⁵ Rapport Administratif - Administratief Verslag (Administrative Report) Information System, an application that facilitates the exchange of information between the police and the Immigration Office.

⁶ For example, a given individual was arrested around ten times and therefore appeared ten times in the interception figures (example given during a meeting with the Immigration Office in May 2019).

2.1.2 FIGURES RELATING TO THE UNITED KINGDOM

The figures on transit migrants arrested at the UK-border are not an accurate reflection of the total number of transit migrants either, or of the number of individual transit migrants who attempted to reach the UK.

The figures presented in this Myriadoc were obtained from various sources⁷ and often pertain to different periods (over the timespan of different years, *business years*, etc.). The figures also cover various countries of departure and arrival (e.g. southern UK ports only) and do not always include the same categories of persons (e.g. persons detained at juxtaposed controls (see 4.8.1) and all persons detained at the UK border).

2.2 MONITORING

Local and federal policy priorities are primarily formulated on the basis of the perception of the police and local politicians. Given the lack of substantiated information and accurate figures, the resulting policy measures do not always meet the needs on the ground. For example, there were 12,848 interceptions of transit migrants in 2018. However, we do not know whether the actual average number of transit migrants that are in Belgium is 2,000, 5,000, 10,000 or (much) more or (much) fewer *individual* transit migrants. We don't know how many minors there are among them, and whether there are indeed between 15 and 20% women, as stated in the report of the Humanitarian Hub.⁸ Data from the Humanitarian Hub and the Porte d'Ulysse homeless shelter (see 7.1) do contain individual cases, but are limited to people who call on the support of their organisations. In addition, the service is not exclusively offered to transit migrants. However, an approximate estimate of the make-up of the 'group' of transit migrants offers a significant advantage in assessing policy needs.

Myria has observed that there is no coordinated approach between the various services that come into contact with transit migrants. Validated data are rarely provided, meaning that there is a lack of reliable, transparent and comparable information on transit migrants. In other words, it is necessary to give priority to this aspect, in order to:

- ascertain the scope of the phenomenon;
- have an informed debate;
- enable a humanitarian and appropriate government response.

There is therefore a need for a systematic approach by the competent authorities to map out transit migration.

⁷ Reports of the *Independent Chief Inspector of Borders and Immigration*, figures from the *UK Home Office*, figures obtained from the Federal Judicial Police of West Flanders, etc.

⁸ Figures from the Humanitarian Hub, received on 20 September 2019. Moreover, they estimate that there were 800 to 1,000 transit migrants in Brussels as of June 2019. For more information on the Hub, see 7.1.

RECOMMENDATION

Myria recommends the **collection of reliable, transparent and comparable data** on the phenomenon of transit migration, by:

- the development of a **uniform working definition** of the concepts 'transit migration' and 'transit migrant' by the administrations concerned (police forces, the Immigration Office, Fedasil, Guardianship Service, etc.) ;
- **Identifying** the (average) number of **individual persons** in all available data on transit migrants and the provision of this statistical information to governments (including Parliament);
- Ensuring the **validation** of available information and the **publication** of non-confidential **information**.

Myria also recommends implementing **multidisciplinary monitoring** of the phenomenon of transit migration, with due consideration of the European and international context. The various actors in the field need to be involved in this regard (the relevant public services, civil society organisations, academics, etc.).

3. PHENOMENON

The migration phenomenon in Europe is becoming increasingly complex and diverse. This is partly due to increasing restrictions on regular migration and heightened surveillance of external borders since 1990.⁹ The concept of 'transit migration' expresses a political and Eurocentric point of view.¹⁰ It is in fact the external borders of the European Union (hereafter: EU) that are the core of the issue. The term 'transit migration' was first used in the 1990s by various international organisations and European institutions. 'Transit migrants' initially referred to persons who wanted to enter the European Union but were unable to, and were therefore stuck at the external borders.

Given the lack of regular migration channels and restrictive migration legislation, which make it difficult to reach the destination country, migrants are often forced to make use of so-called 'underground means'.¹¹ This may refer to: travelling without the necessary documents, relying on smugglers, endangering themselves, etc. As a result, they get stuck, 'in transit' in an easily accessible country near the destination country.

However, while transit migration at the external borders of the EU receives the most attention, transit migration also occurs within the EU, especially at the internal borders of the Schengen area. The migrants stuck in France, Belgium, the Netherlands and Spain who want to reach the UK are one example of this, and are the focus of this Myriadoc.

In addition, Germany, Denmark and Sweden are both destination and transit countries. Transit migration is also observed outside the EU, for example from South and Latin America to the United States.

In this light, transit migration can be seen as a strategic response of the transit migrant to the constantly changing regimes in countries and the complex interaction between their autonomy and the sovereignty of the state.¹²

3.1 CONCEPT

As early as 1993, the United Nations defined transit migration as follows: "transit migration is migration in one country with the intention of seeking the possibility there to emigrate to another country as the country of final destination".¹³ However, international¹⁴ and domestic authorities¹⁵ define the concept in many different ways.¹⁶

¹²F. DÜVELL, "Transit Migration: A Blurred and Politicized concept", *Popul. Space Place* 2012, (415) 422.

¹³ Ibid, 417; UN/ECE 1993p 7; A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 3.

¹⁴ International Organization for Migration and Assembly of Inter-Parliamentary Union: "Transit migrants are defined as aliens who stay in the country for some period of time while seeking to migrate permanently to another country", see: IOM, "The next stop is...", 2003, 7 and ASSEMBLY OF THE INTER-PARLIAMENTARY UNION, *Report on Migration and Development*, C-II/113/R-rev, 2005, 4; European Committee on Migration: "People who enter the territory of a state in order to travel on to another", see: EUROPEAN COMMITTEE ON MIGRATION, *Towards a Migration Management Strategy*, 2002, 11.

¹⁵ (translation) "Transmigration indicates the departure of an individual/community from their country of origin (for various reasons) to other places to await transit or to settle there. The phenomenon of transmigration therefore encompasses both 'migration' and 'transmigration'; see: National Security Plan 2016-2019, *Samen, naar de kern van de zaak* (Together, to the heart of the matter), 72.

¹⁶ "A short-term temporary stay of a migrant on his/her way from a country of origin to a country of destination", see: I. IVAKHNYUK, "The East-to-West Circuit" in F. DÜVELL, I. MOLODIKOVA and M. COLLYER (eds.), *Transit Migration in Europe*, 2014, (127) 129; "A transit migrant is a foreign national in a legal or irregular situation whose intention is to leave his or her current country of residence 'as soon as possible' in order to reach a third country", see: S. DE TAPIA, "Introduction to the debate: Identification of issues and current and future trends of irregular migration in transit countries" in COUNCIL OF EUROPE, *Regional Conference on Migration. Migrants in the Transit Countries: Sharing Responsibilities in Management and Protection*, 2004, (110) 115.

⁹ C. COLLYER, F. DÜVELL, H. DE HAAS, "Critical Approaches to Transit Migration", *Popul. Space Place* 2012, (407) 407.

¹⁰ Ibid., 410.

¹¹ I. DERLUYN and E. BROEKAERT, "On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors", *International Migration* 2005, vol. 43 (4), (31) 32.

There is also no uniform definition in legal or political documents or in the press.

The expression 'transit migration' almost became a war cry directed at countries that are expected by EU states to keep unwanted migration off its territory.

F. DÜVELL, "Transit Migration: A Blurred and Politicized concept", *Popul. Space Place* 2012, (415) 418.

There is also confusion about the constitutive elements of the definition and the difference with other forms of migration. This confusion only reinforces the need for an integrated approach that sees the transit phase within the wider migration process.¹⁷ Transit migrants do not constitute a separate category of migrants, as is sometimes suggested politically. Myria warns that enlarging the transit phase increases the risk of not adequately taking account of the possible protection needs of the migrants in question.

3.1.1 (IR)REGULAR STAY

Transit migration is often confused with irregular migration and trafficking and smuggling of human beings.¹⁸ Among others, the United Nations has stated that transit migrants reach their destination "by means that are partially, if not fully, illegal"¹⁹, while the Council of Europe has stated that "the two major characteristics of transit migration are its illicit nature and an elaborate criminal organisation"²⁰.

The Belgian Immigration Act lumps irregular stay, smuggling of human beings and transit through Belgium together.²¹

However, the irregular stay of some transit migrants needs to be nuanced. Some transit

migrants are refugees within the meaning of the Geneva Convention. The refugee status that can be granted by Belgium following an application for international protection is, according to this Convention, only declarative.²² This means that a person who meets the conditions of the Convention *is* a refugee and can therefore hardly be regarded as being in irregular stay.

Myria also recalls that the use of irregular migration channels and the lack of regular stay cannot constitute an obstacle to access to international protection or to respect for fundamental rights.

Finally, it can be asserted that transit migration is a process rather than a migration status, a phase in which different migrants pass through their journey.²³ 'Transit migrant' is a kind of second layer, which can be the case both among migrants in irregular stay and migrants with regular stay; both applicants for international protection and refugees; both labour migrants and students, etc.²⁴ A transit migrant can also be in regular stay during the transit phase. Legal transit migration is not further covered in this Myriadoc.

3.1.2 TEMPORARY NATURE

The temporary nature of the stay in the transit country is at the heart of the phenomenon of transit migration.²⁵ However: how long or short does the stay need to be to be

¹⁷ A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 4.

¹⁸ Ibid., 6; F. DÜVELL, "Transit Migration: A Blurred and Politicized concept", *Popul. Space Place* 2012, (415) 417.

¹⁹ UN/ECE 1993:7.

²⁰ Recommendation 1489 (2001) of the Parliamentary Assembly of the Council of Europe, adopted on 22 January 2001, point 3.

²¹ Art. 77bis of the Immigration Act.

²² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, HCR/IP/4/Eng/REV.1, republished, Geneva, January 1992, no. 28, 7.

²³ E. CASTAGNONE, "Transit migration: a piece of the complex mobility puzzle. The case of Senegalese migration", *Cahiers de l'Urmis* 2011, 2; A. PAPADOPOULOU, *Asylum, Transit Migration and the Politics of Reception: the Case of Kurds in Greece*, paper for symposium, 8.

²⁴ A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 5.

²⁵ E. CASTAGNONE, "Transit migration: a piece of the complex mobility puzzle. The case of Senegalese migration", *Cahiers de l'Urmis* 2011, 3; F. DÜVELL, "Transit Migration: A Blurred and Politicized concept", *Popul. Space Place* 2012, (415) 417.

considered as transit migration? Where is the boundary between transit migration and the start of the settlement process?

It is more useful to prioritise integration and the emotional bond with a location as a criterion, instead of the time frame.²⁶ A characteristic of 'being in transit' is the fact that migrants are not socially or economically committed to the transit country.²⁷ Transit migrants remain very much focused on the country of origin and the country of destination.²⁸

However, in certain cases, a migrant, even if they still intend to travel on to another country, will work, spend money, consume, learn the language, etc.²⁹ This may be the case for practical reasons (in order to survive), due to uncertainty regarding the future (if the migrant fears he will never reach the destination country) or to finance the onward journey.

3.1.7 DESTINATION COUNTRY

The so-called destination country is not always clear.³⁰ Sometimes a country is a destination country in the first instance, but it becomes a transit country due to a lack of social and economic opportunities. Sometimes a country is an intended transit country, but will de facto become the destination country. In practice, we see that initial migration plans are subject to change throughout the entire process.

²⁶ A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 7.

²⁷ A. PAPADOPOULOU, *Asylum, Transit Migration and the Politics of Reception: the Case of Kurds in Greece*, paper for symposium, 8.

²⁸ Ibid.

²⁹ A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 7.

³⁰F. DÜVELL, "Transit Migration: A Blurred and Politicized concept", *Popul. Space Place* 2012, (415) 417.

Transit migration can be regarded as a '*state of mind*³¹', but is also an '*actual condition*': living conditions, access to protection and the rights and opportunities in the country of residence also play an important role in determining the complete migration process.³²

3.1.3 CONCLUSION AND WORKING DEFINITION

The essence of transit migration can be summarised as follows:

*the situation between emigration and settlement that is characterized by indefinite migrant stay, regular or irregular, and may or may not develop into further migration depending on a series of structural and individual factors.*³³

The following definition will be used as working definition for this Myriadoc:

A transit migrant in Belgium is a third country national, generally in irregular stay:

- who is in transit through Belgium with a view to settling in the United Kingdom

and

- who initially has no intention of settling in Belgium.

³¹ F. DÜVELL, *Illegal Immigration in Europe: Beyond Control?*, Palgrave, 2006.

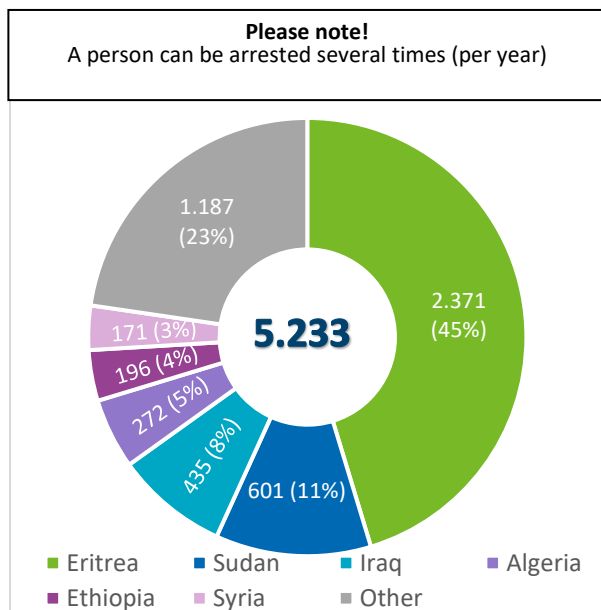
³² A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 10.

³³ A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 4-5; see also: DÜVELL summarises the core as: "On-migration of which transit migration would be a sub-category"; see: F. DÜVELL, "Transit Migration: A Blurred and Politicized concept", *Popul. Space Place* 2012, (415) 424.

3.2 PROFILE: THE TRANSIT MIGRANT IN BELGIUM

3.2.1 NATIONALITY

According to the most recent figures for the first half of 2019, Eritrea, Sudan and Iraq make up the top three declared countries of origin during administrative arrests in the context of transit migration. These figures do not represent individuals, but the number of interceptions.



Number of administrative arrests of transit migrants per (declared) nationality between January and July 2019. (Source: Immigration Office)

It is highly likely that certain persons with one nationality are arrested less than persons with another nationality or that the label 'transit migrant' is used more often for certain nationalities.

At the Porte d'Ulysse reception centre, where primarily transit migrants spend the night, the main countries of origin are Eritrea, Sudan and Ethiopia (see 7.1).³⁴

³⁴ BXL REFUGEES, *Activiteitenrapport Porte d'Ulysse*, 15, received on 14 September 2019.

Eritrea has also been the main country of origin of the UM identified in Belgium for two years.³⁵ The number of identified Eritrean UM tripled between 2017 and 2018.³⁶

It is striking that the volunteers on the Belgian coast encounter people of very different nationalities. For example, they often come into contact with Iranians, although this group is not significantly present in the interception statistics.³⁷ This may be attributed to over- and under-representation of certain nationalities in these statistics. It is also possible that the location where the volunteers are active is known to transit migrants or smugglers of certain nationalities.

For more information on the evolution of nationalities during arrests in the context of transit migration, see 6.2.1.

3.2.2 GENDER

Myria does not have figures on the gender of transit migrants at its disposal. Based on conversations with people in the field, we can assert that the majority of transit migrants are male.

However, according to the Humanitarian Hub, it appears that when more facilities are set up for female transit migrants, more women will also show up.³⁸ For example, since the provision of a separate area for women, 15-20% of visitors to the Humanitarian Hub (see 7.1) has been female.³⁹ Up until then, the number of women was very limited.

Gender also appears to influence the migration route. According to the coordinator of the Humanitarian Hub and the spokesperson of BXL REFUGEES, women appear to travel in different ways, for example always in groups, and spend the night in

³⁵ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 17-18.

³⁶ Source: Guardian Service.

³⁷ Meeting with Pastor Maréchal and the volunteers of Bruges on 6 September 2019.

³⁸ Meeting on 12 July 2019.

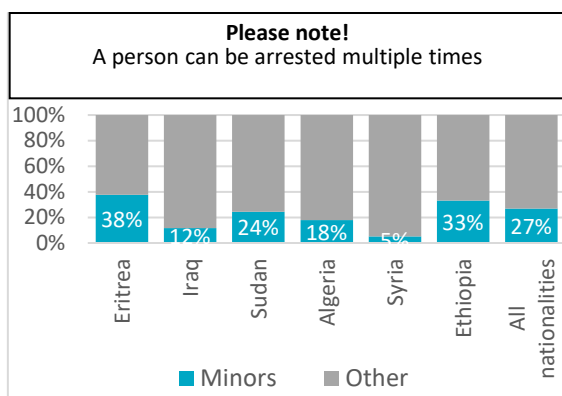
³⁹ Figures from the Humanitarian Hub, received on 20 September 2019.

different places than men.⁴⁰ Women (and children) also reach Europe more often on average through family reunification. More than 75% of the persons who receive a residence permit in the capacity of spouse are female.⁴¹

3.2.3 AGE

On the basis of the various encounters that have taken place with people on the ground, we can state that the average transit migrant is between 17 and 25 years old.⁴² In the first half of 2019, 27% of persons arrested in the context of transit migration declared that they were minors.⁴³

Both statistics and the experience of people in the field show that arrested Eritrean and Ethiopian transit migrants are often very young. Among Syrian, Iraqi and Libyan transit migrants, this appears to be less the case. Based on the interception statistics for the first half of 2019, Vietnamese transit migrants often also appear to be very young: 56% (40 out of 72 persons) of this group declared that they were minors.⁴⁴



(Declared) minors under administrative arrest in the context of transit migration; January to July 2019 (Source: IO)

⁴⁰ Meeting on 12 July and 5 August 2019.

⁴¹ MYRIA, *Migratie in cijfers en in rechten 2019*, (Migration in rights and numbers 2019) Annual Report, 2019, 66.

⁴² Based on the various conversations that were held within the framework of this Myriadoc.

⁴³ Source: Immigration Office.

⁴⁴ Source: Immigration Office.

3.2.4 ADMINISTRATIVE STATUS AND ASYLUM

Transit migrants wishing to travel from Belgium to the UK usually do not have legal residence at that time, even if they have already started and/or completed a procedure in another EU country. There are also transit migrants who have already acquired a status in the EU but wish to continue their journey to the UK. In any event, the transit migrant does not want to apply for international protection or obtain another right of residence in Belgium in the first instance.⁴⁵

Within the EU, there is often talk of so-called 'secondary movements' of migrants, i.e. the movement of migrants, including refugees and asylum-seekers, who leave the country where they arrived for various reasons in order to seek protection or settle elsewhere.⁴⁶ Transit migration is also often a so-called secondary movement.

Once arrived in the UK, not every transit migrant wishes to apply for international protection or legal residence. Persons with a genuine chance of international protection, such as Sudanese, Eritreans and Iraqis, do usually apply for international

protection.⁴⁷ This is also the group that will spontaneously report to the authorities upon arrival in the port or British waters.⁴⁸

Persons who do not apply for international protection in the UK, but wish to stay below the radar, will be more likely to hide and not report to the police on arrival in the UK.⁴⁹

⁴⁵ As regards UM, Eritrea is the main country of origin, but only 10% apply for international protection, see: UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 18.

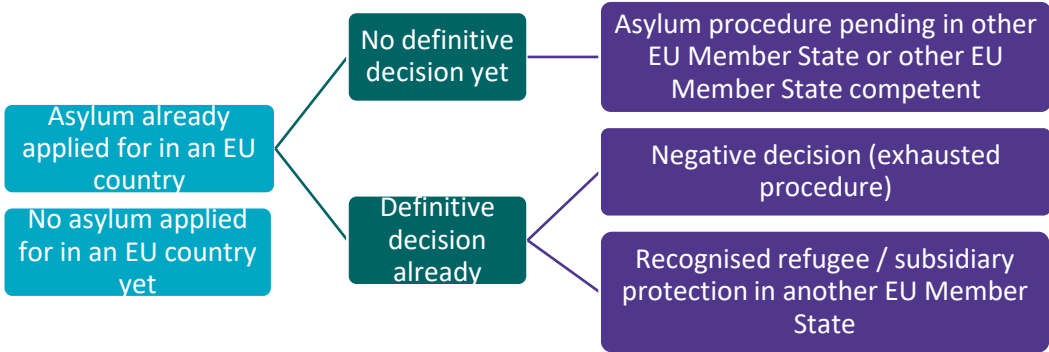
⁴⁶ https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/secondary-movement-migrants_en.

⁴⁷ ICIBI, *An inspection of Border Force operations at east coast seaports. July to November 2016, 2017*, 33-34.

⁴⁸ Based on a telephone conversation with the Independent Chief Inspector of Borders and Immigration on 8 August 2019.

⁴⁹ ICIBI, *An inspection of Border Force operations at east coast seaports. July to November 2016, 2017*, 33-34.

According to the *Chief Inspector of Borders and Immigration*, this includes, for example, Albanians, Indians and Vietnamese. Vietnamese are often involved in smuggling and trafficking in human beings, and are often economically exploited upon arrival in the UK.⁵⁰



3.2.5 MEANS AND METHODS OF TRAVELLING

There are significant differences between the financial means of the people seeking to reach the United Kingdom. This has an important influence on the way they travel.

Some transit migrants have few resources to finance their journey and therefore use cheaper ways to move about. According to the people in the field, these include Sudanese and Eritreans.⁵¹ Transit migrants with limited means often travel on foot along motorways and on public transport without transport tickets. They also often don't have enough money to pay smugglers and try to crawl into trucks on their own, for example. It is a not very organised way of travelling.

People with a lower budget also try to reach the other side with rubber dinghies, inflatable boats, kayaks or homemade rafts. This practice is more feasible from France.⁵²

In any case, crossing the Channel in this way is very dangerous given the busy navigation schedule and the undercurrents in the

Channel. For example, a - according to the most up-to-date information Iranian - man died trying to cross the Channel swimming from the north of France.⁵³ The crossing from Belgium is even more dangerous, given the greater distance to the British coast.

Transit migrants with more resources, for example, according to the people in the field, Kurds and Vietnamese, more often rely on a large organised network. Kurds also sometimes manage the larger car parks where attempts are made to crawl into trucks. In these cases, for example, migrants have to pay to use the car park, under the threat of violence.

In addition to trucks, refrigerated lorries are also used for transport. This way of travelling risks the lives of transit migrants hiding in the cargo compartment.⁵⁴

⁵⁰ See for example INDEPENDENT ANTI-SLAVERY COMMISSIONER, *Combating modern slavery experienced by Vietnamese nationals en route to, and within, the UK*, 2018.

⁵¹ Meeting with Humanitarian Hub on 12 July 2019 and BXL Refugees on 5 August 2019.

⁵² Meeting with the Maritime Police on 24 May 2019.

⁵³ See: H. DECRE, "Irakees sterft bij poging om naar Engeland te zwemmen", *VRT NWS* 26 August 2019.

⁵⁴ For example, on 23 October 2019, 39 bodies were found in a refrigerated truck in Essex, see: www.vrt.be/vrtnws/nl/dossiers/2019/10/39-doden-in-koelwagen.app/.

Small trucks are also converted to create hidden spaces in which migrants can hide.⁵⁵

In addition, there are migrants, often Iraqis and Iranians, who are often more affluent and can pay larger sums of money to travel to the UK from, for example, Dunkirk in small motorboats.

3.2.6 STAY AND PLACE OF DEPARTURE

Transit migrants stay in various places, such as homeless shelters⁵⁶, in camps in northern France, in Maximilian Park and near Brussels North train station, in private homes⁵⁷, in *safe houses* of smugglers of human beings, hotels, et cetera.

After the demolition of the camp in Calais, also known as 'the jungle', in 2016 there was a shift in the place of residence and departure of transit migrants from northern France to Zeebrugge. The tightening of port security or police checks are also causing shifts.

Transit migrants generally stay at the above-mentioned places until they make a new attempt to get to the UK. They then try, for example, to climb into lorries driving to the UK on motorway car parks.

In 2017, almost 23% of the official police notices issued in a car park were in violation of the Immigration Act.⁵⁸ In the first half of 2018, this was almost 33%.⁵⁹ This increase may be the result of an increase in the number of transit migrants in car parks, but may just as well be explained by an increase in targeted police actions on motorway car parks.

The car parks where transit migrants climb into lorries shift over time. In the past, people

primarily climbed into trucks along the E40, from the vicinity of the coast to Flemish Brabant. As a result of increased checks, the closure of car parks and the management of certain car parks by smugglers of human beings, transit migrants are moving further and further away from the coast and are gradually spreading across car parks throughout the country, for example along the E42 motorway (see 9.2).⁶⁰ Industrial estates and the ports where ships leave for the UK also serve as places to climb into trucks.

In October 2018, according to the Minister of Security the Interior, the top 5 of the most frequently used car parks were Groot-Bijgaarden, Wetteren, Maisières, Jabbeke and Heverlee.⁶¹

⁵⁵ See for example the Halifax dossier: D. LEESTMANS, "Van garagisten tot IS-terroristen: het opvallende proces tegen een bende mensensmokkelaars", *VRT NWS* 25 February 2019.

⁵⁶ For example at SamuSocial or in the Porte d'Ulysse reception centre in Haren.

⁵⁷ For example via the Citizens' platform, see: <http://www.bxlrefugees.be/en/my-front-page/onthaal-vluchtelingen-thuis/>.

⁵⁸ There were 549 official police notices in 2017 and 391 in the first half of 2018; see: Q&A. Chamber 2018-19, 28 February 2019, 54/181, 128 (Question no. 3785 B. PAS).

⁵⁹ Ibid.

⁶⁰ See Mawda case (see 9.3); MYRIA, *Jaarlijks evaluatieverslag 2018 Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual report trafficking and smuggling of human beings, Minors at Major Risk) 2018, 6; Meeting with BXL Refugees on 5 August 2019.

⁶¹ Q&A. Chamber 2017-18, 8 October 2018, 54/171, 270-71 (Question no. 2947 B. VERMEULEN).

"Manchmal Angst, manchmal freundlich"⁶²

This is the story of a young, 23 year-old Eritrean man, Zekariyas, and a young, 20 year-old Eritrean woman, Mikal. Zekariyas comes from a small village, Mikal from a large city. We met them on 14 October 2019 between Maximilian Park and the Humanitarian Hub in the North Quarter of Brussels.

Zekariyas left Eritrea four years ago. He wanted to get to his sister, who had gone to live with her husband in London via family reunification. He travelled via Ethiopia, Sudan, Libya and arrived in the EU in Italy. He was on the road for about 7 months and paid €5,000. He travelled on to Germany, where he applied for international protection. He was granted resident status there, but says he could not get a passport to continue travelling to his sister in the United Kingdom. Zekariyas now speaks fluent German and English.

Mikal, one of Zekariyas' cousins, decided to leave Eritrea a few months later. Her brother had previously made an arduous journey and has since been living in Liverpool for almost 5 years. She travelled on her own from Eritrea to Germany via the same route as Zekariyas, but it cost her €3,000. Once in Germany, she contacted Zekariyas via Facebook. She did not apply for international protection herself, but stayed in Germany for 2 years. Mikal can get by in German, and also speaks some English.

Both indicate that the trip from Eritrea to Italy was the most difficult part.

Zekariyas left Cologne to visit Mikal in Berlin. They decided to continue their journey to the United Kingdom. By bus, they travelled on to Belgium. They both have smartphones to keep in touch with friends and family, and they explain that in Eritrea there is only internet in the big cities. Their mobile phone subscription is paid for by their families in the United Kingdom.

Zekariyas has been in Belgium for two months, while Mikal has only been here for a month. During the week, they try to hide in trucks to travel to the UK and they spend the night in the homeless shelter of Samu Social. Mikal also sometimes stays at Sister's House, organised by BXL REFUGEES. Zekariyas says he often sleeps on the streets during the week. He also often sleeps in the afternoon, if he has spent the night trying to climb into a truck. In the weekend, they generally

stay together with a host family. Every now and then they stay the night with volunteers in Bruges.

They do not rely on smugglers of human beings to get to the UK. Zekariyas tells about a car park where they go to hide in trucks. It's far away: they first take the train to Ghent, then change trains twice or, if it's too long to wait, go on foot to the car park. A friend showed him where this car park was. There are always a lot of other people in the car parks trying to crawl into the trucks. It is not easy to get to the right locations, as bus drivers and train conductors throw them off the train or bus if they don't have a ticket. Sometimes they have to wait another hour for the next bus or train.

Zekariyas has tried to crawl into a truck 10 times, but has often been caught. "No chance", as he puts it. When he does manage to crawl in a truck, he uses Google Maps to track whether the truck is heading in the right direction. If that's not the case, they knock on the door to be let out.

Mikal has only tried 4 times. She always tries together with others, for example Zekariyas and other women and men.

They were once all arrested by the police in Bruges, who took their fingerprints. They had to wait at the police station for 8 hours, and were then released. Zekariyas has also been arrested another time. Their experience with the police in Belgium is positive. "No problem", explains Zekariyas.

Mikal admits that it's very difficult to travel as a woman. "Manchmal Angst, manchmal freundlich"⁶³, she explains. So she tries to stay with a man and in a group. It is especially difficult for women in the Sahara, says Zekariyas. There is almost nothing to drink and the men help the women to survive. Sleeping on the streets is also more difficult for women than for men.

It's not easy, but Mikal and Zekariyas seem determined to continue their journey to the UK, despite the many obstacles.

⁶² German for: "Sometimes frightened sometimes friendly."

⁶³ Ibid.

3.3 LEGAL FRAMEWORK

3.3.1 EXISTING LEGISLATION

There is no separate legal framework regulating the residence situation, reception or return of transit migrants.

This is not surprising, given that transit migration is part of the migration process (see 3.1). Transit migrants who irregularly stay in countries during their journey, cross national borders and do not apply for international protection or initiate another residence procedure are migrants in irregular stay. They are subject to the full range of legal standards applicable to persons without legal residence. And yet we should not lose sight of the declarative nature of refugee status, at any point (see 3.1.1).⁶⁴

Internationally, there are few agreements in place, given the sensitivity of migration as a theme and the different interests involved. There are several authoritative conventions, but also some *soft law* instruments. The UN Refugee Convention⁶⁵ is the cornerstone of international protection policy. In addition, several non-binding international pacts have recently been concluded: the Global Compact on Refugees⁶⁶ and the Global Compact for Migration⁶⁷. In the Global Compact for Migration, signatory states commit to respond to the needs of migrants in a vulnerable situation regardless of whether they are in a country of transit or destination - by assisting them and protecting their human rights.⁶⁸

With the Return Directive, the EU provides a legal framework for migrants who are unable to present valid travel or identity documents in the Member State where they are located.

⁶⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1979, HCR/IP/4/Eng/REV.1, republished, Geneva, January 1992, no. 28, 9.

⁶⁵ Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951.

⁶⁶ Global Compact for Safe, Orderly and Regular Migration, 19 December 2018.

⁶⁷ Global Compact on Refugees, 17 December 2018.

⁶⁸ Objective 7 Global Compact for Migration.

There are also the European directives and regulations that give direction to the Common European Asylum System (CEAS), such as the Asylum Procedures Directive, the Qualification Directive and the Dublin III Regulation.⁶⁹

The Belgian authorities also apply the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals (hereinafter referred to as the Immigration Act or IA), the Immigration decree⁷⁰, the royal decree on detention centres⁷¹ and the Police Function Act of 5 August 1992 in the context of transit migration.

3.3.2 FUNDAMENTAL RIGHTS

Transit migrants have inalienable fundamental rights, regardless of whether they have a residence status in the countries they transit. In principle, they have the same rights as anyone else living in Belgium in irregular stay. In practice, they face very different obstacles in exercising their rights, given that it is not their aim to settle in Belgium.

Fundamental rights can entail positive and negative (obligation to refrain) obligations for

⁶⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State that is responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

⁷⁰ Royal Decree of 8 October 1981 on access to the territory, residence, settlement and removal of foreign nationals.

⁷¹ Royal Decree of 2 August 2002 laying down the regime and working measures applicable in the locations on Belgian territory, managed by the Immigration Office, where a foreign national is detained, placed at the disposal of the government or detained, in accordance with the provisions of Article 74/8, §1, of the Act of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals.

the State. The State has a responsibility to protect the fundamental rights of all persons residing on its territory, including transit migrants.⁷² Fundamental rights must not be contravened by policy choices.⁷³ In addition, in order to evaluate whether the fundamental rights of transit migrants are respected, the State must establish procedures.⁷⁴

The principle of non-discrimination⁷⁵, among other things, must be respected in the adoption and implementation of policy measures. Foreign nationals who are in Belgium are also entitled to protection granted to persons or property (subject to the exceptions laid down by law), regardless of whether they reside here temporarily or permanently⁷⁶, regularly or irregularly.⁷⁷

Throughout this Myriadoc, various relevant fundamental rights and the extent to which they may be threatened will be brought into focus. We will not examine rights that are more relevant for persons who (wish to) reside in Belgium for a longer period of time, such as labour rights or the right to education.⁷⁸

Right to human dignity

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services [...]"⁷⁹

In addition to a more general reference to a 'dignified standard of living', many norms also include the right of access to a number of basic services.⁸⁰ Respect for human dignity is also at the heart of the European Convention on Human Rights. (hereinafter: ECHR)⁸¹ and the EU.⁸² Belgian law also recognises the right to a 'dignified standard of living'.⁸³

The right to social and medical assistance is not protected by the European Social Charter for persons in irregular stay.⁸⁴ However, in 2013, the Netherlands was called upon by the European Committee of Social Rights (ECSR) to ensure with immediate effect that foreign nationals without legal residence were no longer put on the streets without basic facilities such as clothing, food or shelter.⁸⁵

⁷² United Nations Human Rights Council (19 June 2017), "Protection of the human rights of migrants: the global compact for safe, orderly and regular migration" *UN Doc. A/HRC/35/L.28*, 2.

⁷³ P. KILIBARDA, "Obligations of transit countries under refugee law: A Western Balkans case study", *International Review of the Red Cross* 2017, (211) 236.

⁷⁴ United Nations Human Rights Council (19 June 2017), "Protection of the human rights of migrants: the global compact for safe, orderly and regular migration" *UN Doc. A/HRC/35/L.28*, 2.

⁷⁵ Art. 7 UDHR; art. 10 and 11 Constitution; art. 14 ECHR.

⁷⁶ Art. 191 Constitution; B. RENAULD, "La Cour d'Arbitrage et les droits fondamentaux de l'étranger" in A. RASSON-ROLAND, D. RENDERS and M. VERDUSSEN (eds.), *La Cour d'Arbitrage vingt ans après. Analyse des dernières réformes*, Bruylant, 2004, (119) 121.

⁷⁷ See Constitutional Court 29 June 1994, no. 51/94.

⁷⁸ For more information, see PICUM, *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, 2007.

⁷⁹ Art. 25.1 of the Universal Declaration of Human Rights (UDHR); Article 11 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 also endorses this right: "*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*".

⁸⁰ For example, Objective 15 of the (non-binding) Global Compact for Migration refers to safe access to basic services; Art. 5 of the International Convention on the Elimination of All Forms of Racial Discrimination refers to the right to housing, health care, social security and other social rights.

⁸¹ ECtHR 17 July 2014 [GC], no. 32541/08 and 43441/08, Svinarenko and Slyadnev/Russia, §118.

⁸² Article 2 Treaty on European Union (TEU); Article 1 Charter of Fundamental Rights of the European Union (Charter).

⁸³ Art. 23 Constitution. For more information, see: S. BOUCKAERT, *Documentloze vreemdelingen*, Maklu, 2007, 341, 351 et seq., 362 et seq.; Art. 1 of the Organic Law of 8 July 1976 on Public Centres for Social Welfare (hereafter: PCSW law).

⁸⁴ Art. 13 ESC.

⁸⁵ ECSR 25 October 2013, Conference of European Churches v. The Netherlands, Complaint no. 90/2013; The Dutch Council of State nuanced this by stating that the State Secretary of Security & Justice, in providing food, clothing and shelter, may require a foreign national

In a case against France, the ECSR stated that denial of medical assistance, regardless of residence status, is contrary to the ESC.⁸⁶ In Belgium, the Public Centre of Social Welfare (hereafter: PCSW) is obliged to provide urgent medical assistance to transit migrants in irregular stay.⁸⁷ This includes assistance of an exclusively medical nature, the urgency of which is demonstrated by a medical certificate, of a preventive and curative nature. In the case of certain infectious diseases, this should include aftercare.⁸⁸ The Court of Cassation clarified further that (translation) "*the provision of food necessary for the survival of the human person and adequate shelter*" are excluded.⁸⁹

Right to housing and right to respect for the home

Transit migrants cannot rely on the reception network available to applicants for international protection or support from the PCSW.⁹⁰

Unlike applicants for international protection, transit migrants have no right to reception. In theory, they have a constitutional right to decent housing⁹¹, but this provision only has an indirect effect.⁹² The provision of the European Social Charter which includes the right to housing has not been ratified by

Belgium.⁹³ The Belgian Constitutional Court states that the right to social services may be restricted to persons without legal residence in order to encourage them to leave the territory.⁹⁴ Transit migrants are therefore subject to the same regulations as other (homeless) persons without legal residence. Admittedly, the ECtHR does not include the right to housing in the scope of Article 8 ECHR.⁹⁵

However, pursuant to the right to human dignity, the then Arbitration Court ruled that failure to accommodate families with minors without legal residence would be inconsistent with, inter alia, Article 27 of the International Convention on the Rights of the Child, which refers to a standard of living adequate to help the child develop their personality, talents and mental and physical abilities to their fullest potential.⁹⁶ The Committee also considered that the right to shelter is directly linked to the right to life, social protection and the overriding interest of the child.⁹⁷ In other words, the current reception of families residing irregularly, whether or not in 'return houses', has its origins in the right to a dignified life.⁹⁸

who has exhausted all legal remedies to cooperate in his departure from the Netherlands, unless special circumstances prevent this cooperation, see: (NL) Council of State 26 November 2015, 201500577/1/V1.

⁸⁶ ECSR 3 November 2003, FIDH v. France, complaint no. 13/2003.

⁸⁷ Art. 57, §2, 1° PCSW law.

⁸⁸ Art. 1 Royal Decree of 12 December 1996 on the urgent medical assistance provided by public centres for social welfare to foreign nationals staying irregularly in the State.

⁸⁹ Cass. 17 February 1997, J.T.T. 1997, 662, J.L.M.B. 1997, 536, Soc. Kron. 1997, 498, note, Bull. 1997, 244 and Decision Cass. 1997, 237.

⁹⁰ Minors who stay irregularly on the territory with their parents may benefit from material aid on the basis of the Royal Decree of 24 June 2004 laying down the conditions and modalities for granting material aid to a foreign minor staying irregularly in the State with his parents.

⁹¹ Art. 23,3° Constitution.

⁹² Printed Documents of the Senate, 1988-89, no. 100-10/2, 11-13.

⁹³ Art. 31.1 ESC.

⁹⁴ See for example: Constitutional Court 24 February 1999, nos. 51/94 and 25/99; Constitutional Court 17 May 2000, no. 57/2000; Constitutional Court 14 February 2001, no. 17/2001; Constitutional Court 1 March 2001, no. 21/2001; Constitutional Court 30 May 2001, no. 71/20017; Constitutional Court 5 June 2002, no. 89/2002.

⁹⁵ ECtHR 4 October 2001 [GC], no. 27238/95, Chapman/United Kingdom, §98; for further discussion, see: S. BOUCKAERT, *Documentloze vreemdelingen*, Maklu, 2007, 381-384.

⁹⁶ Constitutional Court 22 July 2003, no. 106/2003, B.7.8.

⁹⁷ ECSR 20 October 2009, Defence for Children International v. The Netherlands, complaint no. 47/2008.

⁹⁸ On the basis of the Royal Decree of 24 June 2004 laying down the conditions and modalities for granting material aid to a foreign minor staying irregularly in the State with his parents.

Transit migrants also have the right to respect for their home.⁹⁹ This represents a negative obligation for the government. In the case of a settlement or camp, the protection of the property may be at issue. A 'home' within the meaning of, for example, the ECHR is not limited to places that are lawfully occupied or that have been lawfully constructed.¹⁰⁰ There only needs to be sufficient and continuous links to a specific location.¹⁰¹ The State must respect the right to respect for the home in the event of removal or destruction of the places of residence of the transit migrants.¹⁰²

Prohibition of torture, inhuman or degrading treatment or punishment

Transit migrants are often in need of protection. Being sent back to their country of origin can, in some cases, entail adverse consequences and contravene the prohibition of torture, inhuman or degrading treatment or punishment. This prohibition is a universal, absolute fundamental right, enshrined in binding standards with direct effect.¹⁰³ It is closely linked to respect for human dignity.¹⁰⁴ The European Court of Human Rights (hereinafter: ECtHR) considers treatment to be 'degrading' when it humiliates a person or degrades their human dignity or when it induces feelings of fear or inferiority that may

⁹⁹ Art. 8 ECHR; art. 23(1) ICCPR; art. 10(1.2) ICESCR; art. 9(1), 10(1) and 20(1) UNCRC.

¹⁰⁰ ECHR 17 October 2013, no. 27013/07, Winterstein and others/France, §141.

¹⁰¹ Ibid.

¹⁰² For more information, see: L. SLINGENBEG, "(In)formal migrant settlements and right to respect for a home", *European Journal of Migration and Law* 2017, (335) 337.

¹⁰³ Article 3 ECHR; Article 5 UDHR; Article 7 ICCPR; Article 3 of the Convention against Torture; Art. 6 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. For the discussion of the case-law on the applicability to persons staying irregularly, see: S. BOUCKAERT, *Documentloze vreemdelingen*, Maklu, 2007, 572.

¹⁰⁴ ECtHR 21 November 2013 [GC], no. 23380/09, Bouyid/Belgium, §81; Treatment which humiliates a person, or which shows a lack of respect for or an affront to his or her human dignity, or which prompts feelings of fear or inferiority which may break down a person's morale and physical resilience, may, according to the ECtHR, be characterised as degrading and also fall under the prohibition of Article 3 ECHR, Ibid., §87.

break down morale or physical resistance.¹⁰⁵ The ECtHR hesitates to include socio-economic rights within the scope of Article 3 ECHR.¹⁰⁶

The principle of *non-refoulement* derives from the prohibition of torture, inhuman or degrading treatment or punishment: the prohibition of removal to a country where a migrant has fear of persecution or where his life or safety is in danger.¹⁰⁷ Removal is postponed (temporarily) if the decision to return or expel the person to their country of origin exposes them to a violation of this principle.¹⁰⁸

Article 3 ECHR is essential in removal procedures.¹⁰⁹ Despite the right of a State to remove a person in irregular stay, this provision may, inter alia, prevent removal.¹¹⁰

¹⁰⁵ See also ECtHR 29 April 2002, no. 2346/02, Pretty/United Kingdom, §52.

¹⁰⁶ The ECtHR has already held in a number of cases that the assumption that poverty implies a positive obligation to provide support is manifestly unfounded for the Member State. However, both the ECtHR and the European Commission have accepted in principle that in certain circumstances a State can be held responsible for an individual's exposure to poverty; A. O'REILLY, "The European Convention on Human Rights and the Socioeconomic Rights Claims: A Case for the Protection of Basic Socioeconomic Rights through Article 3", *Hibernian L.J.* 2016, (1) 6-7.

¹⁰⁷ Art. 33 Geneva Convention; art. 3 ECHR; art. 7 ICCPR; art. 3 of the Convention against Torture.

¹⁰⁸ Art. 74/17, §1 IA; This mechanism provides insufficient guarantees that the principle of *non-refoulement* will not be violated. See: Myria, *Migratie in cijfers en in rechten*, (Migration in Rights and Numbers) 2018, 64.

¹⁰⁹ ECtHR 20 March 1991, no. 15576/89, Cruz Varas and others/Sweden, §§69-70; See also art. 1 Protocol No. 7 to the ECHR.

¹¹⁰ ECtHR 11 October 2011, no. 46390/10, Auad/Bulgaria, §96. Removal of a foreign national is prohibited if there are serious and demonstrable reasons to believe that the person in question, if returned to their country of origin, will run the risk of being subjected to torture or inhuman or degrading treatment or punishment after their departure or just for that reason; ECtHR 28 February 2008, No 37201/06, Saadi/Italy. The treatment or punishment must have a minimum level of seriousness, ECtHR 18 January 1978, no. 5310/71, Ireland/UK.

The State must examine Article 3 ECHR before a return decision is taken.¹¹¹ However, Belgian legislation does not prescribe a clear, uniform procedure for examining the risk of violation of Article 3 ECHR. A mere hypothetical possibility of inhuman or degrading treatment is insufficient.¹¹² The migrant in question must provide initial evidence that there is a serious and real risk of torture, inhuman or degrading treatment or punishment.¹¹³

Right to life

Many transit migrants undertake dangerous journeys to get to the United Kingdom, and in so doing come into contact with the police or are locked up in a detention centre. In the treatment of transit migrants, the government has positive and negative obligations in the context of their right to life. The right to life may also be violated in the event of removal.¹¹⁴

The right to life¹¹⁵ is a cornerstone of the ECHR, from which no derogation is possible in extremely urgent necessity.¹¹⁶ However, derogations can be made if absolutely necessary and proportional.¹¹⁷

The government has an obligation to provide a legislative and administrative framework that regulates the use of coercion to prevent the loss of life. The ECtHR reminds Contracting States that with regard to persons in prison, who are under the full control of the authorities, they have a special obligation as regards the right to life.¹¹⁸ This also applies in

the context of a risk of self-harm. Precautionary measures need to be taken to protect the person in question from him or herself in certain circumstances while respecting personal autonomy.¹¹⁹

Where the authorities are aware that there is a genuine and immediate risk that a person may commit suicide, they must do what is (reasonably) possible to prevent it.¹²⁰ In addition, the competent authorities must conduct an effective and independent investigation into the cause of such deaths and, where appropriate, punish those responsible.¹²¹ Myria believes that this applies equally to persons in administrative detention and stresses that the Immigration Office must always take the necessary precautions and provide psychological support.¹²²

Right to information

Transit migrants are often insufficiently aware of existing procedures in Belgium, e.g. for minors, smuggling of human beings, the Dublin regulation, etc.

Correct information facilitates access to the necessary procedures and the effective exercise of fundamental rights.¹²³

Public authorities have a positive obligation to ensure access to information.¹²⁴ The Global Compact for Migration states that governments must provide newly arrived migrants with information on their rights and obligations that is targeted, gender- and age-sensitive, accessible and understandable.¹²⁵

¹¹¹ Council of State 29 May 2018, no. 241623; Council of State 29 May 2018, no. 241625; Council of State 28 September 2017, no. 239.259.

¹¹² ECtHR 30 October 1991, nos. 13163/87 e.a., *Vilvarajah and others/United Kingdom*, §111.

¹¹³ *Ibid.*, §99 (b); Council of State 20 May 2005, no. 144.754; When this is done, the government must dispel any doubts, ECtHR 23 March 2016, no. 43611/11, *F.G./Sweden*, §120.

¹¹⁴ ECtHR 19 February 1998, no. 25894/94, *Bahaddar/Netherlands*, §49.

¹¹⁵ Article 2 ECHR; Article 2 Charter of Fundamental Rights of the European Union.

¹¹⁶ Art. 15 ECHR.

¹¹⁷ ECtHR 27 September 1995, no. 18984/91, *McCann and others/UK*, §§148-149.

¹¹⁸ ECtHR 22 September 2015, no. 68736/11 *Lykova/Russia*, §114.

¹¹⁹ ECtHR 16 October 2008, no. 5608/05, *Renolde/France*, §83.

¹²⁰ ECtHR 4 February 2016, no. 58828/13, *Isenc/France*, §38.

¹²¹ ECtHR 28 August 2018, no. 74282/11, *Khodyukevich v. Russia*, §§63-68.

¹²² Myria had correspondence on this issue with the Immigration Office.

¹²³ ENNHRI, *Migrants' access to information in their rights. Recommendations to bridge theory and practice*, 2017, 2.

¹²⁴ Art. 19 ICCPR; Report of the UN Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, E/CN.4/20.05/64, 2005, para 39.

¹²⁵ Objective 3 Global Compact for Migration.

A person under administrative arrest has the right to be informed of the reasons for their deprivation of liberty, the maximum duration thereof, the material procedure of the detention and the possibility of coercive measures.¹²⁶ However, Committee P points out that very little information is provided, given the language barrier between transit migrants and police officers.¹²⁷

An order to leave the territory must be written in a language that the person in question understands or may be presumed to understand. The person in question must also be informed of the possibilities of appeal open to them.¹²⁸ Foreign nationals also have the right to know what will happen to their fingerprints.¹²⁹ Information on the application of the Dublin III Regulation also needs to be given as soon as an application for international protection has been lodged in an EU Member State.¹³⁰

The authorities also need to provide information in the context of the asylum procedure.¹³¹

NGOs indicate that when transit migrants are well informed, they are often more willing to apply for international protection.¹³² When basic needs are not met and transit migrants do not have the necessary space to think about their future, it is difficult for them to make a well-considered long-term decision. Myria emphasises the importance of providing objective and complete information to migrants in a language they understand. This

¹²⁶ Art. 33ter Police Function Act.

¹²⁷STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 26.

¹²⁸ Art. 12 Return Directive.

¹²⁹ Art. 29 Eurodac Regulation,

¹³⁰ Art.4 Dublin III Regulation.

¹³¹ Art. 5 Reception Directive; art. 19 Asylum Procedure Directive.

¹³² CITIZENS' PLATFORM SUPPORTING REFUGEES, CARITAS INTERNATIONAL, CIRÉ, NANSEN NON-PROFIT ASSOCIATION AND VLUCHTELINGENWERK VLAANDEREN, *Migranten op doortocht in België*, (Transit migrants in Belgium) 2019.

includes information on their fundamental rights, international protection in Belgium, the Dublin III Regulation, irregular stay in Belgium and information on voluntary return. This is the only way they can make informed, conscious decisions about their future.

In practice, providing information in a language that the person in question understands is not self-evident. Languages such as Tigrinya (spoken inter alia in Eritrea) and Amharic (spoken inter alia in Ethiopia) are not commonly spoken in Belgium, which means that volunteers, social workers, civil servants and the police often have limited communication in, for example, English.¹³³

Right to an effective remedy

Transit migrants can also appeal against decisions that go against them.¹³⁴ They can lodge an appeal against a possible return decision with the CALL.¹³⁵ and to the Council Chamber against the decision that they will be detained in a detention centre or that their detention will be extended.¹³⁶ If the detention is found to be unlawful, they must be released immediately.¹³⁷

However, the appeal procedures are too complex¹³⁸, the time limits for lodging (suspensive) appeals are very short, sometimes only 10 or 5 days.¹³⁹ The appeal procedure against an order to leave the territory does not provide a sufficient guarantee of respect for the principle of *non-refoulement*, since the order is not automatically suspended when this risk is invoked. Myria also reiterates its recommendation to reform the appeal

¹³³ Based on the various meetings with the people in the field.

¹³⁴ Art. 13 Return Directive. This is in accordance with art. 15, §2, 3rd paragraph of the Return Directive.

¹³⁵ Art. 39/1 Immigration Act.

¹³⁶ Art. 71 Immigration Act.

¹³⁷ Art. 15, §2, *in fine* Return Directive; Art. 74 Immigration Act.

¹³⁸ ECtHR 27 February 2014, no. 70055/10, Josef/Belgium.

¹³⁹ Art. 39/82 Immigration Act and Art. 39/57, §1, 3rd para. Immigration Act.

procedures against removal decisions.¹⁴⁰ The General Prosecutor of the Court of Cassation has also argued along these lines.¹⁴¹

Migrants can invoke the right to an effective remedy before a national authority (Article 13 ECHR). However, disputes concerning, inter alia, expulsion from the territory do not fall within the scope of the right to a fair trial (Article 6 ECHR). This provision includes the right to a fair trial in civil and criminal matters.¹⁴²

Myria stresses that (transit) migrants must have effective access to a lawyer and the judicial process, in order to enforce their fundamental rights, whether or not in the context of their arrest by the police or possible detention.¹⁴³

¹⁴⁰ Myria has recommended providing an automatic suspensive effect of the appeal to the CALL against removal decisions in which a risk of violation of Articles 2 and 3 of the ECHR is invoked (or similar provisions, as Articles 3, 4 and 19 §2 of the Charter of Fundamental Rights of the EU), MYRIA, *Migratie in cijfers en in rechten (Migration in Rights and Numbers) 2018. Recht op gezinsleven in het gedrang* (Right to family life at risk), 2018, 69, 159; MYRIA, *Migratie in cijfers en in rechten 2016*, (Migration in Rights and Numbers) 2016, 208-209.

¹⁴¹ A. HENKES, *La privation de liberté d'un étranger et le recours auprès du pouvoir judiciaire*, Mercuriale 2019.

¹⁴² ECtHR 5 October 2000, no. 39652/98, *Maaouia/France*, §§38-39; The Council of State confirmed this, inter alia, see: Council of State 11 July 2019, No 13413. This is consequently also the case for Article 47, 2nd paragraph of the Charter, which is based on Article 6 ECHR.

¹⁴³ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 91-92.

4. CONTEXTUALISATION OF BELGIUM AS A TRANSIT COUNTRY EN ROUTE TO THE UNITED KINGDOM



4.1 IRREGULAR BORDER CROSSING

For the time being at least, the UK is still part of the EU. However, the UK is not part of the Schengen area, where there are no controls at the common land borders.¹⁴⁴ The border between Belgium and the UK is therefore an external border of the Schengen area.

Throughout their journey from their country of origin to the UK, transit migrants cross various national borders, usually without the required identity and travel documents. Some transit migrants do have a Schengen visa and therefore travel legally through the Schengen area. The external borders of the Schengen area may in principle only be crossed at border crossing points and during opening hours.¹⁴⁵ As a result, travellers are subject to border checks in airports, on ships and when boarding the Eurostar.¹⁴⁶

On the other hand, pleasure craft can also depart and arrive at places other than border crossing points. Given the proximity of the UK, checks on persons on board and the vessel may nevertheless take place in a Belgian port if there is a risk of irregular immigration.¹⁴⁷

The Schengen Borders Code itself explicitly prescribes the right to human dignity, including during border checks.¹⁴⁸ For more explanation of this term, see 3.3.2.

¹⁴⁴ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (hereinafter, the Schengen Convention).

¹⁴⁵ Art. 5, §3 Schengen Borders Code.

¹⁴⁶ Annex VI, 1.2, 2.1, 3.1 Schengen Borders Code.

¹⁴⁷ *Ibid.*, 3.2.4-3.2.6.

¹⁴⁸ Art. 7 Schengen Borders Code.

4.2 THE JOURNEY IN FIGURES

In 2018, a total of 25,071 transit migrants were found at the border with or in the UK with Belgium as the last stop. For France the figure was 13,265 and for the Netherlands only 391. This low figure is probably due to the geographical location of the Netherlands.

The total figure includes the following persons:

- persons stopped at a checkpoint on UK territory;
- persons stopped at the UK border point on the European mainland (juxtaposed controls, see 4.8.1);
- persons who voluntarily reported to the police upon arrival in the UK (in the port or outside).

Period	France	Netherlands	Belgium (%)
2018	13,265	391	25,071 (65%)
2019 (Jan-July)	6,426	226	6,974 (51%)

Transit migrants found at the border with or in the UK with France, the Netherlands or Belgium as their last stop (Source: Federal Judicial Police of West Flanders).

For the figures pertaining to Belgium, the point of departure is the port of Zeebrugge and the ports of arrival in the UK are the ports of Hull, Teesport or Tilbury.

For 2019 there is a falling trend similar to the observations made by people in the field.¹⁴⁹ It is important to note that these figures relate to (attempted) crossings to the UK. No conclusion can be drawn from this regarding the presence of transit migrants on Belgian territory.

Monthly figures are not available. However, there are sometimes sudden surges in the number of attempts made, for example during the summer months or in the light of Brexit-related current events and rumours.¹⁵⁰

¹⁴⁹ Meeting with local police zone West on 23 May 2019, with the Maritime police on 24 May 2019 and with the volunteers in Bruges on 6 September.

¹⁵⁰ See for example: M. TEMMERMAN and V. DE VOS, "Hoogste aantal migranten steekt kanaal over in 1 dag

4.3 PRIOR TO DEPARTURE

There are treaties between Belgium, France and the United Kingdom regarding so-called juxtaposed controls.¹⁵¹ These are checks carried out at the external borders of the Schengen area, i.e. before the persons checked have crossed the border. The checks are organised in the ports of Calais and Dunkirk, at the Eurotunnel in Coquelles, in the North station of Paris, in Calais-Frethun and in the South station of Brussels for Eurostar passengers.¹⁵²

Via these controls, more than 56,000 attempts to cross the Channel irregularly were prevented in 2016.¹⁵³ This does not only concern transit migrants, but all persons who want to make the crossing without the necessary documents.

In addition, between 1 January 2016 and 30 June 2016, 933 persons were found in the same situation in the port of Zeebrugge and the Dutch ports.

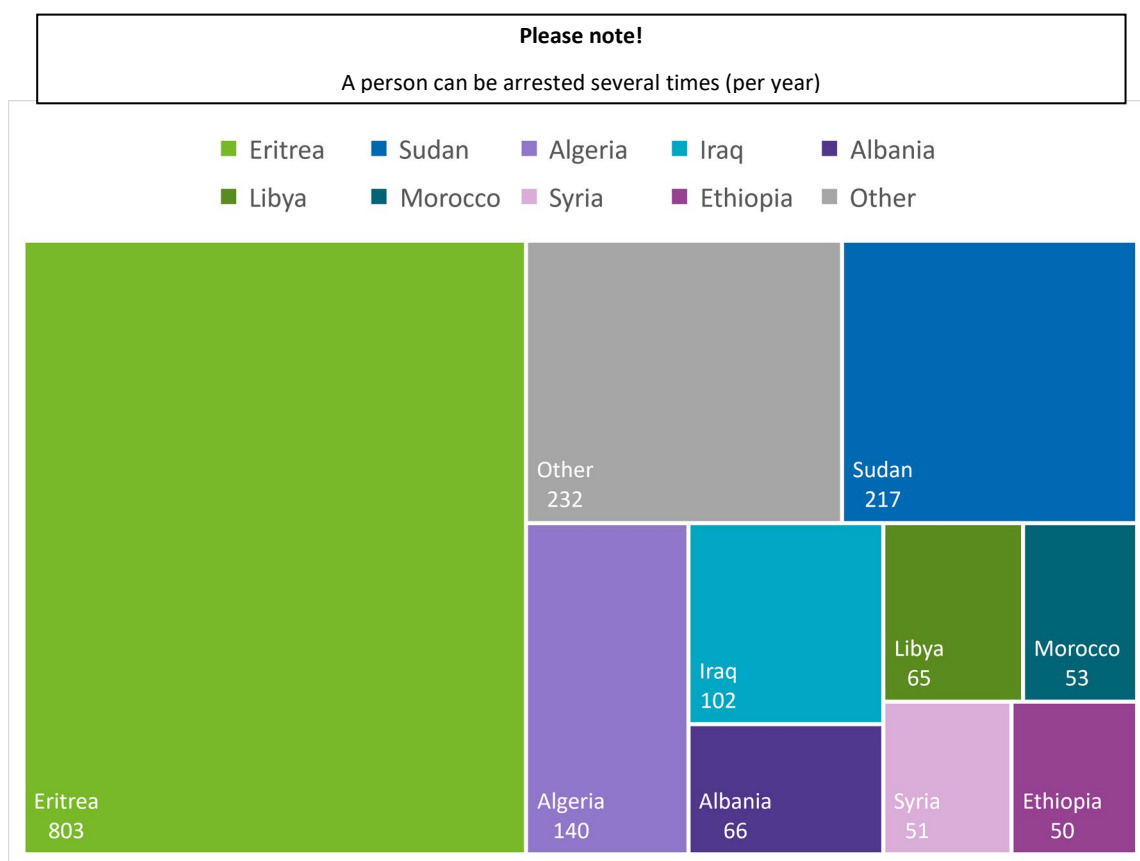
In Zeebrugge, 3,585 transit migrants were detained in 2018, in 2019 up to and including August, 1,779. The number has therefore increased sharply in recent years. In 2018, the 'top 3' was: Eritrea, Algeria, and Libya; in 2019 it was Eritrea, Sudan and Algeria.

door "fake news" over brexit", VRT NWS 11 September 2019.

¹⁵¹ Among others: trilateral treaty between the UK, France and Belgium of 15 December 1993 on rail traffic between Belgium and the UK via the fixed channel link (with protocols) and the bilateral agreement between Belgium and the UK of 3 and 18 December 2013 on immigration controls on rail traffic between Belgium and the UK via the fixed channel link; For more details on the treaty, see: EMN, *Practical Measures for Reducing Irregular Migration in Belgium*, 2012.

¹⁵² UK HOME OFFICE, *Fact sheet: the UK's juxtaposed border controls*, last update on 16 January 2018.

¹⁵³ Ibid.



Administrative arrests of transit migrants in Zeebrugge Jan-August 2019 (Source: SPN Zeebrugge)

	2016-2017 ¹⁵⁴	2017-2018 ¹⁵⁵
Dieppe (FR)	112	189
Le Havre (FR)	12	265
Caen/Ouistreham (FR)	445	2,190
Cherbourg (FR)	132	445
Saint-Malo (FR)	16	184
Roscoff (FR)	18	35
Bilbao (ES)	319	2,131
Santander (ES)	68	331
Total	1,122	5,770

Number of migrants detected by the French and Spanish authorities and port operators before the ship could leave for the UK (Source: ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018, 2018, 29*)

In 2017-2018¹⁵⁶ 735 persons were discovered in French ports and 387 persons in Spanish ports, prior to departure.

¹⁵⁴ Business year: 1 April 2016 to 31 March 2017.

¹⁵⁵ Business year: 1 April 2017 to 31 March 2018.

¹⁵⁶ Business year: 1 April 2017 to 31 March 2018.

4.4 DURING THE CROSSING

On certain routes, primarily where ships moor at a remote location, a 'crossing officer' is relied upon.¹⁵⁷ This person can already carry out checks on the ship itself.

A person who is hidden in a (cargo) ship without permission of the captain and who is found after the ship has left port is called a 'stowaway'.¹⁵⁸

In 2018, around 60 transit migrants were sent back to Zeebrugge, after they were discovered en route to the UK.¹⁵⁹ In the first half of 2019, 12 migrants were sent back.

¹⁵⁷ ICIBI, *An inspection of Border Force operations at east coast seaports. January – May 2018, 2018, 7*.

¹⁵⁸ Convention of 9 April 1965 on Facilitation of International Maritime Traffic; see also: MYRIA, *Het juridisch statuut van verstekelingen. Grondrechten, tussen schip en wal?*, Fundamental rights, between ship and shore?) MyriaDocs #3, April 2017.

¹⁵⁹ Information obtained from the Federal Judicial Police of West Flanders.

According to the Maritime police in Zeebrugge, the chance of being discovered between Dover and Calais is much smaller. The longer the distance between the port of departure and the port of arrival, the greater the risk of discovery.

Rescue operations

There are rules that lay down which country must carry out a rescue operation when, for example, a rowing boat or a motorboat gets into trouble at sea.

The UN Convention on the Law of the Sea of 1982 stipulates that a country's territorial waters extend up to 12 nautical miles or a little more than 22 kilometres from the nearest point of the low-water line (see attached map).¹⁶⁰ Search and rescue operations within territorial waters are therefore the competence of the respective state.

As the Channel is only 33 kilometres wide between Dover and Calais, an agreement was reached between the UK and France on the boundary between the two territorial waters (see map under 4).¹⁶¹

However, in any event, every captain must render assistance to persons, whatever their status, in mortal danger or distress.¹⁶²

Also, any State Party to the supplementing Protocol of 15 November 2000 against the Smuggling of Migrants by Land, Sea and Air¹⁶³ can request the assistance of other Member States where there is reason to believe that a

particular vessel is involved in smuggling migrants by sea.¹⁶⁴

When transit migrants are found at sea or on the coast, the emergency plan is triggered in the UK.¹⁶⁵ This means that medical personnel and personnel to initiate the procedure to apply for international protection will be on site. In case of an application for international protection, the transit migrants are immediately transferred to a reception centre. This procedure is also used in UK ports where few people arrive without legal residence.¹⁶⁶

4.5 ARRIVAL

4.5.1 BORDER CONTROLS IN THE UK

The tasks of the UK Border Force (hereinafter UKBF) include:

- checking the immigration status of people arriving in and departing the UK;
- searching baggage, vehicles and cargo for illicit goods or irregular immigrants;
- patrolling the UK coastline and searching vessels.¹⁶⁷

In most ports, staff carry out both immigration and customs duties. The focus on migration controls would have a negative impact on the customs function of the Border Force.¹⁶⁸

Some ports are unstaffed and only occasionally visited by the UKBF.¹⁶⁹ In Dover there is only customs control, as the migration control has already been carried out in the juxtaposed controls in Dunkirk and Calais.¹⁷⁰

¹⁶⁰ Art. 3 of the UN Convention on the Law of the Sea.

¹⁶¹ Agreement of 2 November 1988 between the Government of the United Kingdom and the Government of the French Republic; see also: The Territorial Sea (Limits) Order of 1989.

¹⁶² Art. 98 of the UN Convention on the Law of the Sea. For more information on this rule, see MYRIA, *Een nieuw paradigma voor het Europese asielmodel? Toegang tot bescherming onder druk* (A new paradigm for the European asylum model? Access to protection under pressure), MyriaDocs #9, 2019.

¹⁶³ Of the United Nations Convention against Transnational Organised Crime.

¹⁶⁴ Art. 5 Protocol against the Smuggling of Migrants by Land, Sea and Air of the United Nations Convention against Transnational Organised Crime.

¹⁶⁵ Based on information obtained from the Federal Judicial Police of West Flanders.

¹⁶⁶ *Ibid.*

¹⁶⁷ See: www.gov.uk/government/organisations/border-force/about.

¹⁶⁸ ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018*, 2018, 17.

¹⁶⁹ ICIBI, *An inspection of Border Force operations at east coast seaports. July to November 2016*, 2017, 5.

¹⁷⁰ *Ibid.*, 6.

Of all the ports in the UK, the port of Dover is the best equipped.¹⁷¹ In certain other ports, for example, there is no vehicle scanner or fingerprints still have to be taken with ink in order to enter and check them in the Eurodac system at the nearest airport. (see 6.4.1).¹⁷²

4.5.2 FIGURES

Only partial figures are available on arrivals in the United Kingdom. A nuance must therefore be made between the period covered ('business year') and ports of arrival (specific ports, northern or southern ports or all ports in the United Kingdom).

The concept of 'arrival' also needs to be nuanced: boats intercepted in the British rescue zone will be brought to the British port and are therefore also part of the arrival figures.¹⁷³

In 2018, 509 migrants were found in the UK having departed from the port of Zeebrugge. In the first half of 2019 the figure was 151.¹⁷⁴

From Spain¹⁷⁵, in the period 2017-2018¹⁷⁶ 184 persons arrived in the southern ports¹⁷⁷ of the UK.¹⁷⁸ In Spain, Bilbao is the largest port of departure.

From France¹⁷⁹, in the period 2017-2018¹⁸⁰ 662 persons arrived in the southern ports¹⁸¹ of the UK.¹⁸² In France, Calais is the largest port of departure.

In 2017-2018¹⁸³ 57% of the irregular arrivals in the southern ports¹⁸⁴ were registered in the port of Dover.¹⁸⁵

The British newspaper *The Telegraph* calculated the number of irregular arrivals of small boats in the UK based on *ad hoc* confirmations from the UK Home Office. In 2019 (up to 22 August), a total of 1,027 people had apparently arrived in the UK in small boats.¹⁸⁶

	2016-2017 ¹⁸⁷	2017-2018 ¹⁸⁸
Antwerp (BE)	0	1
Dunkirk (FR)	69	62
Calais (FR)	625	414
Coquelles (FR)	6	8
Dieppe (FR)	73	7
Le Havre (FR)	17	10
Caen/Ouistreham (FR)	67	131
Cherbourg (FR)	39	28
St. Malo (FR)	9	0
Roscoff (FR)	11	2
Bilbao (ES)	73	145
Santander (ES)	22	39
Unknown	108	35
Total	1,119	882

Arrivals at the southern ports of the United Kingdom by port of departure (Source: ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018, 2018, 26-27*)

¹⁷¹ ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018, 2018, 8.*

¹⁷² ICIBI, *An inspection of Border Force operations at east coast seaports. July to November 2016, 2017, 8.*

¹⁷³ X, "Who rescues migrants in the Channel?", *BBC News* 2019.

¹⁷⁴ Source: Federal Judicial Police of West Flanders.

¹⁷⁵ The ports of Santander and Bilbao.

¹⁷⁶ Business year: 1 April 2017 to 31 March 2018.

¹⁷⁷ Dover, Newhaven, Portsmouth, Southampton, Poole, Plymouth.

¹⁷⁸ ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018, 2018, 27.*

¹⁷⁹ The ports of Santander and Bilbao.

¹⁸⁰ Business year: 1 April 2017 to 31 March 2018.

¹⁸¹ Dover, Newhaven, Portsmouth, Southampton, Poole, Plymouth.

¹⁸² ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018, 2018, 27.*

¹⁸³ Business year: 1 April 2017 to 31 March 2018.

¹⁸⁴ Dover, Newhaven, Portsmouth, Southampton, Poole, Plymouth.

¹⁸⁵ ICIBI, *An inspection of Border Force operations at south coast seaports. January – May 2018, 2018, 26-27.*

¹⁸⁶ L. ROBERTS, "Number of migrants crossing the Channel reportedly surpassed 1,000 so far this year", *The Telegraph* 22 August 2019; M. TEMMERMAN, "Een verslag vanuit het kamp in Duinkerke", *VRT NWS* 26 August 2019.

¹⁸⁷ Business year: 1 April 2016 to 31 March 2017.

¹⁸⁸ *Ibid.*

4.6 TRANSIT COUNTRY BELGIUM

4.6.1 GEOGRAPHICAL LOCATION

The geographical location of Belgium is one important reason why migrants travel to the UK via Belgium.¹⁸⁹ Belgium has an important maritime link between continental Europe and the UK. France, the Netherlands and Spain are also popular transit countries for this reason.

4.6.2 TRADE AND TOURISM

The large-scale legal commercial trade and tourism between Belgium and the UK also play an important role.¹⁹⁰

In 2018, 1,331,652 trucks and 60,815 passenger cars travelled to Belgium via the port of Zeebrugge.¹⁹¹ 46% of the maritime traffic of the port of Zeebrugge in 2017 was to and from the UK.¹⁹²

There is both accompanied and unaccompanied transport to the north and midlands of the UK. The port of Zeebrugge no longer transports to the ports of southern England (e.g. Dover).

An approximate total of 62 ships sail every week from the port of Zeebrugge to the UK and Ireland.¹⁹³ However, compared to the port of Calais, this figure is rather small. For example, 15 cargo ships sail from the port of Calais to the port of Dover on any given weekday.¹⁹⁴

¹⁸⁹ B. PERRIN, "Just Passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons", *European Journal of Criminology* 2010, (11) 13.

¹⁹⁰ Ibid.

¹⁹¹ MBZ nv, *Jaarverslag 2018* (Annual Report), 2018, 9.

¹⁹² See chart of geographical distribution: <https://portofzeebrugge.be/nl/de-haven/cijfers>.

¹⁹³ Port of Zeebrugge: Liner services 2019.

¹⁹⁴ www.dfds.com/nl-be/vrachtverschepping/routes-en-vaarschemas/dover-calais.

4.6.3 THE PORT OF ZEEBRUGGE

The shortest distance between the EU mainland and the UK is between Calais and Dover (33 km). The distance between Zeebrugge and the UK is greater (see map under 4.). A crossing by pleasure craft or rubber dinghy from the port of Zeebrugge is therefore rare and occurs more often in northern France.

Due to the strict security at the port of Calais and the demolition of the camps in the area, the crossing has shifted to the port of Zeebrugge in Belgium, and attempts have also been made from the Netherlands since the second half of 2018. According to volunteers and the Maritime Police, since 2018 there have been fewer and fewer transit migrants in Zeebrugge.¹⁹⁵ They appear to move in smaller groups, spread over West Flanders and the rest of Belgium.

People must have the necessary documents on them in order to move within the Schengen area.¹⁹⁶ In practice, people freely cross the internal borders of the Schengen area, such as those between Belgium, France and the Netherlands, without the necessary documents.¹⁹⁷

The security and surveillance of the port is ensured through joint efforts by private security, the operators of the terminals, the maritime police, customs and local police.¹⁹⁸ For the figures on intrusions into the port of Zeebrugge, see 5.2 and 6.2.3.

Unlike the port of Calais, the port of Zeebrugge criss-crosses a residential area. As such, it is impossible to fence off the port. The fact that the Belgian coastline is built-up, on the other hand, ensures greater social control, whereby irregularities are reported more quickly.¹⁹⁹

¹⁹⁵ Meeting with the Maritime police on 24 May 2019 and with volunteers in Bruges on 6 September 2019.

¹⁹⁶ Art. 22-23 Schengen Borders Code.

¹⁹⁷ Journeys from the French and Belgian coasts are made on a free bus that runs daily between Dunkirk and De Panne/Adinkerke (DK'bus).

¹⁹⁸ Meeting with the Maritime Police on 24 May 2019.

¹⁹⁹ Ibid.

4.6.4 CAR PARKS

The Belgian car parks where transit migrants try to hide in trucks are unsecured.

Secured car parks are still fairly rare in Belgium.²⁰⁰ These have secure access and cameras, as well as, for example, dogs and CO₂ detectors to detect people hiding. For example, on arrival at a secure car park in Dunkirk, many drivers report that they suspect that someone is hiding in the truck.²⁰¹

4.6.5 SMUGGLING ROUTES AND NETWORKS

Existing criminal networks are also an important factor. These networks determine their own routes and stopovers, and have local contact persons. For example, legal and practical changes in one place can mean that smugglers of human beings change their routes.

Myria has the legal mission to promote the fight against trafficking and smuggling of human beings.²⁰² Belgium has a legal framework for combating and punishing smuggling of human beings (see 9.3). Given the shift of the phenomenon in Belgium, the approach to smuggling of human beings is not yet as advanced in Wallonia as it is in regions where the phenomenon has been present for some time, such as on the coast.

²⁰⁰ The car parks in Westkerke, Kalken, and Kruishoutem are secured. For example, see also in the area around Dunkirk: www.vlbgroep.fr/parking-securise visited by Myria on 23 May 2019. There is also consultation at the European level on secure car parks: www.esporg.eu.

²⁰¹ Meeting with the manager of VLB Parking Dunkirk on 23 May 2019.

²⁰² Article 2 of the Law of 15 February 1993 establishing a Centre for Equal Opportunities and Opposition to Racism with a view to transforming it into a Federal Centre for the analysis of migratory flows, the protection of the fundamental rights of foreign nationals and the fight against trafficking in human beings.

4.7 THE UNITED KINGDOM AS FINAL DESTINATION

There are various reasons why a migrant chooses the UK as the final destination of their journey.²⁰³

There is the fact that English is the official language, the *lingua franca* spoken by people all over the world. The presence of ethnic groups or relatives²⁰⁴ in the UK also plays an important role. In addition, the UK is sometimes referred to as 'the promised land' or 'the land of milk and honey'. However, many of the ideas migrants have about the UK are not always (entirely) accurate.²⁰⁵ Smugglers of human beings take advantage of these (sometimes false) expectations and thereby mislead migrants. Migrants believe the success stories more readily than the information provided by the government, for example.

There are apparently favourable employment opportunities, high wages and good social conditions in the UK.²⁰⁶ There would also be good access to health care.²⁰⁷ In addition, detection of irregular stay in the UK appears to be more difficult.

²⁰³ For an analysis of the motivations of UM to continue travelling to the UK, see: UNHCR, *Destination anywhere. The profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019.

²⁰⁴ Meeting with Pastor Maréchal on 6 September 2019.











²⁰⁵ See for example: J. PARKINSON, "Would Calais migrants really be better off in the UK?", *BBC News* 7 July 2015.

²⁰⁶ I. DERLUYN and E. BROEKAERT, "On the Way to a Better Future: Belgium as Transit Country for Trafficking and Smuggling of Unaccompanied Minors", *International Migration* 2005, vol. 43 (4), (31) 34.

²⁰⁷ *Ibid.*

Another important pull factor is the fact that the UK does not appear to apply the Dublin III Regulation, and that applicants for international protection would not be sent back to Greece or Italy, for example.²⁰⁸

In the table below, certain themes are compared between Belgium and the UK in order to create a clear picture of which preconceptions are (partly) (in)correct.

Number of applications for international protection	 In 2018, 29,380 people applied for international protection. ²⁰⁹
	 In 2018, 23,443 people applied for international protection. ²¹⁰
Level of protection ²¹¹	 In 2018, the recognition rate for Eritreans was 93%, for Sudanese 76% and for Iraqis 58%. ²¹²
	 In 2018, the recognition rate for Eritreans was 92%, for Sudanese 39% and for Iraqis 30%. ²¹³
Working during the procedure for the application for international protection	 An applicant for international protection may apply for a work permit if they have not received a first decision after 12 months. ²¹⁴ However, this is only possible for professions with a shortage of applicants.
	 An applicant has access to the labour market if they have not received a first decision after 4 months. ²¹⁵
Dublin transfers	 In 2018, 209 transfers were made from the United Kingdom under the Dublin III Regulation. In the same year, 5,510 requests were sent from the United Kingdom to other EU Member States.
	 In 2018 there were 792 forced transfers from Belgium under the Dublin III Regulation. ²¹⁶ In 2018, Belgium sent 8,384 requests to other EU Member States. ²¹⁷
Number of persons in irregular stay	 The number of persons in irregular stay in April 2001 was estimated at 430,000, ranging from 310,000 to 570,000. ²¹⁸
	 A 2007 study estimated that there were more than 100,000 people in Belgium in irregular stay. ²¹⁹

²⁰⁸ DOCTORS WITHOUT BORDERS, *Vlucht zonder einde. Psychische hulp in de humanitaire hub in Brussel* (Endlessly fleeing. Psychological assistance in the humanitarian hub in Brussels), 2019, 14; CITIZENS' PLATFORM SUPPORTING REFUGEES, CARITAS INTERNATIONAL, CIRÉ, NANSEN NON-PROFIT ASSOCIATION AND VLUCHTELINGENWERK VLAANDEREN, *Migranten op doortocht in België*, (Transit migrants in Belgium) 2019, 7; meeting with Pastor Maréchal on 6 September 2019.

²⁰⁹ HOUSE OF COMMONS LIBRARY, *Asylum Statistics*, briefing paper, n° SN01403, 6 March 2019, 3.

²¹⁰ CGRS, *Asylum Statistics*, 2018, <https://www.cgrs.be/en/news/asylum-statistics-survey-2018>.

²¹¹ Given that the United Kingdom applies the same rules as Belgium, the recognition rate of applicants for international protection should not differ too much from one nationality to another. Given the differences in numbers and nationalities, it is difficult to compare global statistics.

²¹² Source: Eurostat.

²¹³ MYRIA, *Migratie in cijfers en in rechten 2019*, (Migration in Rights and Numbers 2019) Annual Report, 2019, 51.

²¹⁴ Part 11B, §360 and 360A of the Immigration Rules.

²¹⁵ Art. 18, 3° of the Royal Decree of 2 September 2018 implementing the Law of 9 May 2018 on the employment of foreign nationals in a specific residence status.

²¹⁶ Immigration Office, *Statistisch jaarverslag 2018*, (Annual statistical report 2018) 9.

²¹⁷ Source: Immigration Office.

²¹⁸ These are the 2005 figures of the UK Home Office. In 2007, another report from the London School of Economics estimated the number of people in irregular stay at 533,000. See: UK OFFICE FOR NATIONAL STATISTICS, *Illegal immigrants in the UK*, May 2015, www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/illegalimmigrantsintheuk; the UK states that the majority of the people without legal status are so-called *overstayers*, rather than those who have entered the country irregularly; see: THE MIGRATION OBSERVATORY, *Irregular Migration in the UK: Definitions, Pathways and Scale*, 2011, 3.

²¹⁹ M. VAN MEETEREN, M. VAN SAN and G. ENGBERSEN, *Irreguliere immigranten in België. Inbedding, uitsluiting en criminaliteit*, (Irregular immigrants in Belgium. Embedding, exclusion and criminality) Erasmus Universiteit Rotterdam, 2007, 15 et seq.

Proof of identity	 Since 2011, it has not been compulsory to carry an identity card. ²²⁰ However, for third country nationals, there is a compulsory 'biometric residence permit'. ²²¹ Police officers cannot simply stop someone on the street to make them prove their identity either. ²²² Identity, i.e. name and address, can be proven in a variety of ways. ²²³
	 Every Belgian national over 15 years of age must always have their identity card with them. ²²⁴ For foreign nationals who are authorised to stay in Belgium for more than three months, there is the foreign national's card. ²²⁵ Foreign nationals who are unable to provide the necessary documents may be administratively arrested. ²²⁶
Renting in irregular stay	 Before renting out a property, the landlord must check that the tenant is staying regularly and enjoys the so-called 'right to rent'. ²²⁷
	 In Belgium, there is no obligation to ask tenants for proof of identity.
Working in irregular stay	 Working without papers is punishable not only for the employer, but since 2016 also for the employee. ²²⁸ The State also has the possibility to seize part of the employee's income.
	 Unlike employers, an employee without papers will not be punished for being employed illegally. Since 2016, an employee working illegally does run the risk of being fined. ²²⁹
	 The employment rights of a worker without papers stay must be respected (hours, wages, protection, etc.), regardless of whether or not they are staying irregularly in the EU. In the event of non-compliance with the rights as an employee (e.g. payment of salary), the person (or certain organisations) may take legal action. ²³⁰
Forced return	 In 2018, 7,319 people were forcibly removed from British territory. ²³¹
	 In 2018, 3,980 people were forcibly removed from Belgian territory. ²³²

²²⁰ The Identity Cards Act of 2006 was repealed in 2010.

²²¹ This card can be used to prove the following: identity, the right to study or work, the right to public services or assistance, etc. See: The Immigration Biometric Registration Regulations 2008.

²²² www.gov.uk/police-powers-to-stop-and-search-your-rights

²²³ www.gov.uk/government/publications/proof-of-identity-checklist/proof-of-identity-checklist#proof-of-identity-checklist-for-individuals

²²⁴ Art. 1 of the Royal Decree of 25 March 2003 on identity cards.

²²⁵ Article 6 of the Law of 19 July 1991 on population registers, identity cards, foreign national's cards and residence documents.

²²⁶ Art. 21 Police Function Act.

²²⁷ This is under penalty of a fine of up to £3,000; see: Immigration Act 2014, regulations 21-23.

²²⁸ Immigration Act 2016, regulation 34.

²²⁹ Art. 183/1 Social Penal Code.

²³⁰ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

²³¹ UK HOME OFFICE, *Immigration statistics*, 2018, including the expulsions in the context of the Dublin III Regulation.

²³² Immigration Office, *Statistisch jaarverslag* (Annual statistical report), 2018, 9, including the expulsions in the context of the Dublin III Regulation.

4.8 REGIONAL COOPERATION

There is a long history of cooperation between Belgium and the UK on border control.

Following the meeting on 26 September 2002 in Zeebrugge between the Ministers of the Interior of Belgium, France and the UK, a Memorandum of Understanding was drawn up.²³³ This can be regarded as the start of structural cooperation between Belgium and the UK to tackle the problem of irregular migration. The Memorandum primarily focuses on information sharing and the exchange of immigration liaison officers.

The desire for structural cooperation was underscored in 2015 by a Joint Ministerial Statement by the UK, Belgium and the Netherlands on improving border security at ports and countering organised immigration crime.²³⁴ Within the framework of the ten-point plan of the Minister and State Secretary responsible at that time for tackling transit migration (see 6.1), more effort was also put into this cooperation.

4.8.1 (BORDER) CONTROLS

The United Kingdom's border controls take place both in Belgium (juxtaposed controls) and in the United Kingdom itself.

In addition, there is structural cooperation between the Maritime police and the UKBF in the area of control, in Zeebrugge. The UKBF provides staff and CO₂ meters to support the Maritime police.

Following the deaths of 39 migrants in a refrigerated container, the UK sent more immigration officers to the ports of Zeebrugge.²³⁵

²³³ Memorandum of understanding as the result of the meeting of the Ministers of the Interior from Belgium, France and the United Kingdom at Zeebrugge on 26 September 2002.

²³⁴ Joint Ministerial Statement on co-operation between Belgium, the Netherlands and the United Kingdom: Improving border security at ports and countering organised immigration crime, 12 November 2015, The Hague.

²³⁵ X, "Britten sturen meer controleurs naar Zeebrugge om mensensmokkel aan te pakken", *De Standaard* 28

There is also a joint debriefing team which consists of experts who talk informally with transit migrants. On the basis of the information reports they draw up, specific actions can be taken or judicial investigations can be opened.

In addition, there are joint security assessments. These assessments result in recommendations to improve the port's security infrastructure. It is currently being examined whether the UK can co-finance the security infrastructure. This is the case in a number of French ports (Calais, Le Havre). In the past, consultations on this subject for Belgium were held at ministerial level. This consultation has recently been relaunched.

4.8.2 INFORMATION EXCHANGE²³⁶

There are monthly structural consultations between the UKBF and the Belgian Maritime police. Since 2018, a Federal Judicial Police liaison officer has also been seconded to the UKBF Integrated Border Intelligence Centre in Folkestone.²³⁷ This facilitates the exchange of operational information.

This shared information is useful for national, international or joint judicial investigations. Joint Investigation Teams (JITs) can also be set up in the context of cross-border cases.

As part of the EMPACT²³⁸ operational action plans, there is also a monthly Transit Migration Taskforce with the UK, France, the Netherlands and Belgium. This Taskforce consists of investigators from the police and the judiciary.

There is also the Cross-border Intelligence Group with the police services in the UK, France, Netherlands and Belgium, which meets every 4 years.

October 2019.

²³⁶ Information obtained from the international unit of the FPS Home Affairs.

²³⁷ *Annals*. Chamber 2017-18, 7 March 2018, 11-12.

²³⁸ European Multidisciplinary Platform Against Criminal Threats. For more information, see: www.europol.europa.eu/empact.

4.8.3 DETERRENT

At a meeting in London on 26 February 2018 with Home Secretary Amber Rudd, it was agreed to devise a joint and targeted communication campaign to provide transit migrants with information on the procedures used in the UK and to refute the false information given by smugglers of human beings.²³⁹ However, in view of the political developments, this has not yet been followed up.²⁴⁰ In September 2019, Amber Rudd resigned from the government.

4.8.4 COOPERATION WITH FRANCE

Given the proximity of the borders between Calais and Dover and the high number of irregular arrivals from Calais (see figures in 4.5.2), the UK's priority is cooperation with France.

In 2016, the UK and France reaffirmed their commitment to strengthening the security of the common border.²⁴¹ At that time, the UK had already invested €100 million in the Port of Calais. In the run-up to the dismantling of the camp in Calais, the UK Home Secretary announced that £36 million would be set aside for the security of the juxtaposed controls and the demolition of the camp.²⁴²

The UK invested in: fences, lighting, camera surveillance and infrared technology in both the ports of Calais and Dunkirk and the terminal at Coquelles; new technology to assist border guards in tracing people; additional guards and search dogs; a secure waiting area for trucks in Calais and Coquelles; and a joint command and control centre to coordinate the handling of migrants attempting to reach the UK irregularly.²⁴³

²³⁹ *Annals*. Chamber 2017-18, 7 March 2018, 11.

²⁴⁰ Due to the dissolution of the Belgian federal government in December 2018, the imminent Brexit and the formation of a new federal government after the elections of May 2019.

²⁴¹ www.gov.uk/government/news/joint-statement-by-the-governments-of-france-and-the-united-kingdom.

²⁴² UK HOME OFFICE, *Fact sheet: the UK's juxtaposed border controls*, last update on 16 January 2018.

²⁴³ *Ibid*.

4.9 BREXIT

The consequences of Brexit cannot be entirely predicted. Brexit will also have an impact on the issue of transit migrants.²⁴⁴

4.9.1 INTERNATIONAL PROTECTION

The refugee status is enshrined in the 1951 Geneva Convention. The protection of refugees will therefore continue to be guaranteed, even after Brexit.

Subsidiary protection status has been transposed into national law.²⁴⁵

Procedural guarantees laid down in EU Directives will only continue to apply in the UK to the extent that they have been incorporated into national legislation. However, the UK legislator is free to amend this national legislation when the latter is no longer bound by EU law.

4.9.2 DUBLIN SYSTEM

As regards the Dublin system, there are several options for the UK.

In the event of a hard 'no deal' Brexit, the Dublin III Regulation will no longer apply in the UK. This means that there will no longer be any possibility for the UK to return transit migrants who have applied for international protection to another EU Member State. This might become a pull factor for migrants to transit to the UK for a first or second application for international protection.

However, the proposed Dublin-IV Regulation creates a corrective allocation mechanism, where the UK should receive more applicants

²⁴⁴ For a comprehensive analysis of the future relationship between the UK and the EU in the field of international protection, see: POLICY DEPARTMENT FOR CITIZENS' RIGHT AND CONSTITUTIONAL AFFAIRS, *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU*, October 2018.

²⁴⁵ Immigration Rules, part 11, 339C.

for international protection.²⁴⁶ However, the UK has the possibility to remain under an opt-out from the Dublin III Regulation unless that Regulation is repealed.²⁴⁷

Of course, the UK can negotiate bilateral agreements to return applicants for international protection to another country, as Australia²⁴⁸ does.

4.9.3 PROTECTION OF FUNDAMENTAL RIGHTS

The EU Charter of Fundamental Rights will no longer apply in the UK in the event of a 'no deal Brexit'. However, fundamental rights are still guaranteed by the ECHR. Although the guarantees are similar, the Charter is sometimes more specific and thus offers broader protection.²⁴⁹

4.9.4 SHIPPING

The port authority of the port of Zeebrugge takes various initiatives in cooperation with the private sector in Zeebrugge and with policymakers at the Flemish, federal and European level.²⁵⁰

The bilateral and trilateral agreements on border controls will remain valid. A tightening of controls has already been announced in the event of a 'no-deal Brexit', as the right to free movement within the EU will be abolished.²⁵¹

In the absence of proper arrangements and smooth cooperation, these tightened controls could lead to long traffic jams at the port, which would create more opportunities for transit migrants to crawl into trucks.

²⁴⁶ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final; REFUGEE COUNCIL INFORMATION, *Asylum Seekers in Europe*, May 2016.

²⁴⁷ Protocol no. 21 of the TFEU on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

²⁴⁸ See: www.kaldorcentre.unsw.edu.au/bilateral-agreements-offshore-processing.

²⁴⁹ One example of this is the right to non-discrimination, based on any ground such as "sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation" (art. 21 of the Charter). The ECHR, on the other hand, only prevents discrimination in connection with the rights of other conventions, and not as a right in itself (Article 14 ECHR).

²⁵⁰ <https://portofzeebrugge.be/nl/brexit>.

²⁵¹ UK HOME OFFICE, "Government announces immigration plans for no deal Brexit", 4 September 2019.

5. EXTERNAL CONTRIBUTIONS: FRANCE, SPAIN AND NETHERLANDS

5.1 TRANSIT MIGRATION IN FRANCE

5.1.1 SITUATION AT THE TRANS-ITALIAN BORDER AND IN THE CALAIS REGION

Author: Commission nationale consultative des droits de l'homme (CNC DH - National Consultative Commission on Human Rights)

The CNC DH is the French national body for the promotion and protection of human rights. It was founded in accordance with the Paris Principles and accredited with A status by the United Nations.

One year after approving the so-called "Asylum and immigration law"²⁵², which further tightened up the French migration policy, in particular by reducing the time taken to process applications for international protection, reinforcing measures on expulsion and extending administrative detention²⁵³, the French government once again put the issue of immigration at the top of its list of priorities by organising an annual debate on migration policy in the French parliament. The guidelines issued by the Prime Minister during the debate held in October 2019 focused on two main concerns: the ambition to manage migratory flows more effectively and improve the integration of foreign nationals in France.²⁵⁴ The management of migration flows is a central element of the debates on migration in France and partly relates to transit migrants, who cross the French border into the UK. Many of these migrants are in transit in the north of France, especially in

Calais. Due to its geographical location and proximity to the British coast, Calais is an essential transit point for people aiming to reach the United Kingdom, either by sea or rail (Eurotunnel). There have been significant numbers of migrants in this city and the surrounding region for the last 30 years, and this is undoubtedly the result of a complicated geopolitical situation due to the UK's divergent status within the European Union.

The CNC DH has not tackled transit migration as such, but regularly discusses its consequences.²⁵⁵ Although it does not have precise figures on the subject, the CNC DH has carried out various investigations in northern France, Calais and Grande-Synthe and on the French-Italian border, analysing the impact of government policy on fundamental rights. For example, the CNC DH found that these migrants primarily come from Eritrea, Afghanistan, Sudan and West Africa and that there are also a significant number of minors among them, most of whom are unaccompanied.

²⁵² Law No 2018-778 of 10 September 2018 on controlled immigration, an effective right of asylum and successful integration.

²⁵³ CNC DH, *Opinion on the draft law "on controlled immigration and an effective right of asylum" as adopted by the Council of Ministers on 21 February 2018*, adopted on 2 May 2018, JORF no. 0105 of 6 May 2018, text no. 28.

²⁵⁴ M. RESCAN and J. PASCUAL, "Débat sur l'immigration à l'Assemblée: un goût d'inachevé pour l'opposition et les ONG", *Le Monde* 8 October 2019.

²⁵⁵ CNC DH, *Opinion on the ministerial investigation on the cooperation between the SIAO and the Office français de l'immigration et de l'intégration (OFII)*, adopted on 24 September 2019, JORF no. 0237 of 11 October 2019, text no. 77; CNC DH, *Opinion on the situation of migrants at the Franco-Italian border missions in the Hautes-Alpes and Alpes-Maritimes départements - March-April 2018*, adopted on 19 June 2018, JORF no. 0150 of 1 July 2018, text no. 24; CNC DH, *Opinion on the draft law "on controlled immigration and an effective right of asylum" as adopted by the Council of Ministers on 21 February 2018*, adopted on 2 May 2018, JORF no. 0105 of 6 May 2018, text no. 28; CNC DH, *Declaration: Warning over the treatment of migrants*, 17 October 2017, JORF no. 0270 of 19 November 2017 text no. 27; CNC DH, *Opinion "foreign nationals and the right of asylum in Overseas Territories. The case of Guyane and Mayotte"*, 26 September 2017, JORF no. 0276 of 26 November 2017, text no. 41; CNC DH, *Opinion on the reform of immigration law*, adopted on 21 May 2015, JORF no. 0159 of 11 July 2015, text no. 94.

5.1.2 LEGAL FRAMEWORK AND POLICY INITIATIVES

The legal framework in France is therefore closely linked to policy initiatives. The theme of the "migration crisis" is systematically highlighted when migration policy is discussed, while the main problem is the inability of the government to address the challenges of reception and integration of foreign nationals. The CNCDH reiterates the fact that migration flows on French territory are, in objective terms, very relative and limited.²⁵⁶ It therefore regrets the fact that the fear surrounding this issue is utilised for political ends.²⁵⁷ More than 18 laws have been passed since 1980. This inflation of legislation makes the issue more and more complex, which in turn leads to unclear, confusing and inefficient law.²⁵⁸

The term 'transit migrants' can refer to different situations: persons who have just arrived in France, or several months or even years ago, or who have applied for international protection in another European State and are therefore subject to the Dublin procedure. The provisions of the Code on the entry and residence of foreign nationals and asylum law, and the Code of administrative

jurisdiction, apply. Foreign nationals staying irregularly who have been recognised as such by the State (following an identity check or a refused application for a residence permit) may be subject to removal measures, such as an obligation to leave French territory, with or without a period for voluntary departure²⁵⁹, a ban on returning to France or Europe after expulsion, or an escort back to the border. To enforce these removal decisions, coercive measures may be applied, such as house arrest²⁶⁰ or transfer to a centre for administrative detention²⁶¹, the duration of which was extended to 90 days by the law of 10 September 2018.

Since the Law of 29 July 2015, persons subject to the Dublin procedure are considered as applicants for international protection.²⁶² Given that in 2017²⁶³ they accounted for 34% of applicants for international protection, they are a priority for the government. Measures have been adopted to monitor them and drastically reduce their rights. Reception facilities have been opened, the centres for reception and examination of administrative situations (CAES), where people are housed but where their administrative situation is also examined in order to be able to transfer them quickly. The "Dublin" procedures are followed regardless of the risks to which the person is exposed, such as inhuman or degrading treatment in the event of transfer, or the risk that victims of trafficking in human beings are conscripted by exploitative networks. Recourse to the discretionary provision in Article 17 of the Dublin III Regulation remains

²⁵⁶ In 2017, the number of applicants for international protection was 105,000, or 0.15% of the French population, and the number of first residence permits issued was 262,000.

²⁵⁷ It is important to put this number in context, so as not to fall into generalisations and exaggerated claims. In the area of asylum, according to Eurostat data covering 32 countries (the EU and Iceland, Liechtenstein, Norway and Switzerland), France was the thirteenth country to grant international protection in 2017, a position calculated on a per capita basis. And if we also assume that the OFPRA grants international protection, France ranks 30th on a list of 32 countries (29% recognition), link on 20 April 2018: <http://ec.europa.eu/eurostat/documents/2995521/8817685/3-19042018-AP-FR.pdf/89ae56ea-112c-456b-ba05-7944733f6de1>.

²⁵⁸ CNCDH, *Opinion on the draft law "on controlled immigration and an effective right of asylum" as adopted by the Council of Ministers on 21 February 2018*, adopted on 2 May 2018, *JORF* no. 0105 of 6 May 2018, text no. 28.

²⁵⁹ Art. L 511-1 et seq. CESEDA.

²⁶⁰ Art. L 561-1 et seq. CESEDA.

²⁶¹ Art. L 551-1 et seq. CESEDA.

²⁶² This entitles them to certain rights, such as obtaining a certificate to remain on the territory and to benefit from material reception conditions.

²⁶³ MINISTRY OF FOREIGN AFFAIRS, *L'essentiel de l'immigration*, no. 2018-14, January 2018.

rare. Since 2016, the number of coercive measures²⁶⁴ has also increased.

5.1.3 THE HUMAN RIGHTS CHALLENGES

Transit migration prompts a strengthening of border controls and coercive measures against migrants, so that it can be contained. The CNCDH notes that this stricter control goes hand in hand with various violations of fundamental rights.

The reintroduction and subsequent extension of controls at French internal borders in 2015 following the terrorist threat led to the introduction of authorised border crossing points where systematic controls are carried out.²⁶⁵ Persons who are not authorised to enter France are subject to a procedure of refusal of entry. During its mission at the French-Italian border, the CNCDH found that these procedures constituted a violation of certain rights²⁶⁶: no individual interview, failure to respect the right to a full day to return to Italy, particularly difficult or even impossible access to the international protection procedure, etc. With regard to this

²⁶⁴ In 2016, 1750 people were placed under house arrest under the Dublin procedure (37% of the total) and 2208 asylum seekers were administratively arrested; CFDA, *D'une réforme à l'autre- L'asile en danger*, February 2018; See also CNCDH, *Opinion on the draft law "on controlled immigration and an effective right of asylum" as adopted by the Council of Ministers on 21 February 2018*, adopted on 2 May 2018, *JORF* no. 0105 of 6 May 2018, text no. 28.

²⁶⁵ A total of 48,362 people were arrested in the Alpes-Maritimes department in 2017. 44,433 of them were told that they were not allowed on the national territory. In 2016 the figure was 32,285. Between 1 January 2018 and 24 May 2018, 12,538 migrants were arrested, 10,983 of whom were informed that they had not been admitted to the national territory. In Hautes-Alpes, the smallest department, 1,900 decisions to deny access were handed down in 2017, compared to 316 in 2016 - Information from the DCPAF of Menton and Briançon. It should be recalled that many people have been refused entry multiple times.

²⁶⁶ Mission carried out in the southern part of the border (Menton-Vintimille) by the CNCDH on 12 and 13 April 2018; hearing of border police (PAF) and Rencontres interassociatives on 12 and 13 April.

last point, that was raised by the CNCDH, the border police and the authorities stated that no application for international protection had been lodged at the border. This confirms the lack of accessibility, in particular taking into account the nationality of the persons arrested, but also the increase in the number of requests registered on the national territory. This claim also contradicts the various reports on access to international protection at the border²⁶⁷ and the convictions of the Prefect of the Alpes-Maritimes department by the Administrative Court in Nice for infringement of the right to asylum.²⁶⁸ This confirms a desire not to keep people on the territory who are presumed not to wish to settle in France, even though they might consider doing so.

In the context of the non-admission procedure, the persons being checked must first be informed of the refusal of entry before being sent back to Italy. During the verification of their administrative situation, they wait in the units provided for that purpose by the border police. The CNCDH was shocked by the deprivation of migrants' liberty outside any legal framework. In practice, this can take a whole night and is clearly contrary to the fundamental rights of detained persons.²⁶⁹

²⁶⁷ FORUM RÉFUGIÉS-COSI, *Les obstacles à l'accès à la procédure d'asile dans le département des Alpes-Maritimes pour les étrangers en provenance d'Italie. Constats et recommandations*, April 2017; AMNESTY INTERNATIONAL, *Des contrôles aux confins du droit. Violations des droits humains à la frontière avec l'Italie. Synthèse de mission d'observation*, February 2017; ANAFÉ, *Note d'analyse. Rétablissement des contrôles aux frontières internes et état d'urgence. Conséquences en zone d'attente*, May 2017; ANAFÉ, *Alertons sur les pratiques étatiques vis-à-vis des migrants à la frontière franco-italienne*, 19 October 2017.

²⁶⁸ TA Nice, 2 May 2018, no. 1801843; TA Nice, 4 September 2017; TA Nice, 31 March 2017, no. 1701211.

²⁶⁹ Violation of human dignity, protected by Article 3 of the ECHR, Article 1 of the Charter of Fundamental Rights and Article 1 of the UDHR; of the right to security enshrined in particular in Article 5-1 of the ECHR, Article 66 of the (French) Constitution and Article 3 of the UDHR.

Especially in Menton Pont-Saint-Louis, the border post with Italy, detention is a serious violation of human dignity: modular blocks with armoured walls, no electricity, etc. The CNCDH has therefore called for the immediate closure of these buildings. More generally, it has called for a legal definition of the holding sites at the border.

In Calais, the relocation of the British border to French soil and the mish-mash of various treaties and administrative regulations²⁷⁰ which are in stark contradiction with EU law, are very worrying. As such, France is *de facto* the "armed wing" of the British migration policy.²⁷¹ After the dismantling of the so-called 'jungle' in 2016 and in order to avoid new 'settlements', the Ministry of the Interior's instructions on the ground resulted in a form of bullying of migrants by the security services. This bullying - systematic destruction of migrants' shelters, spraying gas around on adults and children, on their food and clothing, etc. - is a major problem. - It has been repeatedly denounced and documented by organisations, primarily in Calais, but also in Paris and in the Roya Valley. These sometimes violent actions - hampering the distribution of meals and medical consultations, harassment and threatening legal proceedings, inappropriate identity

²⁷⁰ See in particular: Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic (...) *concerning frontier controls and policing, cooperation in criminal justice, public safety and mutual assistance relating to the Channel fixed link*, signed at Sangatte on 25 November 1991; treaty between the Government of the United Kingdom and the Government of the French Republic (...) *concerning the implementation of frontier controls at sea ports of both countries on the Channel and North Sea*, signed at Le Touquet on 4 February 2003; French-British administrative agreement on *strengthening the fight against immigration*, signed at Evian on 6 July 2009; administrative agreement *concerning the strengthening of the common frontier*, signed in London on 2 November 2010.

²⁷¹ For more details, see: O. CAHN, *La coopération policière franco-britannique dans la zone frontalière transmanche*, Doctoral thesis in criminal law, Université de Poitiers 2006, 195-204, 405-408.

checks, etc. - are now also targeted at organisations and ordinary citizens, with the aim of making their humanitarian actions more difficult, when they are precisely intended to compensate for the shortcomings of the state.²⁷²

The presence of migrants has consequences for the population who come into contact with them. Both on the French-Italian border and in Calais, the tireless efforts of individuals and organisations on the ground are to be welcomed. However, the increase in prosecutions and convictions of persons assisting migrants is a cause for concern. The many arrests and summonses, appeals by the public prosecutor against release decisions and legal prosecutions²⁷³ are expressions of a political will to punish solidarity.²⁷⁴ Although the exceptions to the crime of solidarity have been extended following a ruling by the Constitutional Court²⁷⁵, prosecutors still stubbornly opt for criminalisation and prosecution.

In this context, two particularly vulnerable groups merit special attention: unaccompanied minors and victims of trafficking in human beings. In the Hautes-Alpes and Alpes-Maritimes departments, unaccompanied minors are confronted with various illegal practices. The conditions in which they are housed are also far from optimal. For example, the CNCDH noted that the authorities had changed dates of birth in the forms for refusing entry into the territory. In addition, there were also random links with adults who have no connection whatsoever with minors, pre-ticked refusals of entry on

²⁷² CNCDH, *Declaration: Warning over the treatment of migrants*, adopted on 17 October 2017, JORF no. 0270 of 19 November 2017, text no. 27.

²⁷³ See in particular the trial of the so-called "Briançon seven".

²⁷⁴ CNCDH, *Opinion: Ending the crime of solidarity*, adopted on 18 May 2017, JORF no. 0131 of 4 June 2017, text no. 82.

²⁷⁵ In its decision no. 2018-717/718 QPC of 6 July 2018, the Council acknowledged the constitutional value of the principle of fraternity.

the wish to return to Italy, etc. These practices have been confirmed in recent reports.²⁷⁶ Elsewhere, the Public Prosecutor's Office in Nice has also opened a preliminary investigation into possible violations by the police at border posts in Menton, specifically forgery of documents.²⁷⁷ In Calais, for example, various shortcomings in the reception of unaccompanied minors were identified during the dismantling of the jungle in 2016.²⁷⁸ For example, the ECtHR convicted France on account of the fact that an unaccompanied minor was not admitted to a reception centre.²⁷⁹ The reception and referral centres for unaccompanied minors set up to temporarily house them after the dismantling of the 'jungle' in Calais and pending the assessment of their minority were not fit for purpose.²⁸⁰

²⁷⁶ HUMAN RIGHTS WATCH, "Ça dépend de leur humeur", *Treatment of migrant children in the Hautes-Alpes*, 5 October 2019; ANAFÉ, *RAPPORT PERSONA NON GRATA - Consequences of the security and migration policy at the French-Italian border*, Observation report 2017-2018.

²⁷⁷ C. LIOULT, "Migrants : le parquet ouvre une enquête préliminaire sur de possibles infractions de la police aux frontières à Menton", *France 3 Régions* 5 February 2019.

²⁷⁸ CNCDH, *Opinion on the situation of migrants in Calais and the Pale of Calais*, 2 July 2015, *JORF* no. 0157 of 9 July 2015, text no. 102; *Opinion on the situation of migrants at Grande-Synthe*, 26 May 2016, *JORF* no. 0131 of 7 June 2016, text no. 46; CNCDH, *Follow-up opinion on the situation of migrants in Calais and in the Pale of Calais*, 7 July 2016, *JORF* no. 0164 of 16 July 2016, text no. 124; CNCDH, *Declaration on the dismantling of the Calais refugee camp and its consequences: the case of minors*, 8 November 2016, *JORF* no. 0060 of 11 March 2017, text no. 91; CNCDH, *Declaration: Warning on the treatment of migrants*, 17 October 2017, *JORF* no. 0270 of 19 November 2017, text no. 27.

²⁷⁹ ECtHR 28 February 2019, no. 12267/16, Khan/France: "the failure to comply with the judicial order to protect the applicant, considered together, constituted a breach of the obligations imposed on the respondent State, and that the gravity threshold required by Article 3 of the Convention had been reached."

²⁸⁰ CNCDH, *Declaration on the situation of unaccompanied minors placed in CAOMI following the dismantling of the refugee camp in Calais*, 26 January 2017.

The reception of unaccompanied minors is still a problem.²⁸¹

Transit migrants are by definition vulnerable and in need, and therefore easy prey for traffickers in human beings and networks of traffickers in human beings.²⁸² At the French-Italian border, the CNCDH has noted the lack of measures to identify and protect transit migrant who fall victim to this. As such, the CNCDH has recommended placing greater emphasis on identifying potential victims of trafficking in human beings or exploitation by public actors in contact with migrants.

Another recommendation was to improve the training of institutional actors, including border police. Since it is impossible for transit migrants to cross the Franco-British border in Calais legally as a result of the bilateral treaties and agreements referred to above, more and more people are trying to make the illegal crossing to the United Kingdom, with all the dangers this entails. The watertight border provides a very lucrative activity for the networks of smugglers of human beings. As an independent national rapporteur on trafficking in human beings and exploitation of human beings, the CNCDH insists on the need for a resolute criminal policy against traffickers.

²⁸¹ See DEFENSEUR DES DROITS, *Exilés et droits fondamentaux, trois ans après le rapport Calais*, report, December 2018.

²⁸² FRANCE TERRE D'ASILE, "Identification et protection des victimes de la traite dans un contexte de migration de transit", *Les cahiers du social* no. 39, April 2017.

5.2 TRANSIT MIGRATION IN THE NETHERLANDS

Author: Brechtje Keulen, freelance journalist

In August 2018, a camp of transit migrant tents was discovered near the Dutch town of Zevenbergschenhoek. The migrants were sheltering in a cornfield, in shacks as big as a single sleeping bag, covered with garbage bags and corn leaves. There in the field, along the A16 motorway, they were preparing for the risky crossing to the United Kingdom. For truck drivers, the car park next to the cornfield is often the last stop before boarding the ferry. This makes it an ideal location for the people referred to as 'inklimmers' in the Netherlands: transit migrants on their way to the United Kingdom and trying to ride along in a transport van or truck. During intensive checks that followed the discovery of the camp, people were caught almost daily here in 2018 waiting to take their chance. Then things went quiet.

5.2.1 TRANSIT MIGRANTS

The Netherlands has been confronted with so-called 'inklimmers', or transit migrants, for decades. Although transit migration in the Netherlands is less common than in countries such as Belgium and France, probably due to its geographical location, an upward trend has been observed in recent years.²⁸³ For example, 944 transit migrants were intercepted by the port police in the port of Rotterdam in 2017. In 2018 this number had grown to 1,371 and in 2019 the increase seems to have continued slightly. The ports where ferries sail to the United Kingdom, such as IJmuiden, Hoek van Holland and Europoort, are guarded by the military police. In 2018, 740 transit migrants were detained there. This

²⁸³ Colonel Vos of the Royal Dutch Marechaussee (KMar) explained to KMar Magazine (translation): "When I started at the KMar in 1992, there were already stowaways in Hoek van Holland. But in recent years we have seen a fairly continuous increase in the number of stowaways.", see: H. DE BOER, "Samen sterk tegen inklimmers", *KMarMagazine* June 2019.

figure was reached after only 9 months in 2019.²⁸⁴

5.2.2 ALBANIA

Of the 1,371 transit migrants detained in the port of Rotterdam in 2018, 897 came from Albania. This is striking, because they are not apprehended in these numbers in other countries. Albanian transit migrants are generally young men, aged between 18 and 30. They want to escape poverty in their own country and look for a better life. They expect to find work in the UK easily.²⁸⁵ The risk of suffocation or hypothermia along the way does not deter them.

Although Albania is not part of the European Union, Albanians have enjoyed visa-free travel within the EU since 2010. Since 2017 there have also been cheap, direct flights from the Albanian capital Tirana to Amsterdam. A one-way ticket costs only €34 at the cheapest times. These two factors may also contribute to the fact that the Netherlands has become an important transit country for Albanians on their way to the United Kingdom.

Transit migrants from countries including Afghanistan, Syria, Iraq, Iran, Algeria and Vietnam have also been found in recent years in Dutch ports and on ferries departing from the Netherlands.

²⁸⁴ Figures taken from the Key Figures on Asylum and Migration (September 2019) of the Dutch government, see: www.rijksoverheid.nl/documenten/publicaties/2019/11/06/kerncijfers-asiel-en-migratie-september-2019.

²⁸⁵ The Algemeen Dagblad went to Albania and asked Albanian men why they would want to go to the United Kingdom. 'Take a look at Mother Teresa Square, says 16-year-old John at a bus stop in Tirana. "There you'll find Lamborghinis, Bentleys, Ferraris. All owned by Albanians working in England. They come back and have a great life. And we all want to have the same life.", see: L. VAN HEEL and E. OOSTEROM "Dit is waarom jaarlijks honderden Albanezen hun leven wagen in de Rotterdamse haven", *AD* 1 September 2019.

5.2.3 FUNDAMENTAL RIGHTS

It is difficult to ascertain how many transit migrants are in the Netherlands and how they survive while awaiting their crossing to the United Kingdom, because they remain out of the sight of authorities as much as possible while waiting to cross. The main clues as to their living conditions can be found in the tent camps that are discovered from time to time, such as the camp near Zevenbergschenhoek and a camp in Bladel, which was discovered a few months later.

On 26 October 2018, the police raided a tent camp along the A67 motorway near Bladel in North Brabant. 38 refugees were living there, including 11 children.²⁸⁶ They were interrogated and turned out to all be from Iraq, but they did not apply for asylum, presumably because it was not the Netherlands but the United Kingdom that was their goal. They left the reception centre for asylum seekers with an unknown destination and once again stayed under the authorities' radar.

People living in a tent camp under these conditions, or even - such as current affairs section EenVandaag²⁸⁷ discovered - in an underground bunker from World War II, lack the most basic amenities. There are no sanitary facilities or heating, and the area is strewn with garbage. Children do not attend school. Everyone is entitled to urgently needed medical care, but it is likely that transit migrants in irregular stay will only make use of it when there is really no other option.

²⁸⁶ Figures from the Dutch police: www.politie.nl/nieuws/2018/oktober/26/09-illegaal-tentenkamp-in-bossen-ontruimd.html.

²⁸⁷ "Veel van de Albanezen verblijven volgens de politie illegaal in de vele bunkers uit de Tweede Wereldoorlog die Hoek van Holland rijk is.", see: S TIMMER, R. van VUREN and V. TRIEST, "Mensensmokkel voor een prikkie", *Een Vandaag*.

5.2.4 ARRESTED

transit migrants apprehended in a vehicle are first interrogated by the police. Since 2018, they are then automatically placed in custody for evading exit checks from the Schengen territory. The police try to avoid²⁸⁸ that people make another attempt to move to another port shortly after their arrest. For Albanians, the right to reside on EU territory also lapses after their arrest. They are not allowed to enter the EU for two years after that.²⁸⁹ The driver will be arrested as well. He or she will be suspected of smuggling in human beings automatically after the discovery of transit migrants.

5.2.5 APPROACH

'This must not turn into a new Calais', said mayor Jac Klijns in the summer of 2018, after the discovery of the tent camp in the cornfield near Zevenbergschenhoek. In the months that followed, the police, military police, farmers and truck drivers worked together to tackle transit migration at this location. The car park and the cornfield were checked every day. The corn was cut down, and in the entire field there are now new and shorter crops in which it is less easy to find shelter. The Dutch news reported that the Albanian transit migrants had been successfully contained.²⁹⁰ After a few months, far fewer transit migrants were found around the car park.

One stop further, in the ports, cars are checked with specially trained dogs and CO2 meters, among other things. But the Netherlands also takes a preventive approach. In 2017 the mayor of Rotterdam, Ahmed Aboutaleb, travelled to Albania to talk about migration and smuggling of human beings.

²⁸⁸ The Advisory Committee on Immigration describes this measure in the report *Secundaire migratie van asielzoekers in de EU* (November 2019).

²⁸⁹ In this article, the KMar explains how this works: H. DE BOER, "Samen sterk tegen inklimmers", *KMarMagazine* June 2019.

²⁹⁰ See for example: L. DAUTZENBERG, "Hoe Moerdijk korte metten maakte met Albanese inklimmers langs de snelweg", *AVROTROIS* 20 November 2019.

In 2019, an Albanian delegation visited the port of Rotterdam to get a better picture of the situation of transit migration.

5.2.6 THE CURRENT SITUATION

Transit migration may not be as widespread in the Netherlands as in Belgium and France, but it is still an important topic. With the incident in Grays in England still fresh in the memory, when 39 transit migrants were found dead in a refrigerated trailer, the emergency services showed up in great numbers when only a few weeks later 25 transit migrants were found in a refrigerated trailer on a ferry in the port of Vlaardingen. They were 'prepared for the worst', Mayor Annemiek Jetten later told the NOS.²⁹¹ In this case there was a happy ending - all the transit migrants were still alive. But the crossing entails many risks, and it is only a matter of time before another major incident occurs.

²⁹¹ See: X, "Verstekelingen Vlaardingen zeggen dat ze uit Irak en Koeweit komen", *NOS* 20 November 2019.

5.3 TRANSIT MIGRATION IN SPAIN

Author: El Defensor del Pueblo

Spain is a reference country in terms of transit migration, not only because of its history, but also because of its geographical location, as a bridge between Africa and Europe and as an external border of the European Union. Moreover, Spain's historical links with Latin America have always facilitated intensive migratory flows, which is still the case today.

El Defensor del Pueblo, recognised as a national prevention mechanism in the framework of the OPCAT in Spain, monitors the issue closely on the basis of existing official data.

5.3.1 MIGRATION IN SPAIN

Foreign nationals in regular stay

According to data from the Spanish National Statistics Institute, Spain had a total of 46,934,632 inhabitants as of 1 January 2019, including 4,848,516 foreign nationals. This is the highest number since 2013. As of June 2019, there were 5,535,079 foreign nationals.

The Moroccan community remains the largest (714,239), followed by the Romanian (671,233), British (287,292), Italian (244,148), Colombian (199,540) and Chinese (190,624) communities. The largest increase in 2018 was among the Venezuelan community (134,000 inhabitants).

Foreign nationals in irregular stay

The Spanish territory is accessible by sea, land and air.

In 2018, there were a total of 64,298 irregular entries, an increase of 131% compared to 2017.

However, according to data from the Ministry of the Interior, there were 56% fewer irregular arrivals by sea between January and October 2019, or 19,748 fewer than the 45,541 in the

same period in 2018. Arrivals by land in Ceuta and Melilla also decreased in 2019 (4,961) compared to 2018 for the same reference period (5,698). According to the Ministry, this decrease can be partly explained by the cooperation with the countries of origin and transit countries.

There are seven detention centres for foreign nationals without legal residence (CRA) in Spain, with eight structures whose sole purpose is to carry out the removal measure taken in respect of a foreign national. The maximum detention period is 60 days and is subject to judicial supervision.

In total, nationals from 89 countries or territories were in detention, along with one person who was considered stateless. Moroccans (35.5%) and Algerians (31.65%) account for more than two thirds of the detainees. They are followed by nationals from Guinea-Conakry (5.32%), Senegal (4.07%), Gambia (3.21%) and Colombia (1.62%), followed by EU nationals from Romania (1.20%). In terms of data on women who were detained, the leading countries are Algeria (15.01%), followed by Guinea-Conakry (13.96%), Colombia (7.26%), Morocco (6.70%) and the Dominican Republic (5.03%).

CRA are not equipped to accommodate a large influx of people arriving irregularly via the coast. The use of emergency sites, such as sports halls and other infrastructure, has led to the creation of temporary reception centres for foreign nationals and humanitarian reception programmes.

Unaccompanied minors (UM)

According to figures from the Commissariat General de Extranjería y Fronteras, 7,026 unaccompanied minors arrived in Spain in 2018 by sea, on board small boats or other makeshift vessels. These figures represent a

spectacular rise of 199.61% compared to 2017 (2,345) and of 3,050% compared to 2014 (223). In 96.9% (6,810) of the cases, the migrants were boys. Most come from Morocco (61.89%), Guinea (14.10%), Mali (8.15%), Algeria (5.6%), Côte d'Ivoire (4.5%) and Gambia (1.69%).

In 2018, a total of 755 minors arrived in Spain by boat in the company of adults (accompanied minors), who claimed to have a parental bond with the child but could not prove it. This is an increase of 599% compared to the 126 that came via the same route in 2017. In total there were 383 girls and 372 boys. Most of these minors came from Guinea (38.67%), Côte d'Ivoire (27.15%), Cameroon (9%) and Algeria (8.74%).

There are no quantitative data on minors who entered Spain via Ceuta and Melilla and crossed the border, hidden in cars or by aeroplane. On 31 December 2018, a total of 13,796 minors were registered in the register of unaccompanied minors under guardianship or under the supervision of the protection services. These included 12,825 boys and 971 girls. This is an increase of 115% compared to the 6,414 registered in 2017.

12,152 pre-procedural age assessments were carried out, more than twice as many as in 2017. The main reason for this increase is the increase in the number of boats reaching the Spanish coast, with many people on board claiming to be minors.

It is striking that in 2018, 264 minors (including 92 Vietnamese) entered the country via Madrid airport. The national police placed them in protection centres. However, they quickly renounced their international protection without making an appointment with the asylum office.

In the conclusions of the Committee on the Rights of the Child, which contained an analysis on the age assessment system in Spain in 2018, in which the Committee expressed its concerns about this system.

Moreover, in June 2019, Spain was convicted twice for violating the rights of two children who had arrived in Spain alone. They had been treated as adults, even though they had submitted documents proving that they were minors.

These convictions held that the age assessment procedure "did not provide the necessary guarantees to protect their rights recognised by the Convention and that, consequently, Spain had infringed on the rights set out in Articles 3 and 12 of the Convention by failing to take into account the overriding interests of the child in this procedure".

Although minors cannot be detained in centres, UMs that slip through the cracks are often found there. For instance, in 2018, 88 UM were found in administrative detention centres for foreign nationals before they were transferred to the public services for the protection of minors. In 2017, the figure was 48.

Applicants for international protection

The exponential increase in the number of applications for international protection, from 5,947 in 2014 to 54,065 in 2018, is striking. Between 1 January and 31 October, there were 93,399 applications.

Trafficking in human beings

The Spanish Intelligence Center for Counter-Terrorism and Organized Crime (Centro de Inteligencia contra el Terrorismo y Crimen Organizado - CITCO) - which can rely on data input from the national police, autonomous police and civil protection, as well as government agencies and NGOs - has identified more than 10,000 potential victims of trafficking in human beings (in 2017 alone).

5.3.2 SEVERAL POLITICAL INITIATIVES

- Humanitarian aid programme managed by the Directorate-General for Migration within the framework of the General Secretariat for Immigration and Emigration.
- Projects for the voluntary return of migrants.

As regards the Ministry of the Interior, we can highlight the following:

- Reforms in some centres for administrative detention of foreign nationals and plans to build new centres.
- The implementation of Temporary assistance centres for foreign nationals (CATE) for first aid prior to the arrival of irregular vessels by sea, for a maximum period of 72 hours.
- The project to modernise and improve security in the Ceuta and Melilla border area.
- Measures against irregular immigration.
- Cooperation with countries of origin and transit countries.
- The implementation of the Coordinating Authority to combat irregular immigration in the Strait of Gibraltar, the Alborán Sea and adjacent waters.

5.3.3 SPAIN AND THE UNITED KINGDOM

Migration from Spain to the United Kingdom is primarily by sea. The migrants are stowaways who leave from various ports in northern Spain, such as Santander, Gijón, Pasaia and Bilbao. Some also travel clandestinely aboard trucks on their way to the United Kingdom, although this is less common. Unfortunately, there is no specific data on transit migration to the United Kingdom. These migrants generally have Albanian and to a lesser extent Moroccan nationality.

According to reports, there has recently been an increase in the number of transit migrants in Basque ports en route to the United Kingdom, owing to fears of a hard Brexit. The

Basque port authorities are coordinating preventive measures with handlers and security services in response to the sharp rise in the number of migrants, especially young Albanians, trying to enter the docks to board irregularly towards the United Kingdom.

The port authority of Bilbao continues to step up the security measures, even a year and a half after the construction of a controversial wall to prevent young Albanians from leaving for the United Kingdom.

At the beginning of November, we also learned that the Guardia Civil had dismantled a gang which encouraged Albanian stowaways to travel to the United Kingdom from the ports of Gijón and Avilés.

5.3.4 HUMAN RIGHTS CHALLENGES

There are various, far-reaching human rights challenges posed by transit migration. El Defensor del Pueblo has identified various challenges that are summarised here:

Treatment of stowaways

There are cases of stowaways who are not reported to the asylum authorities, which is in breach of existing legal provisions and the principle of non-refoulement.

Defensor del Pueblo recommends making it obligatory for the port authority to notify in writing of the presence of applicants for international protection in ships moored in a Spanish port or anchored in Spanish waters, and to inform them of their rights, including the right to remain on Spanish territory or in territorial waters until their application has been examined.

It is also recommended that these instructions apply to anyone wishing to seek asylum in Spain and who is on board a ship anchored in waters under Spanish jurisdiction.

It is also recommended that lawyers be provided with copies of documents enabling them to continue to provide legal aid to the applicants.

Poor conditions at border posts

Defensor del Pueblo has been criticising the poor conditions of people seeking asylum at airports for years. The reception conditions are deplorable, with no access to light, no separation of men and women, no access to care, no supervision or access to information, telephone or varied food.

Foreign nationals arriving on the coasts irregularly by boat

According to Defensor del Pueblo, more efforts need to be made in all areas to improve the support and reception of people arriving irregularly on the Spanish coast, including transit migrants. Legal assistance to foreign nationals, especially newcomers, is an essential element for the effective exercise of the most fundamental rights. It is therefore essential for the Bar associations to monitor the quality of the service provided by lawyers representing foreign nationals in court, via specialised training in this area. That way, they can identify particularly vulnerable persons such as minors, victims of trafficking in human beings or applicants for international protection.

In 2016, it was recommended that a protocol of action be developed for the survivors of shipwrecks, including specialised psychological assistance, as the victim status of these persons must take precedence. According to the institution, the police stations or detention centres for foreign nationals where they remain for the long-term are not suitable for providing the necessary care that could improve their psychological condition. The Ministry of the Interior rejected this recommendation.

It is also important to prioritize pregnant women and minors in the centres for first aid and the detention centres for foreign nationals. For this reason, it was recommended that cases concerning the expulsion of pregnant women and minors

were prioritized, regardless of when their boat arrived.

In addition, it was requested that pregnant women and children be housed in public centres for social protection or with entities such as the Red Cross in order to avoid that they are deprived of their liberty.

There is no guarantee that the CRA's medical services have documented knowledge of the medical assistance provided to foreign nationals arriving on the Spanish coast after they have been rescued at sea. This can pose a risk to the health of people stricken by disease and lead to situations that pose a risk to public health. It was therefore recommended that the Ministry of Health, Consumer Affairs and Social Protection draw up an action protocol to provide medical care to foreign nationals. This Protocol needs to provide for the drafting of a preliminary report. This must contain the illnesses detected in the people given assistance and the treatments administered, so that, if necessary, they can be properly referred and receive specialised care following their registration in a centre.

Foreign nationals in irregular stay

Various complaints highlight the fact that deportation procedures have been systematically initiated when a person without legal residence goes to a police station to report a crime or for another reason, for example lost documents. This had a deterrent effect on the people in question. In 2019, Defensor del Pueblo recommended that the Ministry of the Interior issue the necessary instructions so that foreign nationals in irregular stay who are victims of a crime can file a complaint without running the risk that it would lead to their expulsion.

Centres for the administrative detention of foreign nationals

The proposal to release a detainee in a CRA on humanitarian grounds was accepted by the Commissioner General for Aliens and Frontiers.

Based on the complaints received and visits, significant shortcomings within the CRA were identified. In 2018, a recommendation to improve social, legal and cultural assistance was made for the following reasons: to establish common guidelines for the various CRA; to provide sufficient furniture in the relaxation areas; to review the arrangements for public funding for the outsourcing of social and cultural services; to give the necessary instructions to guarantee the right of detainees in each centre to contact NGOs and that these NGOs can visit the centres and speak to the detainees, avoiding general security arguments to limit this; to promote the signing of agreements with the bar associations to provide legal advice in the centres where this service is not yet available.

Victims of trafficking in human beings

Defensor del Pueblo is concerned about the difficulties in tracking down and identifying potential victims of trafficking in human beings, especially transit migrants arriving in Spain via border crossing (airports, southern border, etc.) and along the Spanish coast on board ships.

Defensor del Pueblo is also especially concerned about the situation of UM. There is a need for better identification of and assistance to UM in order to make them less vulnerable and prevent that they would end up in human trafficking networks.

It was recently proposed to the Commissioner General for Aliens and Frontiers that two potential victims of trafficking in human beings, from Vietnam, be exceptionally admitted to the territory after UNHCR and the Office for Asylum and Refugees and the Office responsible for trafficking in human beings

had established that there were indications that the people in question were minors and potential victims of trafficking in human beings. However, the Central Squad of Illegal Immigration Networks and False Documents (UCRIF) did not take the indications into account and ordered the expulsion of the two people.

Applicants for international protection

In recent years, the international protection system has collapsed. The main difficulties relate to both access to the procedure and access to the reception facilities for applicants.

As regards transit migrants, shortcomings have been identified at border crossings in terms of time frames for treatment, inadmissibility criteria, assistance from interpreters or information provided to applicants (although progress has been noted in recent months). In the case of an application of protection at the border, the applicants are immediately returned to the country of origin. The potential risks in cases of return or removal prompted Defensor del Pueblo to recommend that the police services maintain permanent contact with UNHCR and carry out a risk assessment based on the current situation in the country of origin of the person in question before applying any of these measures.

Defensor del Pueblo has also recommended that the criteria for the intervention of border guards be adapted, so that they are obliged to pass persons attempting to enter the national territory irregularly on to the national police. This would allow the police to follow the procedures provided for in the regulations on foreign nationals, and to inform those concerned of the possibility to lodge an application for international protection.

Minors

Defensor del Pueblo undertakes various actions for the protection of minors. As regards minors in transit, the Ombudsman is particularly concerned about the treatment of UM.

There are problems with the registration of data about minors, meaning that it is not possible to get even a vaguely accurate picture of the number of UM.

In addition, there are concerns about the presence of minors in CRA, who are not transferred to child protective services during the age assessment.

Regarding the age assessment, on other criteria have been agreed to with the Office of the Prosecutor-General, due to clear shortcomings in the age assessment procedure.

5.3.5 CONCLUSION

From the perspective of Defensor del Pueblo, the topic of transit migrants covers various situations involving people entering Spanish territory by sea, land and air.

Although the migration plan may include subsequent transit to other countries, this institution only has data relating to persons in Spain who are in different administrative situations.

Of particular concern are the reality faced by migrants staying irregularly after entering the country, those detained in the CRA, UM (often with the intention of migrating to other countries), potential victims of trafficking in human beings, persons refused at border posts, etc.

Defensor del Pueblo has endeavoured to paint as complete a picture as possible, from a broad and comprehensive perspective, of the phenomenon and the main human rights challenges that this institution has been facing for years.

6. ARREST, DETENTION, TRANSFER OR RETURN

6.1 POLICY

The fact that transit migrants do not intend to settle in Belgium does not exempt the government from the obligation to formulate a policy²⁹² that reconciles migration control and human rights, in cooperation with transit and destination countries.²⁹³

Transit migration has featured prominently on the Belgian political agenda since the end of 2015. After the dismantling of the 'jungle' in Calais, temporary border controls were put in place by the Belgian government to prevent the creation of a similar camp in Belgium²⁹⁴ and the Medusa action was set up.²⁹⁵ In June 2015, in the COTER consultation²⁹⁶, a *transit migration taskforce* was set up. This taskforce brings together police actors etc., with the aim of drawing attention to transit migration and exchanging knowledge, for example during consultations on smuggling of human beings.²⁹⁷ The taskforce provides an overview of the situation, works at the policy level and

focuses, among other things, on prevention campaigns with government departments, including the Immigration Office and Fedasil. The *taskforce* also coordinates repressive actions and international cooperation.²⁹⁸

Transit migration has been a recurrent phenomenon in West Flanders for many years. A 'working group on transmigration' develops and executes strategic actions at the border and at car parks. Additionally, a liaison officer from the Immigration Office has been working on transit migration in West Flanders for many years and provides support to local partners. According to the 'Westkust' police force the various police units can rarely undertake major actions with other police units due to the limited space available in the detention centres.²⁹⁹

The Framework Memorandum on Comprehensive Security 2016-2019, the basis of Belgian security policy, identified smuggling of human beings as an important security phenomenon for which an integrated approach is necessary.³⁰⁰ Transit migration and smuggling of human beings are closely interlinked (see 9.2). In the National Security Plan, the police aims to contribute to the fight against 'illegal transmigration'. The police aim to achieve this by setting up a 'smart borders' platform, improving the basic screening of travel and identity documents and *profiling*, and simplifying the examining of large groups of intercepted transit migrants.³⁰¹ Nevertheless, there are no federal or local official guidelines or recommendations for

²⁹² A. PAPADOPOULOU, *Transit Migration. The Missing Link Between Emigration and Settlement*, Palgrave, 2008, 10.

²⁹³ The ECHR always applies. However, a balance must be struck between the protection of individual rights and the general interest of the community; see ECtHR [GC] 15 November 1996, no. 22414/93, *Chahal/United Kingdom*, §76.

²⁹⁴ General policy note Asylum and Migration, 26 October 2018, DOC 54 3296/021, 10.

²⁹⁵ *Ibid.*, i.e. border controls; MYRIA, *Migratie in cijfers en in rechten 2016*, (Migration in Rights and Numbers) annual report, 2016, 225-226.

²⁹⁶ The COTER consultation (coordination of return) is a general consultation under the chairmanship of the competent Minister/Secretary of State for Asylum and Migration with the Immigration Office, Police, Judiciary, Ministry of Defence, Fedasil, Home Affairs and the Cabinet. Working groups can be set up within this consultation, as was done in this case within the coordination of return with the transit migration task force. See: Commission for the evaluation of policy on voluntary return and forced removal of foreign nationals, *Interim report*, 22 February 2019, 37.

²⁹⁷ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018 – actualisatie 2019*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019, 9.

²⁹⁸ Meeting with the Maritime Police on 24 May 2019.

²⁹⁹ Meeting with local police "Westkust" on 23 May 2019.

³⁰⁰ See Point 4.2 of the Framework Memorandum on Comprehensive Security 2016-2019.

³⁰¹ Strategic objective 4 of the National Security Plan.

police officers on how to deal with transit migrants.³⁰²

In a context in which the police are given an increasingly important role by federal policy makers, Myria is concerned that the lack of clear guidelines increases the risk of abuse of power and the risk of violation of the fundamental rights of migrants staying irregularly.

As a result of an increasing number of migrants around Brussels North station and in the Maximiliaanpark in 2018, the then State Secretary for Asylum and Migration Theo Francken and the then Minister of the Interior Jan Jambon launched a ten-point plan to tackle transit migration as a priority.³⁰³ The aim was to make Belgium less attractive as a transit country.

The plan contained the following objectives:

1. The creation of a national administrative centre within the detention centre 127bis in Steenokkerzeel. Any transit migrant arrested in transit to the UK would be transferred to the detention centre in Steenokkerzeel for identification, fingerprinting and data extraction of his or her mobile phone;
2. A doubling of the capacity in the detention centres for transit migrants (70 → 160 places);
3. Increase in police checks along the travelling routes of transit migrants on motorways to prevent nuisance, coordinated by provincial governors;
4. Eviction of people in Maximilian park;
5. Stepping up of the fight against smuggling of human beings;
6. Improved security at the port of Zeebrugge;
7. Closer cooperation between Belgium and the UK;
8. Improved security of motorway car parks with fences and cameras;
9. Deterrence campaigns in the countries of origin: highlighting the risks of irregular migration on social media;
10. Convincing arrested transit migrants to apply for international protection in Belgium;

After the N-VA left the federal government, Michel II largely continued the policy with regard to transit migrants. There is still no new federal government, meaning that the policy remains largely unchanged.

³⁰²STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen*, toezichtsonderzoek (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 6-9.

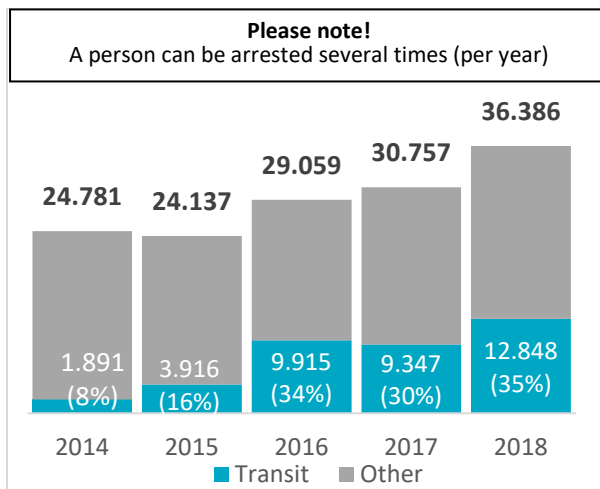
³⁰³ Summary report, *Parl. Doc. Chamber*, October 2018, CRABV 54 COM 971, 11; www.n-va.be/nieuws/negenpuntenplan-tegen-transmigratie; General policy note Asylum and Migration, 26 October 2018, DOC 54 3296/021, 10-11. The plan initially contained 9 points, a tenth point was added at the insistence of CD&V.

6.2 ARREST BY THE POLICE

Transit migrants who travel through Belgium and do not have a valid residence status or valid travel or identity documents, break the law.³⁰⁴ They do not wish to apply for international protection here, or attempt to regularize their stay, and try to avoid contact with the authorities. This does not change the fact that many of them are in need of protection. For many transit migrants, contact with the police is therefore at the beginning of an administrative chain for them. The police ensure compliance with the Immigration Act and may arrest foreign nationals administratively for up to 24 hours when they do not possess the necessary identity or residence documents.³⁰⁵

6.2.1 EVOLUTION

The number of administrative detentions has risen sharply in recent years³⁰⁶, in general, and in the context of transit migration. The share of transit migrants in the number of administrative arrests is also rising. This may be due to the political attention to the phenomenon.



Administrative arrests compared to arrests in the context of transit migration 2014-2018 (Source: IO).

³⁰⁴ Art. 75 Immigration Act.

³⁰⁵ Art. 21, 31, 4th paragraph Police Function Act, art. 74/7 Immigration Act.

³⁰⁶ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 9..

In 2014 transit migration accounted for only 8% of the total number of arrests, in 2018 it was 35%.

In 2018, there were almost 13,000 administrative arrests related to transit migration, 37% more than in 2017. Many transit migrants have been arrested repeatedly³⁰⁷ and released or returned after, for example, having been deported to another EU Member State in application of the Dublin regulation³⁰⁸. The number of arrests appears to have decreased recently. Some actors working with transit migrants think this is due to the decrease in police checks.

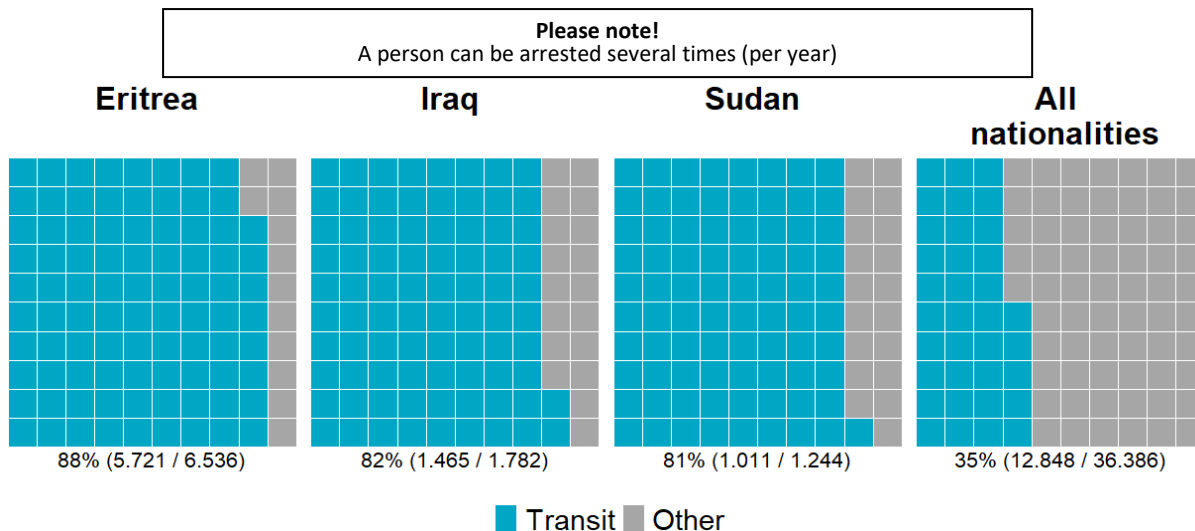
The most common (claimed)³⁰⁹ nationalities among transit migrants arrested in 2018 and the first half of 2019 were Eritreans, Sudanese and Iraqis. The percentage of arrests related to transit migration is much higher for them than for other nationalities³¹⁰, as can be seen in the figure on page 54. In 2018, the level of protection for Eritreans was 92%, for Sudanese 39% and for Iraqis 30%.

³⁰⁷ See for example CALL 8 January 2019, no. 214869.

³⁰⁸ See for example CALL 12 December 2018, no. 213798.

³⁰⁹ Myria reiterates that the nationality declared upon arrest is not necessarily the actual nationality.

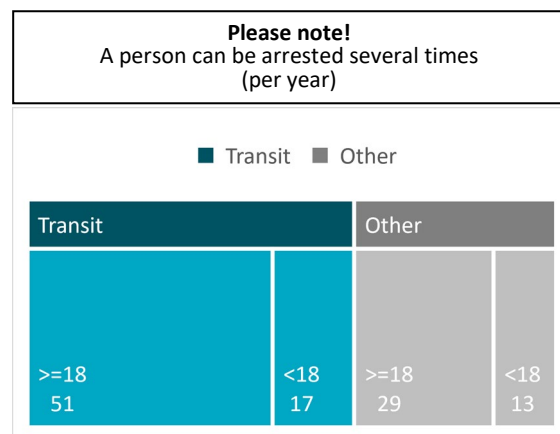
³¹⁰ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018.



General administrative arrests and main nationalities in the context of transit migration 2018 (Source: IO)

It is not unlikely that arrests of persons with a given nationality (e.g. Afghans) are not referred to as transit migrants because these groups are less associated with this phenomenon in the media. With regard to other nationalities, there may be *confirmation bias* among police officers (e.g. Eritreans or Sudanese). The lack of a uniform method of registration of transit migrants, sometimes based solely on whether or not an arrested migrant intends to cross into the UK, makes this highly likely.

An additional element is that certain ethnic groups stay in *safehouses* more frequently than in homeless centres or parks and are therefore smuggled below the radar (see 3.2). Vietnamese transit migrants, who often show up in smuggling cases³¹¹ are not conspicuous on the streets or in interception statistics. An analysis of the figures between 2015 and 2018 shows that when Vietnamese are arrested, it is often in the context of transit migration and a significant proportion of them claim to be minors.

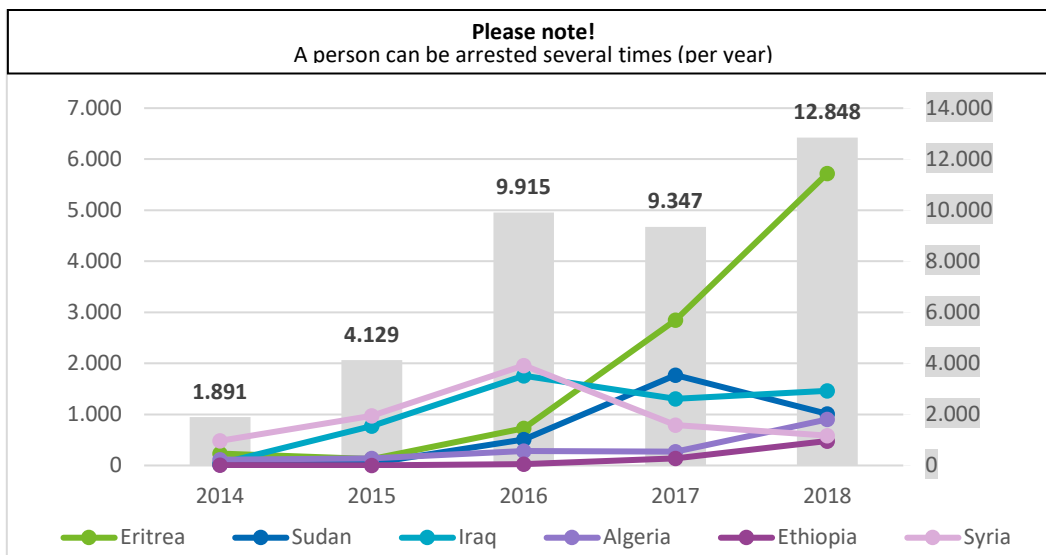


Administrative arrests of Vietnamese in 2018, by (declared) age - in the context of transit migration or for other reasons (source: IO)

In recent years, a striking number of Eritreans and Sudanese have been arrested, and fewer and fewer Syrians. Afghans and Iranians, who were often arrested in 2016³¹², also fall out of the proverbial top 5 of 2018 and 2019.

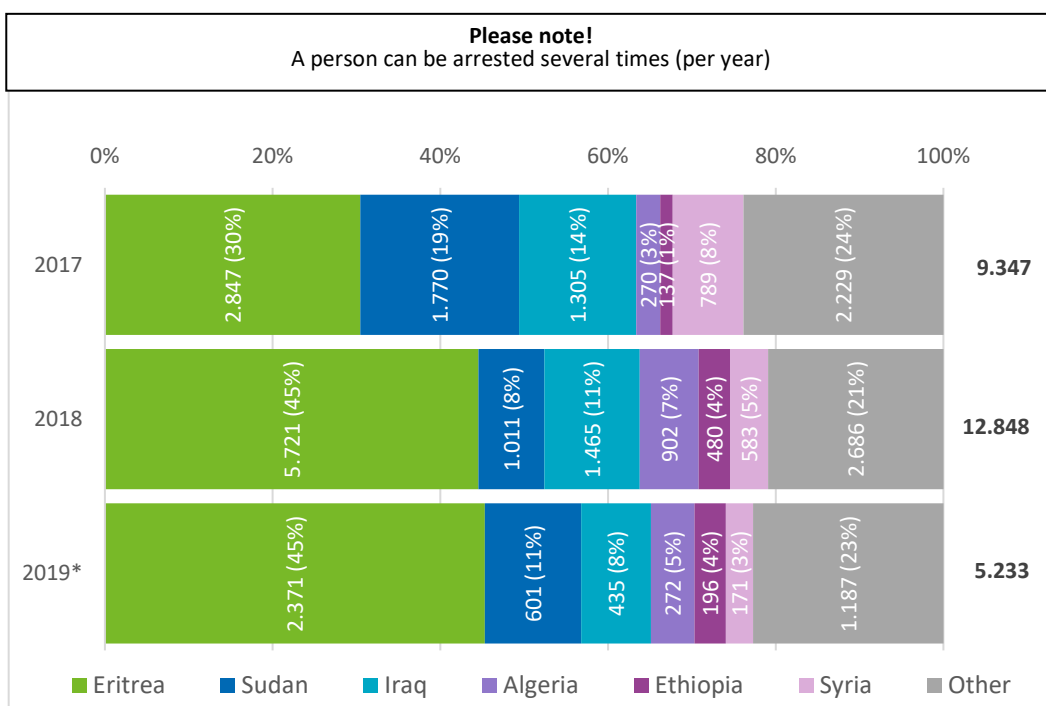
³¹¹ Meeting with local police "Westkust" on 23 May 2019.

³¹² MYRIA, *Migratie in cijfers en in rechten 2019*, (Migration in Rights and Numbers) Annual Report, 2016, 225.



Evolution of administrative arrests of transit migrants of the most common nationalities 2014-2018 (Source: IO).

No downward trend was observed in the first half of 2019. The figures show that Eritreans remain a significant group among arrested transit migrants (see figure below).



Number of administrative arrests of transit migrants per nationality 2017 - Jan-July 2019 (Source: IO).

6.2.2 IDENTITY CHECK: RISK OF ETHNIC AND RACIAL PROFILING

Identity checks cannot be carried out arbitrarily or systematically. Exceptionally, they may be systematic if they are inherent to the controls within the framework of the Immigration Act. The administrative police authorities can in that case, within the limits of their powers, plan identity checks and determine the circumstances in which they must be carried out.³¹³ There must be a valid police reason for an identity check that can be explained to the superiors. The checks must not degenerate into exaggerated and cumbersome police measures.³¹⁴

The police have broad powers, but must be aware that treating persons differently in similar situations without objective and reasonable justification constitutes discrimination³¹⁵ and is therefore in contravention of the principle of equality, among other things³¹⁶.

The use of predictive profiling is in itself a legitimate technique, even if done based on legally protected characteristics such as skin colour, ethnicity, religion, etc. However, this requires an objective or reasonable justification. There must be a legitimate objective to justify a different treatment of persons in similar situations. There must be a reasonable and proportional link between the means deployed and the objective.³¹⁷

It can be inferred from the case law of the ECtHR and of the UN Human Rights Committee that ethnic profiling cannot simply be carried out.³¹⁸ It is in contravention of international, European and nationally established principles such as the rights to equality (as enshrined in the Constitution),

personal freedom and security, and the presumption of innocence.

Transit migrants are generally believed to come from Eritrea, Sudan and the Middle East, among other places. Young men perceived as black or Arabic are sometimes up to twenty times more likely to be subjected to unmotivated police checks.³¹⁹ At the same time, other ethnic groups sometimes slip through the net, meaning that, for example, victims of trafficking in human beings in aggravating circumstances are not always detected (just as the repressive policy itself can be counterproductive, see 6.5). Ethnic or racial profiling is at odds with the fundamental rights of the people checked, is harmful to social cohesion and undermines the legitimacy and effective functioning of the police.

It is not an effective way of fighting criminality and results in many unjustified checks and arrests, without reasonable suspicion that the person in question has committed a crime. People who are not the target of this type of checks, and who commit criminal offences, can carry out their deeds with impunity. It also has a negative impact on the perception of the racial or ethnic minority. By focusing on persons from a certain group, more criminals will be found within this group than in groups that are not subject to checks.³²⁰

In the past, research by Committee P has shown that police officers were insufficiently familiar with the concept of 'ethnic profiling'.³²¹ Myria warns against the adverse effects of ethnic and racial profiling. Myria therefore believes that additional efforts need to be made to educate police forces on ethnic profiling and its impact on the persons

³¹³ Art. 34, §3 Police Function Act.

³¹⁴ Circular letter regarding the law of 5 August 1992 on the police service, 2 February 1993.

³¹⁵ ECtHR 13 March 2006, nos. 55762/00 and 55974/00, Timishev/Russia, §56.

³¹⁶ Art. 10, 11 Constitution.

³¹⁷ ECtHR 23 July 1968, no. 1474/6, Belgian Linguistic Case, §10.

³¹⁸ UN Human Rights Committee 17 August 2009, CCPR/C/96/D/1493/2006, Williams v. Spain.

³¹⁹ MUIŽNIEKS, N./COMMISSIONER FOR HUMAN RIGHTS, *Afrophobia: Europe should confront this legacy of colonialism and the slave trade*, 2017.

³²⁰ Ibid., P. DE HERT and J. VAN CAENEGHEM, "EU richt aandacht op etnische profilering door politiediensten", *Juristenkrant* 2010, 4; AMNESTY INTERNATIONAL, *Etnisch profileren bij de politie. Analyse van het juridisch kader in België*, 2017.

³²¹ STANDING POLICE MONITORING COMMITTEE, *Diversiteitsbeleid met betrekking tot allochtone politieambtenaren* (Diversity policy with regard to immigrant police officers), 2008.

checked, but also on the possible over-representation of certain groups in the interception statistics and the fact that often offences of traffickers in human beings slip through the net when a large part of the resources are deployed on publicly visible transit migrants.

6.2.3 THE ARREST: STEP-BY-STEP DESCRIPTION

The police carry out a check, during which one or more persons in irregular stay are arrested. They are then transferred to the local police station or, until recently, to the Administrative Centre for Transit migrants (ACT). The third stage involves fingerprinting, followed by effective detention in the police cell. Finally, the person is released or transferred, following a decision by the Immigration Office or the Guardianship Service.³²²

Step 1: Detection on the ground

The police regularly carry out actions to arrest transit migrants, for example at large car parks, in Maximilian Park or Brussels-North station. The eviction of migrants from Maximilian park was included in the ten-point plan³²³, but transit migrants still show up in the park or at the North Station. It was recently announced that Maximilian Park would be converted into a children's farm.³²⁴ Of course there are also border controls.³²⁵ In

trucks, around car parks and in the dunes, checks are often carried out by way of modern technologies such as CO₂ meters or drones.

The integrated police do not have a written roadmap for carrying out large-scale checks and subsequent handling.³²⁶ However, a training has been developed to improve the interpersonal relationship between police officers and migrants, in particular refugees.³²⁷ The Maritime Police in Zeebrugge has a team that, on a voluntary basis, receives training on handling transit migrants. The team aims to apply a humane approach to transit migrants³²⁸. The latter is confirmed by many volunteers.³²⁹

A transit migrant may also be discovered unexpectedly during a random check-up or after a transit migrant has been unable to present either a transport ticket or proof of identity on a train. Transit migrants are sometimes arrested for causing a disturbance or as a result of a violent incident. In 2018, more violent incidents involving transit migrants were reported than previously. The number of recorded violent incidents, which the police claim are linked to transit migration, remains rather limited however.³³⁰

³²²VAST COMITÉ VAN TOEZICHT OP DE POLITIEDIENSTEN (Permanent Oversight Committee on the Police Services), *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen*, toezichtsonderzoek (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 2-3, 19-34.

³²³ The former State Secretary tweeted about one of these actions (translation): "This morning 14 people were arrested in Maximilian Park and 9 in the North Station, 3 declared minors. According to police info there are hardly any people in the park. #opkuisen" (#clean-up), see: R ARNOUDT, "Theo Francken haalt zich digitale woede op de hals met "#opkuisen"", *VRT NWS* 14 September 2017.

³²⁴ K. HENDRICKX, "Maximiliaanpark ruimt baan voor open Zenne", *Bruzz* 25 September 2019.

³²⁵ For example, 186 people in irregular stay were intercepted at the Eurostar, see: <http://rapportannuel.policefederale.be/veiligheid/migratie-trafiek-personen-goederen/>.

³²⁶ STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen*, (The control and detention of transmigrants by the police as a result of large-scale administrative arrests), 2019.

³²⁷ Information received from the Permanent Oversight Committee of the Local Police on 7 November 2019.

³²⁸ Meeting with the Maritime Police on 24 May 2019.

³²⁹ For example, transit migrants are referred to volunteers; meeting with the volunteers of Bruges and Pastor Maréchal on 6 September 2019.

³³⁰ 3 incidents were recorded in 2014, 9 in 2015, 8 in 2016, 5 in 2017 and 10 in 2 months in 2018, see: Q&A, Chamber 2017-18, 8 October 2018, 54/171, 270-71 (Question no. 2947 B. VERMEULEN).



Port trespassing

A number of transit migrants are arrested when they trespass the port of Zeebrugge.

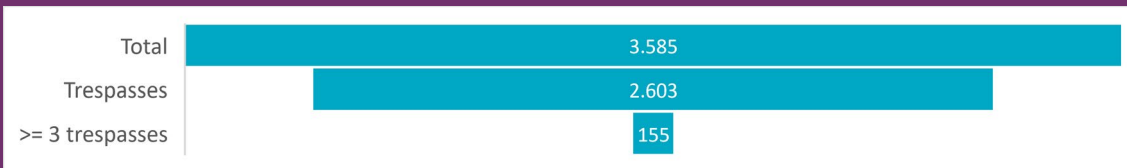
In order to limit port trespassing and the damage it causes, and to punish it more stringently, climbing into the port area was made punishable. A person convicted of this may be sentenced to a fine and/or imprisonment of up to 2 years. This applies regardless of whether damage is caused.

Myria believes that the accompanying harsh sentences are disproportionate, and illustrate the criminalisation of transit migrants (see 6.5). However, the penalty varies according to whether there were aggravating circumstances.

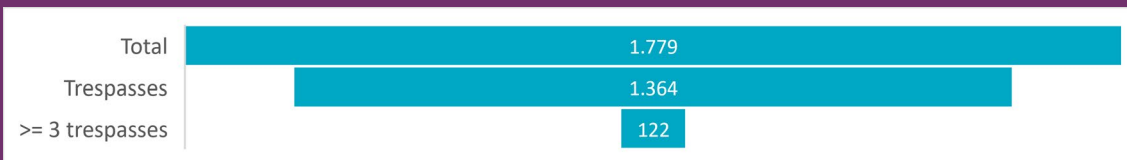
Aggravating circumstances may include the fact that trespassing has become a regular habit, that it is committed at night, by two or more persons, with fraudulent intent or intent to damage, by force or threat, or if critical infrastructure has been entered.³³¹

The prosecution of this crime usually follows the procedure described below. For the 1st and 2nd time, the offenders will be informed that they are committing a misdemeanor. For the third time, a summons is issued. For the 3rd time, they are brought before the examining magistrate.³³² In 2016 (the law took effect in June!) and 2017, **70** people were prosecuted each year. In 2018, **155** people were prosecuted, more than double the figure for 2017. Up to May 2019, **87** people had been prosecuted. There therefore appears to be an increasing number of prosecutions for port trespassing. Whether this is due to an increase in the number of checks or an increase in the number of port infiltrators is a matter for further investigation.

The figures below on arrests in Zeebrugge show that the majority of transit migrants who were arrested by the Maritime Police in Zeebrugge in 2018 and 2019 were caught entering the port area. A small number of them were caught more than twice. A number of migrants prosecuted on the basis of this crime spent a year in prison.



Arrests in the context of transit migration, part of which involved an official report for port trespassing, and part of which involved more than two official reports for port trespassing. (2018, Zeebrugge. Source: SPN Zeebrugge)



Arrests in the context of transit migration, part of which involved an official report for port trespassing, and part of which involved two official reports for port trespassing. (Jan-Jun 2019, Zeebrugge. Source: SPN Zeebrugge)

³³¹ Art. 546/1-546/3 Criminal Code Persons may be punished for entering or infiltrating a port facility or immovable or movable property within the boundaries of a port, without being authorised or permitted to do so, introduced as a result of the draft law amending the Criminal Code with a view to making it a criminal offence to enter or infiltrate a port facility or immovable or movable property within the boundaries of a port without being authorised or permitted to do so, *Parl. Doc. Chamber, 2015-2016, 54-1664/5*. Previously, a number of legislative proposals had already been initiated on this subject.

³³² E-mail from former deputy public prosecutor Frank Demeester of 11 June 2019; meeting with the Maritime Police on 24 May 2019.

Step 2: Transfer to the Police station (or the Administrative Centre for Transit migrants (ACT))

In 2018, a growing number of local policy makers were saying that transit migration was insufficiently addressed. Police forces arrested migrants, but the Immigration Office often subsequently released them with an order to leave the territory. To facilitate the subsequent examination by the police and the Immigration Office, the ACT was opened in a wing of the centre 127bis. Initially, the former State Secretary intended for all arrested transit migrants to be transferred to this centre and detained for up to 24 hours until the further process was decided on. The ACT was supposed to be staffed by representatives of the federal police and the Immigration Office³³³ Children or families with children would not be transferred to the ACT, but minors who are close to being young adults would. For the latter category, the Police contacted the Guardianship Service (see 8.2).

In practice, the ACT was only used at the request of intercepting police forces. Less and less use was made of it in 2018 and it was closed in December 2019.³³⁴ The make-up of the police teams changed all the time, although the police tried to ensure the team leaders stayed the same.³³⁵ The Immigration Office acknowledged that it was not present all the time. As soon as transit migrants were present, a staff member of the Immigration Office arrived as soon as possible to help with the administrative procedure, such as guaranteeing the right to be heard.³³⁶ The vast majority of transit migrants were still transferred to the local police station close to where they had been arrested, during the time the ACT was open.³³⁷

³³³ Meeting with the Immigration Office on 9 July 2019.

³³⁴ R. DIERICKX, "Nationaal afhandelcentrum voor transmigranten na 15 maanden al dicht", *HLN* 19 December 2019.

³³⁵ Meeting with the Immigration Office on 18 June 2019.

³³⁶ Meeting with the Immigration Office on 8 October 2018.

³³⁷ E-mail from the Immigration Office dated 12 November 2019.

As soon as the construction of this centre was announced, Myria drew the attention of the authorities to the need to guarantee the fundamental rights of those arrested and the protection of victims of trafficking and smuggling of human beings. Myria made several attempts to visit the ACT in the context of its legal missions³³⁸. Other bodies such as the UNHCR did the same. However, only a few independent bodies have (had) access to the ACT. The General Inspectorate of Police Services (AIG) was able to visit the centre³³⁹, although the visit was long before the opening. Various members of parliament also visited the centre. Myria's requests to visit the ACT were always refused, partly because the ACT is managed by the police and not by the management of the 127bis centre where it is located. The ACT was said to be the equivalent of a local police station. Myria then asked the Minister of the Interior to visit the ACT. This was also refused.³⁴⁰ Myria found this regrettable, all the more so since there is a considerable lack of clarity about the working method of the centre in practice, among other things with regard to the exercise of the right to be heard, the right to information, etc.³⁴¹

³³⁸ Indeed, Myria is legally tasked with promoting the fight against trafficking and smuggling of human beings, as well as ensuring respect for the fundamental rights of foreign nationals and informing the authorities about the nature and scale of migratory flows, in accordance with the Law of 15 February 1993 establishing a Federal Centre for the analysis of migratory flows, the protection of the fundamental rights of foreign nationals and the fight against trafficking in human beings.

³³⁹ The AIG is tasked with checking forced removals. It is authorised to carry out its checks at all places where removals are enforced. Myria had contact with the AIG via e-mail in March 2019.

³⁴⁰ In the ACT, transit migrants were detained under art. 74/7 of the Immigration Act and Art. 21 of the Police Function Act; Myria received a letter from Minister of the Interior Pieter De Crem on 14 February 2019 stating that Myria was not authorised to visit the ACT. The ACT is an autonomous police centre managed by the Federal Police which provides support to the first line services of the integrated police.

³⁴¹ Myria reiterates its recommendation concerning the implementation of a national prevention mechanism in the context of the OPCAT. For more information, see MYRIA, *Migratie in cijfers en in rechten 2019*, (Migration in Rights and Numbers) Annual Report, 2016, 237-238.

Moreover, there are no data available on e.g. the occupancy of this centre.

Myria recommends the establishment of additional guarantees concerning the rights of arrested transit migrants with regard to the right to be heard, access to a lawyer, taking into account vulnerability, right to information and suchlike.³⁴² Myria recommends that more efforts be made to raise awareness and train local police forces about the procedures to be followed and the fundamental rights of transit migrants when they are arrested. It was already unclear to Myria to what extent the ACT offers added value for the arrested persons, the police services involved or the Immigration Office. The closure of the ACT therefore appeared to be the right decision.

Step 3: The police actions prior to detention

Before a transit migrant is actually detained in a police cell, their identity details and age are checked. This phase is crucial for the identification of UMs. If there is doubt about a person's age, an age assessment must be carried out by the Guardianship Service (see 8.4).

Fingerprints are taken and a body search is performed. These fingerprints are not uploaded into the Eurodac database (see 6.4.1).³⁴³ The General National Database (ANG) is consulted. The consultation is to see whether the arrested transit migrant has a criminal record.³⁴⁴

When there is a suspicion of smuggling of human beings, the mobile phones of transit migrants are inspected. This may be because a

group of transit migrants are found together or because there are other indications. Some police units systematically inspect mobile phones.³⁴⁵ A mobile phone can be confiscated in accordance with Article 35 of the Code of Criminal Procedure (CCP). A mobile phone in aircraft mode can then be inspected by an officer of the judicial police³⁴⁶ and results from the regular confiscation of the device, and does not require the intervention of an examining magistrate.³⁴⁷ Myria reiterates the importance of the right to private life according to Article 8 ECHR. Everyone has the right to private correspondence³⁴⁸, even persons who are detained.³⁴⁹ The inspection of mobile phones must be handled sensitively and systematic inspection without permission should not be allowed.

The first-line police services must inform a suspected victim of serious forms of smuggling of human beings of the protection procedure for victims of smuggling of human beings.³⁵⁰

In addition, the arrested person must be informed of other rights he or she has³⁵¹:

- Explanation for the reasons for the arrest (art. 5.2 ECHR);
- A trusted person may be notified (Article 33quater Police Function Act);
- Free medical consultation (Article 33quinquies Police Function Act);
- Free food and water (Article 33sexies Police Function Act);
- Use of sanitary facilities (Article 33sexies Police Function Act);

³⁴²MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 54-57.

³⁴³ Art. 17(3), 2nd paragraph, Eurodac Regulation.

³⁴⁴ STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 27.

³⁴⁵ Ibid., 26.

³⁴⁶ Art. 39bis, §2 CCP.

³⁴⁷ Cass. 11 February 2015, P.14.1739.F.

³⁴⁸ ECtHR 6 December 2012, no. 12323/11, Michaud/France, §90, §53.

³⁴⁹ ECtHR 25 March 1983, no. 5947/72 and others, Silver and others/United Kingdom, §84; ECtHR 11 January 2011, no. 15672/08 and others, Mehmet Nuri Özen and others/Turkey, §41, ECtHR 12 February 2013, no. 152/04, Yefimenko/Russia, §144.

³⁵⁰ Art. 3.2 Circular of 3 December 2016; see 9.3.

³⁵¹ M. BEYS, *Quels droits face à la police? Manuel Juridique et pratique*, Brussels, 2014.

Step 4: Actual imprisonment

The imprisonment as a result of targeted actions is usually in collective cells. The cells are not always clean or adequately furnished. Men and women are however detained separately.³⁵²

Myria reiterates the importance of respecting the rights of detained migrants, such as the right to be heard and to be able to provide all elements that could be relevant before a decision is taken by the Immigration Office, the right to contact a person of trust and the right to be informed of your rights as an arrested person.³⁵³

Step 5: Release or transfer after decision of the Immigration Office or Guardianship Service³⁵⁴

Following the arrest, the police send an administrative report to the Immigration Office. In principle, this includes information on the foreign national's identity, any family life, the circumstances of the arrest, any fear they may have of being returned to their country of origin, the language they speak, possible indications relating to trafficking in human beings and information relating to medical needs.³⁵⁵ Myria stresses that arrested transit migrants must be allowed to provide all the relevant elements. Vulnerable transit

migrants must also be identified before any decision to detain them is taken.

On the basis of this report and the information the Immigration Office may already have, the administrative arrest may result in the issuing of one (or more) decision(s), with or without detention (for more information on this, see 6.3). The consequences of the administrative arrest will depend on the evaluation of the case and the availability of spaces in the detention centres.³⁵⁶

6.2.4 TREATMENT OF TRANSIT MIGRANTS BY THE POLICE

Although transit migrants are often treated with respect by the police, there is also a real problem of sub-standard police action, including police violence. Where a person is deprived of their liberty or, in general, is confronted with police officers, the use of physical violence against them, when not strictly necessary as a result of their conduct, constitutes a violation of human dignity and, in principle, a violation of Article 3 ECHR.³⁵⁷

For example, two police inspectors were convicted on appeal for 'theft by a civil servant, using violence or threats'. Following a check, a transit migrant was beaten, stripped of his shoes, mobile phone and money and left

³⁵² STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen*, toezichtsonderzoek (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 29.

³⁵³ MYRIA, *Politie en transitmigranten. Waardigheid respecteren en ernstig onderzoek voeren naar geweldplegingen* (Police and transit migrants. Respecting dignity and conducting serious investigations into acts of violence), 2019; MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017.

³⁵⁴ For more information on the intervention of Guardian Service with regard to minor transit migrants, see 8.2.

³⁵⁵ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 58.

³⁵⁶ MYRIA, *Verslag contactvergadering internationale bescherming* (Report contact meeting on international protection), 17 October 2018, 3.

³⁵⁷ ECtHR [GC] 28 September 2015, no. 23380/09, Bouyid/Belgium, §88; ECtHR 6 April 2000, no. 26772/95, Labita/Italy; Myria highlights the fact that actions such as applying handcuffs or over-tightened plastic strips, the subject of a complaint received by Committee P (report, §47), or handcuffs that stay on too long, may meet this definition. This practice can lead to serious, and sometimes irreversible, damage, with Médecins du Monde reporting a loss of sensitivity in a patient. (Médecins du Monde, op. cit., p. 14) (Patrick CHARIOT, *En garde à vue. Médecin dans les locaux de police*, Paris, La Fabrique, 2005, p. 105, citing Chariot P, Ragot F, Authier F-J, Questel F, Diamant-Berger O., "Focal neurological complications of handcuff application", *J Forensic Sci*, 2001 ; 46(5) :1124-1125); art. 398 et seq. CCR.

miles away in a forest. There was no legal reason for this treatment.³⁵⁸

The NGOs Médecins du Monde and Humain have reported various incidents. Of the 440 male migrants interviewed by Médecins du Monde in the summer of 2018, 51 said they had been victims of 101 violent incidents. They reported physical or psychological violence, such as kicks, punches or baton blows, being forced to undress in the presence of other detainees or police officers of a different sex, sleep or food deprivation, strip searches without a clear explanation. A large proportion of the migrants who reported this were very young: 70% were younger than 25, 27.5% of those who made witness statements about violence were minors. Médecins du Monde states that minors did not receive treatment appropriate for their age and vulnerability. Some of them reported serious physical violence and the doctors of Médecins du Monde diagnosed injuries in them.³⁵⁹ The non-profit association Humain collected dozens of similar witness statements.³⁶⁰

Volunteers from Zeebrugge filed a complaint with Committee P at the beginning of 2016 when, after their arrest, transit migrants were stripped of all their personal belongings, which were subsequently collected by the garbage truck. Although Committee P indicated that this was a regrettable incident and that there would be better cooperation

with the volunteers, the latter stated that things were still being thrown away subsequently.³⁶¹

A number of police forces mark arrested transit migrants with serial numbers using a hard to erase alcohol based marker on their skin.³⁶² Myria believes that this approach dehumanises migrants and finds this practice regrettable, which has already been indicted in the Čonka case.³⁶³

Committee P concluded in its report of February 2019 that the police generally treat transit migrants correctly and humanely. Few complaints have been filed against them (5 for the period 2017 to the end of 2018). No formal complaint has been lodged with the AIG. Some local units also indicated that they had received complaints, but these were generally labeled to be unfounded. They therefore do not have proof that could lead to the conclusion that the police use unlawful violence against transit migrants.³⁶⁴

Nevertheless, Committee P made a number of observations that Myria finds alarming, including the following: detention sometimes exceeded the legal maximum of 24 hours because the Guardianship Service or the Immigration Office had not yet taken a decision, with peaks of up to 35 hours. Moreover, the migrants were often

³⁵⁸ STANDING POLICE MONITORING COMMITTEE, *Rechterlijke beslissingen betreffende leden van politiediensten: 2015, 2016 en 2017 & politiegeweld: 2013 tot 2017*, (Judicial decisions concerning members of police forces: 2015, 2016 and 2017 & police violence: 2013 to 2017), 2019, 97-98; X, "Agent veroordeeld voor mishandeling transmigrant patrouilleert nog altijd in Noordstation", *Bruzz* 6 August 2019.

³⁵⁹ MEDECINS DU MONDE, *Politiegeweld tegen vluchtelingen en migranten onderweg in België. Een kwantitatief en kwalitatief onderzoek* (Police violence against refugees and migrants travelling through Belgium. A quantitative and qualitative investigation), 2018.

³⁶⁰ HUMAIN NON-PROFIT ASSOCIATION, *Rapport over fysiek en verbaald geweld door Belgische politiediensten ten aanzien van mensen op de vlucht* (Report on physical and verbal violence by Belgian police forces against people fleeing), 2018. The witness statements mentioned beatings, deprivation of sanitary facilities, even for babies, among other things.

³⁶¹ Meeting with the volunteers of Bruges on 6 September 2019.

³⁶² STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen*, toezichtsonderzoek (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 22-23.

³⁶³ ECtHR 5 February 2002, no. 51564/99 Čonka/Belgium.

³⁶⁴ STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen*, toezichtsonderzoek (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 11.

handcuffed for no valid reason.³⁶⁵ In addition, information leaflets available on the police intranet in almost 40 languages are rarely consulted or distributed.³⁶⁶ Migrants are also insufficiently informed about their right to medical assistance and the right to inform a person of trust of their arrest. There is also insufficient consideration of the directives on trafficking and smuggling of human beings and the protection status of victims of trafficking and smuggling of human beings. The police sometimes ask the migrants for their permission to confiscate or inspect their telephone, asking them to sign a form drawn up in Dutch or English, without any further verbal explanation.³⁶⁷

These investigations show that various rights of transit migrants have been violated. For example, the right not to be tortured or subjected to inhuman or degrading treatment, the right not to be arbitrarily arrested in accordance with the forms and duration laid down by law and the right to be informed in an intelligible language in the short term of the reason for deprivation of liberty³⁶⁸ are not always respected. This is also the case for the right to be informed, in an understandable language, of the rights of every detained person (such as their right to inform a person of trust, medical assistance, rules on possible coercion, and maximum duration of detention)³⁶⁹. The right of access to sanitary facilities³⁷⁰ and not to be subjected to

detention conditions contrary to human dignity³⁷¹ were not always respected either.³⁷²

Myria highlights the fact that the findings of the NGOs and of Committee P do not cancel each other out. Committee P does not doubt the veracity of most of the cases reported by the NGOs, but cannot verify them as no complaint has been lodged. Moreover, the presence of Committee P in (only large-scale) police operations can have an influence on the actions of police officers. In addition, many migrants indicate that they do not wish to testify about incidents, for fear of reprisals or because they do not see any point in doing so. Myria believes that the limited amount of formal complaints is due to the precarious situation in which transit migrants find themselves. It therefore recommends that the authorities be proactive in investigating police violence on transit migrants, as the ECtHR³⁷³ prescribes.³⁷⁴

³⁶⁵ Ibid., 58; MYRIA, *Politie en transitmigranten. Waardigheid respecteren en ernstig onderzoek voeren naar geweldplegingen* (Police and transit migrants. Respecting dignity and conducting serious investigations into acts of violence), 2019.

³⁶⁶ STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 26.

³⁶⁷ MYRIA, *Politie en transitmigranten. Waardigheid respecteren en ernstig onderzoek voeren naar geweldplegingen* (Police and transit migrants. Respecting dignity and conducting serious investigations into acts of violence), 2019, 3.

³⁶⁸ Art. 12 Judicial Code and art. 5 ECHR.

³⁶⁹ Art. 33ter Police Function Act.

³⁷⁰ Art. 33sexies Police Function Act.

³⁷¹ Art. 3 ECHR.

³⁷² MYRIA, *Politie en transitmigranten. Waardigheid respecteren en ernstig onderzoek voeren naar geweldplegingen* (Police and transit migrants. Respecting dignity and conducting serious investigations into acts of violence), 2019.

³⁷³ The obligation to conduct an effective investigation is based in particular on the procedural part of Articles 2 (right to life) and 3 (prohibition of torture, inhuman and degrading treatment) of the ECHR. See also ECtHR [GC] 28 September 2015, no. 23380/09, Bouyid/Belgium, §§114-123; ECtHR [GC] 13 December 2012, no. 39630/09, El-Masri/Former Yugoslav Republic of Macedonia §§182-185; ECtHR 16 July 2015, no. 20579/12, Ghedir and others/France, §§129-131; ECtHR [GC] 24 March 2011 no. 23458/02, Giuliani and Gaggio/Italy, §§298-306; ECtHR [GC] 15 May 2007, no. 52391/99, Ramsahai and others/Netherlands, §§321-325.

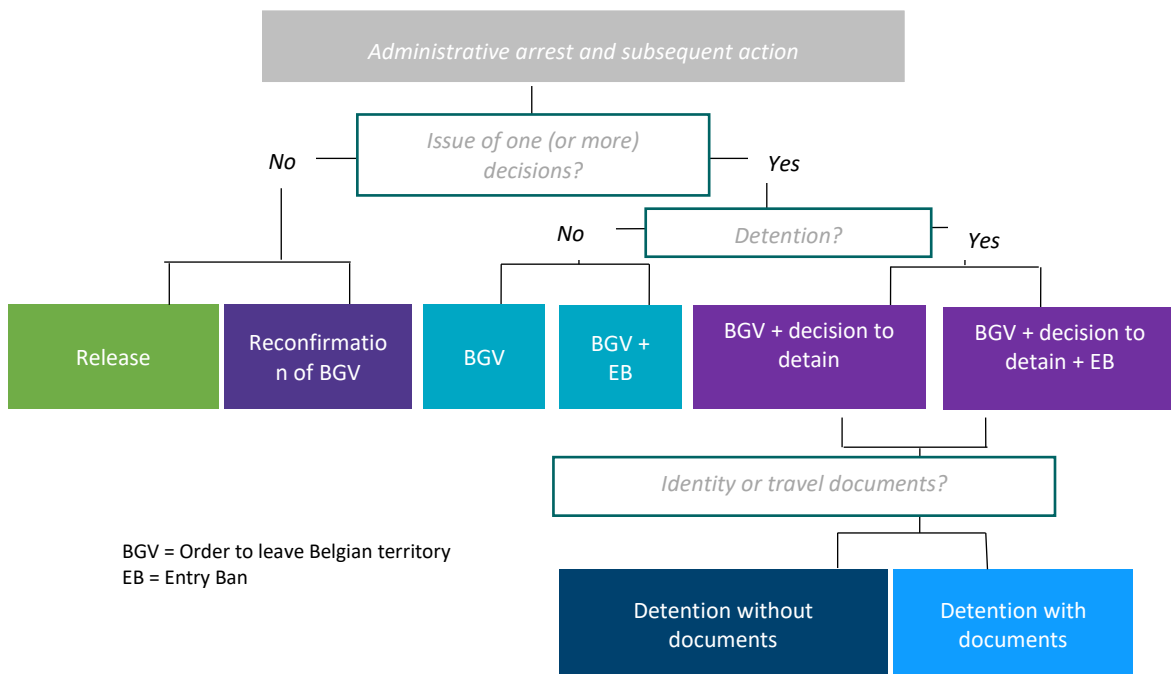
³⁷⁴ MYRIA, *Politie en transitmigranten. Waardigheid respecteren en ernstig onderzoek voeren naar geweldplegingen* (Police and transit migrants. Respecting dignity and conducting serious investigations into acts of violence), 2019.

6.3 ADMINISTRATIVE CONSEQUENCES OF ARRESTS

The police contact the Immigration Office if they arrest a transit migrant who does not have the required travel or residence documents. For persons claiming to be unaccompanied minors, a specific procedure is initiated (see 8.2).

The Immigration Office then investigates what action they should take. The Immigration Office may decide to release the person in question without further action, detain them in a detention centre, issue an order to leave the territory (BGV) or reconfirm an earlier order to leave the territory. The Immigration Office does not consider a reconfirmation as a (contestable) administrative decision against which an appeal can be lodged.³⁷⁵

In the event of an order or reconfirmation of an earlier order, a period may be granted within which the person in question has to leave the country.³⁷⁶ An order to leave the territory may or may not be accompanied by a detention or removal order.³⁷⁷



³⁷⁵MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 13.

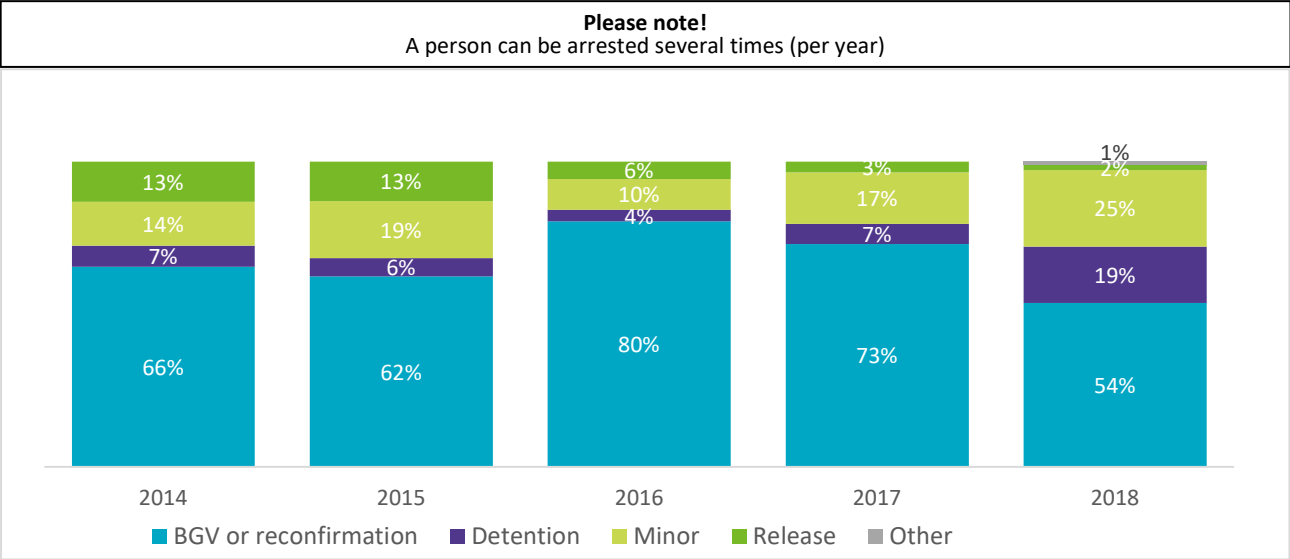
³⁷⁶ Pursuant to art. 74/14, §3 of the IA, it may be decided that no period is given for leaving the territory.

³⁷⁷ Art. 74/14 Immigration Act.

Generally, after several orders to leave the territory have been issued to a transit migrant, they can be issued with an entry ban. This does not prevent the person in question from applying for and being granted international protection.³⁷⁸ The Immigration Office does not always issue a BGV. Sometimes a decision identifying the responsible Member State under the Dublin III Regulation (see 6.4.1) is issued without a BGV.

regarding the person. The authorities of the countries of origin who are also involved in the identification procedure.³⁷⁹

Transit migrants are sometimes released due to a lack of space in the detention centres or because the permitted duration of 24 hours will be exceeded before a decision to detain can be taken by the Immigration Office or because the Immigration Office aims to have a balanced distribution of nationalities in the detention centres.³⁸⁰



Administrative follow-up of detention 2014-2018 following interceptions of transit migrants (Source: IO).

The diagram on page 64 shows the administrative route taken when a person with irregular status is arrested by the police. A distinction is made between migrants who have identification or travel documents and those who do not. Having these documents or not has no impact on the fundamental rights of the person in question or on the maximum period of detention. For persons who do not have any travel or identity documents, as is the case with transit migrants, an identification procedure will be initiated. The Immigration Office tries to ascertain the nationality and obtain the necessary travel documents.

places were made available for transit migrants, in the detention centres 127bis and CIB Bruges. Logically, the number of available places for other types of people decreased, such as migrants with a criminal record. A number of them were released when this Action Plan came into force, prompting public outcry.³⁸¹ These places are no longer used

Depending on the nationality of the person in question, this can be done in various ways. Sometimes it is based on the dialect, or on other available documents or information

³⁷⁹ See also Circular letter on the identification of irregularly staying foreign nationals, 2009 and MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 63-69.

³⁸⁰MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 14.

³⁸¹ H. CATTEBEKE, "Wel degelijk criminelen onder de vrijgelaten sans-papiers", *De Standaard* 17 September 2018.

³⁷⁸ Art. 74/11 Immigration Act.

exclusively for the detention of transit migrants.

The policy measures taken in recent years have led to a turnaround. An agreement was also reached within the Michel I government on creating additional places in detention centres. This does not specifically target the detention of transit migrants.³⁸²

As can be seen from the graphs on page 65, far fewer arrested transit migrants are released (with or without an order to leave the territory or confirmation of an earlier order) and more and more people are effectively detained.

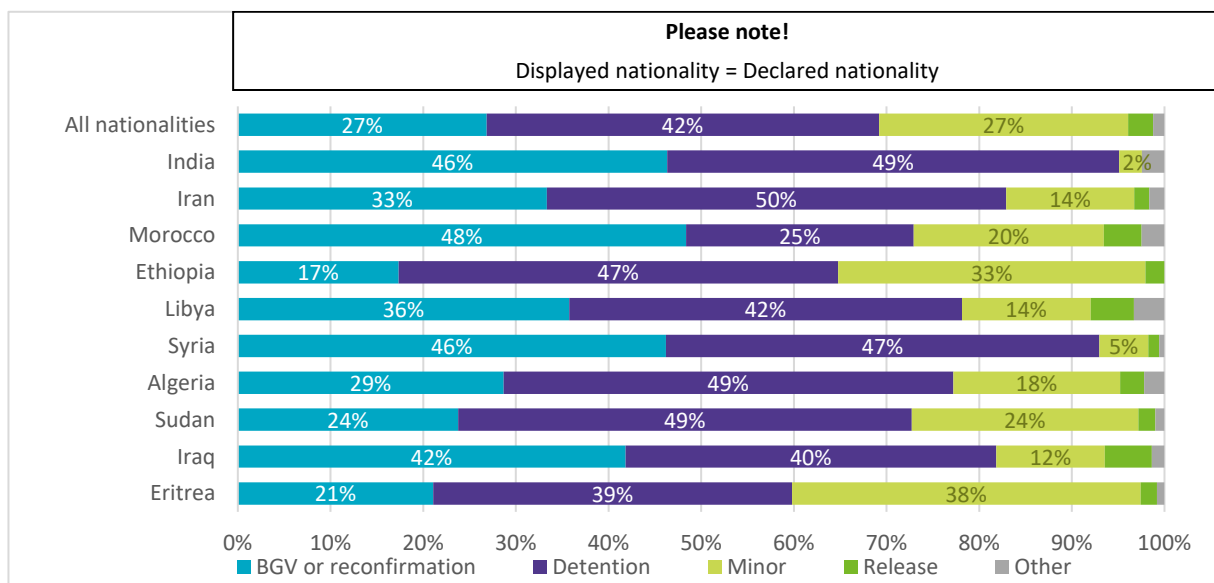
This trend continued strongly throughout the

the issue or reconfirmation of an order to leave the territory.

Nearly one fifth of the intercepted individuals were detained in a detention centre. In the first half of 2019, this figure doubled and 42% of the registered interceptions resulted in detention.

A troubling trend is the increase in the number of declared (accompanied or unaccompanied) minors released on these grounds.

When we examine the figures on the administrative follow-up of transit migrants in more detail, it appears that one quarter of them were arrested transit migrants in 2018.



Administrative follow-up to detention of transit migrant by nationality in Jan-July 2019

first half of 2019. In analysing the figures, it is important to remember that an individual was sometimes arrested and detained several times in succession or received several orders to leave the territory. In 2018, more than half of the arrests of transit migrants resulted in

Since 2016, the number of detentions following (registered) transit migration related arrest has increased tenfold. This figure should be qualified, as the phenomenon has been given more and more attention in recent years. Nonetheless, there seems to be a clear trend in how the aforementioned policy is implemented by the Immigration Office. A closer look at the figures for the first half of 2019 reveals that there are various discrepancies depending on the nationality of the transit migrants. A closer look at the figures for the first half of 2019 reveals that there are various discrepancies depending on the nationality of the transit migrants.

³⁸² Concise report, *Parl. Doc.* Chamber, October 2018, CRABV 54 COM 971, 11. The Masterplan for Detention Centres envisages increasing the number of places in detention centres to 1066 by 2021. It has already been decided to provide an additional 446 places, the intention is currently to provide around 1100 places, said Minister De Block in De Ochtend on 19 December 2019, <https://radio1.be/programma/de-ochtend/radioitem/maggie-de-block-er-moeten-meer-gesloten-terugkeercentra-komen/9224>.

Nearly half of the interceptions of transit migrants with Sudanese, Algerian, Syrian, Iranian and Ethiopian nationality resulted in immigration detention in the first half of 2019. This percentage is lower for Eritreans, Iraqis and Libyans. In addition, it is noteworthy that persons of Moroccan nationality appear to be detained less often than, for example, transit migrants of Indian nationality.

Myria has not received any figures from the Immigration Office regarding the average detention time of transit migrants to further analyse this phenomenon.

DETENTION OF TRANSIT MIGRANTS: ADMINISTRATIVE PRACTICE THAT VIOLATES FUNDAMENTAL RIGHTS?

Outline of the situation

With a view to effectively tackling transit migration, the approach of the Immigration Office has changed several times in recent years. The implicit application for international protection was introduced (see 6.4.2) and various practical changes were also made with regard to the detention of transit migrants.

As mentioned above, not all transit migrants that are arrested by the police are also detained in a detention centre. The Immigration Office assesses whether that is advisable on a case-by-case basis. If the Immigration Office deems it advisable, the arrested transit migrant is transferred from the police station of the place where he or she was arrested to a detention centre.³⁸³ Generally, depending on the place of interception, the centres where they are brought to are CIB³⁸⁴ and 127bis (apart from the family units).

On average, transit migrants took up between one third and one quarter of the available places in all detention centres for the whole period 2018 and 2019.³⁸⁵

One problem that the authorities claim to face is the fact that they often have very little information on the transit migrants that are arrested. They are rarely in regular stay, often do not carry identity documents and do not wish to apply for international protection or return to their country of origin. They often refuse all cooperation with the authorities. As a result, the nationality of the persons in question is unclear in many cases. Sometimes it turns out that his or her fingerprints have been taken in another EU Member State, but the Immigration Office is unable to obtain an agreement from the competent Member State to a Dublin transfer in the short term. This problem is also discussed in the interim report of the Bossuyt Commission.³⁸⁶

There is no separate legal basis whereby transit migrants can be placed in detention. In deciding whether to detain transit migrants, the government therefore applies the legal framework developed for the detention of third country nationals.³⁸⁷

The period of 24 hours within which a migrant can remain detained before the Immigration Office has to take a decision is considered too short by the Immigration Office, among other things due to a lack of delegation to the representative of the Minister or State Secretary (which has been adapted since then, see 6.4.2), following which a number of new types of decisions have been introduced.

³⁸³ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 23.

³⁸⁴ Detention centre in Bruges.

³⁸⁵ M. TEMMERMAN, "Eén jaar actieplan transmigranten: wat leverde het tot nog toe op?", *VRT NWS* 11 May 2019.

³⁸⁶ COMMISSION FOR THE EVALUATION OF POLICY ON VOLUNTARY RETURN AND FORCED REMOVAL OF FOREIGN NATIONALS, *Interim report*, 22 February 2019, 21-23.

³⁸⁷ These could be, for example, provisions transposing the Return Directive or the Dublin III Regulation.

Methodology of the IO

When the Immigration Office has to take a decision regarding the administrative follow-up to the arrest of a transit migrant, it will often take a decision to detain the person in question on the basis of the (limited) information available to it at the time.

Order to leave the territory with detention pending removal (annex 13septieslight)

The Immigration Office sometimes issues an order to leave the territory with detention pending removal, whether or not after a transit migrant has been repeatedly arrested (the so-called 'annex 13septieslight').³⁸⁸ This is *de facto* a temporary decision, but *de jure* an enforceable decision: the obligation to return is imposed.³⁸⁹

However, this decision seems to be mainly aimed at detention, irrespective of the prospect of removal, as it states that removal is not yet possible as the border to where the person will be returned cannot yet be determined.³⁹⁰ Unlike a regular annex 13septies, it is unclear to which border the person concerned will be returned or when the removal can take place.

³⁸⁸ See, for example, CALL 2 July 2018, no. 206419; visit to the CIB on 24 May 2019; This document is different from a 'regular' 13septies in the sense that no border to which the person in question will be returned has yet been determined.

³⁸⁹ The obligation to return pertains to the country of origin or a country of transit in accordance with Community or bilateral readmission agreements, or to a third country to which the person in question decides voluntarily to return and where he or she is authorised or admitted to stay.

³⁹⁰ See for example CALL 29 May 2019, no. 222 085: "L'intéressé n'a pas de document et donc la nationalité de l'intéressé doit être déterminée. La frontière à laquelle l'intéressé sera reconduit sera déterminée dans une décision établissant la frontière après que la nationalité ait été établie et que le risque de violation de l'article 3 de la CEDH ait été examiné. Un recours suspensif peut être introduit contre cette décision au CCE."

Annexes X1, X2 and X3

Persons who have applied for international protection in another Member State but who do not do so in Belgium can be detained.³⁹¹ The Dublin III Regulation applies when a (transit) migrant is detained in the context of an application to transfer the person concerned.³⁹²

With regard to these persons, usually after the initial issue of an Annex 13septieslight, a so-called Annex X1 is taken in application of Article 24(1) and Article 28(2) of the Dublin III Regulation. This is if there appeared to be a *hit* EURODAC (see 6.4.1) "to determine the responsible Member State " or even later, possibly after an exemption, a so-called Annex X2, "to transfer to the responsible Member State", in application of Articles 26(2) and 28(2) Dublin III Regulation. Before the delegation decree was amended³⁹³, these decisions based directly on the Dublin Regulation had to be signed by the responsible State Secretary or Minister.

It is also possible, whether or not after suspension of a possible annex 13septieslight, that a (transit) migrant will be provided with another reason for detention, if more information is available on the person concerned under the Dublin III Regulation. This could be, for example, a 'decision to detain in a particular place in order to determine the responsible Member State' (sometimes referred to as Annex X1) or, after a responsible Member State has been determined, usually a 'decision to transfer to the responsible Member State with a decision to detain in a particular place with a view to

³⁹¹ The Law of 8 May 2019 amending the Law of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals introduced art. 51/5/1 of the Immigration Act, transposing art. 24 Dublin III Regulation.

³⁹² Cass. 20 December 2017, P.17.1192.F; See also 6.4.

³⁹³ Ministerial Decree of 2 July 2019 amending the Ministerial Decree of 18 March 2009 delegating certain powers of the Minister responsible for entry into the territory, residence, settlement and removal of foreign nationals and repealing the Ministerial Decree of 17 May 1995 delegating powers of the Minister responsible for entry into the territory, residence, settlement and removal of foreign nationals.

transfer to the responsible Member State in application of the Dublin III Regulation' (Annex X2).³⁹⁴ These annexes are not listed in the Immigration Decree.

In the meantime, a detention decision, Annex X3 (a decision to detain in a specific place for the purpose of transfer to the responsible Member State³⁹⁵), has also been taken, with the person concerned being detained after acceptance of the Belgian request for readmission.

In practice, it appears that BGVs and detention decisions taken at a time when little information about the transit migrant in question is available regularly lead to the release of the person in question. The Immigration Office and the management of the detention centres which Myria visited during the drafting of this report confirm that many transit migrants are released after a short stay in the detention centre.³⁹⁶ It is important here to recognise that there may be many other reasons why a transit migrant is released from a detention centre. Removal may be postponed if this may lead to a violation of the non-refoulement principle (see 3.3.2), but the physical or mental condition of the person in question may also play a role. Technical problems may also arise. Or it may be that the identification procedure does not lead to effective identification.³⁹⁷ Another element that plays a role in the cycle of 'arrest, detention, release, arrest' is, in the IO's opinion, a lack of space in the detention centres. The available places for transit migrants in the detention centres are

³⁹⁴ COMMISSION FOR THE EVALUATION OF POLICY ON VOLUNTARY RETURN AND FORCED REMOVAL OF FOREIGN NATIONALS, *Interim report*, 22 February 2019, 21; Myria had analysed this previously, see: MYRIA, *Terugkeer, detentie, en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 33-34.

³⁹⁵ CALL 17 May 2018, no. 203915.

³⁹⁶ Visit to the CIB on 24 May 2019 and to the centre 127bis on 27 May 2019; The Immigration Office indicated on 8 November 2019 that this would no longer be the case.

³⁹⁷ Art. 74/17 Immigration Act. For more information, see: MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018.

insufficient according to the IO³⁹⁸, meaning that the person *de facto* is often released, following a brief stay in a detention centre. The Immigration Office claims that currently only transit migrants who are deemed to be removable to the country of origin or the responsible Dublin Member State are detained. If removal cannot be organised within a reasonable period of time, the person may be released, according to the Immigration Office.³⁹⁹

Jurisdiction CALL

The CALL stresses that a return decision is taken in the context of removal to a third country and a transfer decision is taken in the event of readmission by the Member State responsible for examining an application for international protection. The Immigration Office cannot freely choose between the two when initiating a Dublin procedure, even if an AIP has not been submitted in Belgium.⁴⁰⁰ Where a readmission request has been accepted by the Member State responsible, the CALL rejects the application for suspension, in extremely urgent necessity, of an order to leave the territory with detention pending removal.⁴⁰¹

When an appeal is lodged with the CALL⁴⁰² against an annex 13septies*light* the person in question will generally be released if it is not known to which border a transit migrant must be returned. The person in question is sometimes released even before the CALL makes a decision, and sometimes after suspension by the CALL on appeal in extremely urgent necessity (UDN in Dutch).

³⁹⁸ Meeting with the Immigration Office on 9 July 2019.

³⁹⁹ E-mail from the Immigration Office dated 12 November 2019.

⁴⁰⁰ CALL 8 March 2018, no. 200 933; CALL 9 March 2018, nos. 200 976 and 200 977; See also 6.4.

⁴⁰¹ CALL 9 February 2018, no. 199494.

⁴⁰² An appeal must be lodged with the Council Chamber of the Correctional Court with territorial jurisdiction against the 'decision to detain' component of the annex 13septies*light* in accordance with Article 71, 1st paragraph of the Immigration Act.

The CALL suspends decisions to issue an order to leave the territory with a view to removal where there is no thorough consideration of Article 3 ECHR. This may be the case because the Immigration Office does not have a decisive answer regarding the country of return, or gives inadequate reasons why Article 3 ECHR would not be violated.⁴⁰³ As such, the person in question has no effective remedy.⁴⁰⁴

The issue of the so-called 'annex 13septieslight' therefore appears to be inconsistent with Article 3 ECHR, which is a higher legal standard than the provisions of the Immigration Act invoked to support the decision to issue an order to leave the territory with a view to removal.

Under Belgian law, only one decision is usually served which then comprises three parts: an order to leave the territory, a decision to be escorted to the border and a decision to detain.⁴⁰⁵ The CALL has since ruled that a decision to escort to the border is a contestable removal decision and not a simple repressive measure.⁴⁰⁶ However, the planning of a flight with a view to return is not a contestable legal act. It is simply an executive measure concerning the BGV.⁴⁰⁷ After all, if the country where a foreign national must be returned is not known when the BGV is issued and a decision to escort him/her to the border is subsequently taken, no adequate investigation of a violation of Article 3 ECHR will have taken place. This investigation must therefore be carried out before the escort decision is taken. Myria reiterates its recommendations on the splitting of return decisions: those in which the irregularity of the stay is determined and the removal decision, which enforces it.⁴⁰⁸

⁴⁰³ CALL 9 February 2018, no. 199510.

⁴⁰⁴ CALL 30 January 2019, no. 216069.

⁴⁰⁵ MYRIA, *Migratie in cijfers en in rechten*, (Migration in Rights and Numbers) 2018, 62-63.

⁴⁰⁶ CALL 8 February 2018, no. 199329.

⁴⁰⁷ CALL 8 October 2017, no. 193 296; CALL 8 October 2017, no. 193297.

⁴⁰⁸ MYRIA, *Migratie in cijfers en in rechten*, (Migration in Rights and Numbers) 2018, 62-68.

Appropriateness of the administrative practice questioned

The question therefore arises, in Myria's opinion, as to whether detention with a view to taking a more lasting decision results in unlawful detention. This question can be asked if the nationality of the person in question is unclear and the likelihood of removal to their country of origin is very small or if there is no concrete prospect of a transfer to a responsible Member State. In the context of the Dublin transfer or readmission by the competent Member State, the person in question can only be detained if there is a significant risk that they will abscond in order to secure transfer procedures under the Dublin III Regulation, on the basis of an individual assessment and only to the extent that this is proportionate and where less coercive alternative measures cannot be effectively applied. As such, no-one can be detained for the sole reason that they are subject to the Dublin regulation.⁴⁰⁹ Moreover, in practice only a small proportion of intercepted transit migrants is removed to their country of origin (see 3.2.1). This is rarely the case for amongst others, Eritrean, Sudanese or Syrian nationals.

The CJEU confirmed that the Return Directive does not oppose the detention of a (transit) migrant in order to determine whether or not their stay is lawful, as long as the competent authority is diligent in determining this.⁴¹⁰ Nonetheless, Myria stresses the importance of the right to liberty, which is a fundamental right⁴¹¹. Limitations in this regard must be interpreted restrictively.⁴¹² Exceptions may be made where the authorities wish to prevent a

⁴⁰⁹ Art. 28 Dublin III Regulation; see also art. 51/5 Immigration Act.

⁴¹⁰ CJEU 7 June 2016, C-47/15, ECLI:EU:C:2016:408, 'Affum', §53.

⁴¹¹ Art. 5 ECHR; art. 3 and 9 UDHR; art. 9 ICCPR; art. 37 UNCRC; art. 5a of the International Convention on the Elimination of all Forms of Racial Discrimination; art. 15 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live; Art. 6 Charter of Fundamental Rights of the European Union; ECtHR 25 June 2019, no. 10112/16, Al Husin/Bosnia-Herzegovina.

⁴¹² ECtHR 10 August 2007, no. 199/05, John/Greece, §26.

person from entering a country unlawfully, to prepare a return procedure, or to carry out a deportation procedure.⁴¹³ Detention is possible when there is a risk that the person would otherwise abscond or if they evade or obstruct the preparation or the removal procedure and therefore if coercive means would not be sufficient.⁴¹⁴ Detention must be necessary, proportionate, effective and lawful. The duration of detention must not be excessive, the authorities must therefore take the necessary steps as soon as possible.⁴¹⁵ A transit migrant cannot be detained for the sole reason that they do not have any identity documents.⁴¹⁶

Myria believes that the administrative practice whereby many transit migrants are detained, knowing that there is often no prospect of removal within a reasonable period of time, should urgently be called into question. This approach is at odds with the fundamental rights of the transit migrants in question and various provisions of the Immigration Act as set

Belgian law stipulates that a foreign national cannot be removed if they do not have the necessary documents to be removed to a specific country⁴¹⁷ or if this would lead to a violation of Article 3 ECHR (see 3.3.2). The assessment of this risk must be made before the issuance of an annex 13septies or 13septieslight.⁴¹⁸ The destination country must be clear.⁴¹⁹ When an annex 13septieslight is issued without certainty about the border to where the person should be returned, this is not the case. Myria infers from this that the nationality or possible right to stay must be established in such cases. A foreign national cannot be detained if there is no prospect of removal within a reasonable period of time. This is often not the case for transit migrants, especially with regard to removal to their country of origin. Moreover, the Immigration Office cannot make arbitrary detention decisions.⁴²⁰

Myria once again stresses the importance of the effective application of the right to be heard, the right to an interpreter, etc.⁴²¹

⁴¹³ Art. 5, 1, f) ECHR.

⁴¹⁴ Recital 16 Return Directive; art. 7, 3rd paragraph Immigration Act.; Detention may last up to 6 months and may be extended under national law up to a maximum of 18 months if the person concerned does not cooperate or if the necessary documents from the country of origin could not yet be obtained (art. 15 Return Directive); in accordance with art. 7, 5th paragraph Immigration Act the necessary steps must be taken within 7 days of the detention to effectively remove the person in question.

⁴¹⁵ Objective 13 of the Global Compact for Migration; Art. 8 Return Directive; Recital 13 Return Directive; ECtHR 15 November 1996, No. 22414/93, *Chahal/United Kingdom*, §113; "The Court further reiterates that the domestic authorities have an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified" (ECtHR 17 July 2014, no. 44260/13, *Kim/Russia*, §53).

⁴¹⁶ CJEU 5 June 2014, C-146/14, ECLI:EU:C:2014:1320, 'Mahdi', §73.

⁴¹⁷ Art. 28 Immigration Act.

⁴¹⁸ ECtHR, 14 February 2017, no. 52722/15, *S.K./Russia*. This was upheld by the CALL 165165 CALL, no. 201546 of 22 March 2018.

⁴¹⁹ CALL 9 January 2019, no. 214937.

⁴²⁰ ECtHR 24 April 2008, no. 1365/07, *C.G. and others/Bulgaria* §49.

⁴²¹ MYRIA, *detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 91-92.

RECOMMENDATIONS

The practice of repeated arrest, detention and release jeopardises legal certainty. Myria recommends that, with respect for the right to freedom, a **decision to detain** a transitmigrant **should only be taken after the Immigration Office has checked in the administrative file** whether the identification procedure is sufficiently far advanced and/or a Dublin transfer can already be performed or removal to the country of origin **will be possible within a reasonable time frame**, taking into account the possible risk of violation of Article 3 ECHR. This applies *a fortiori* where there is a high protection rate for persons from the country of origin of the person in question.

The **right to be heard** must always be observed. This applies to interviews conducted by the police after arrest, as well as those conducted by the Immigration Office. In this regard, all relevant aspects in the context of the **test provided for in Articles 3 and 8 of the ECHR** must be mentioned by the official conducting the interview, and they must explain the importance of this, in a language which the person in question understands. This relates to, among other things, links in and with Belgium and the country of origin, the risk of torture, inhumane or degrading treatment or punishment upon return, etc. The importance of this must be explained in advance. The right to be heard must be exercised in a **language which the transit migrant understands sufficiently**, if necessary with free assistance from a **qualified interpreter or intercultural mediator**.

When a person's individual circumstances change, e.g. because they submit a **first application for international protection**, and people from their country of origin benefit from a high protection rate on average, Myria recommends that the person in question **should not be detained from the moment this application is submitted**.

6.4 TRANSFER AND RETURN

Decisions to detain a person in irregular stay are taken in the context of the possibility of enforcing an issued return decision.⁴²² In concrete terms, the Immigration Office examines whether an arrested transit migrant can be transferred to another EU Member State in application of the Dublin III Regulation or a bilateral readmission⁴²³, or to the person's country of origin, in application of the Return Directive⁴²⁴.

The Immigration Office cannot issue a return decision in application of the Return Directive with a view to transfer to another EU Member State simply because the person concerned does not submit an application for international protection. Until recently, the Immigration Office often did this, albeit stating that it would not proceed to return the person to the country of origin.⁴²⁵

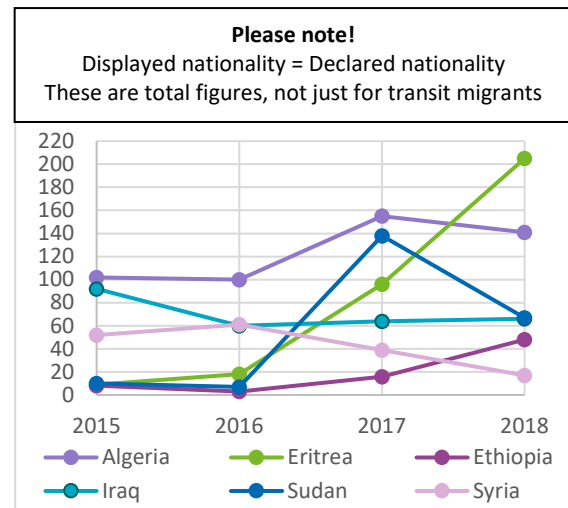
Myria does not have figures available on transfers to other European countries and removal to the country of origin of transit migrants. It is therefore impossible to draw conclusions from the available data. However, on the basis of the figures made available by the Immigration Office regarding general return figures per nationality, regardless of whether they relate to transit migrants, hypotheses can be made.

⁴²² Art. 8 Return Directive; under art. 7, 2nd paragraph IA, the person in question can be escorted to the border.

⁴²³ I.e. in application of an agreement between two countries of which the 'receiving country' is not the country of origin. This is primarily the case with readmissions by the neighbouring countries where a border crossing or a demonstrable stay shortly before arrival is a ground for readmission. For the other bilateral agreements with non-neighbouring countries, it is usually stated that the foreign national has entered or stayed regularly in the other Member State as a condition for readmission (valid or expired visa or residence permit within a certain period of time), but even then the person cannot have a right of residence (e.g. expired visa or residence permit), Immigration Office, e-mail dated 8 November 2019.

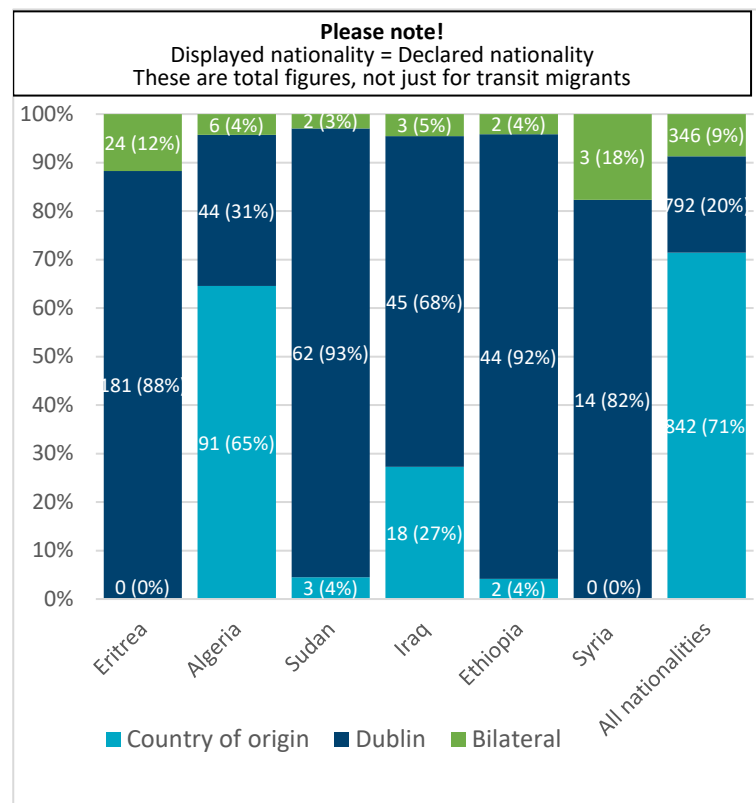
⁴²⁴ CJEU 7 June 2016, C-47/15, ECLI:EU:C:2016:408, 'Affum'.

⁴²⁵ CALL no. 200933 of 8 March 2018; CALL no. 200976 of 9 March 2018; CALL no. 200977 of 9 March 2018. The Dublin III Regulation, as *lex specialis*, applies.



Evolution of removals 2015-2018 per nationality (Source: Immigration Office).

Data from 2018 show an increase in the return figures of nationalities which are often included in transit migration statistics. Bearing in mind that the number of arrests has increased, as well as the number of arrests registered in the context of transit migration, this is not surprising. The increase in detention decisions of transit migrants could also be correlated with this rise.



Removals 2018 (Source: IO)

Removals of third country nationals with nationalities often present in interception statistics of transit migrants are primarily to EU countries, mainly in the context of Dublin transfers or sometimes bilateral readmissions⁴²⁶, also in 2018. The removal figures for all nationalities show that in 2018 an average of 71% were removed to their country of origin, whereas this was 0% for Eritreans, 3% for Sudanese and 27% for Iraqis. Removals via bilateral readmission are usually done for Eritreans and Syrians. There are significant differences between nationalities. Most Algerians are removed to Algeria for example. Around one quarter of Iraqis are sent back to Iraq.

6.4.1 DUBLIN PROCEDURE

The Dublin III Regulation of 26 June 2013 is part of the Common European Asylum System (CEAS) and determines which Member State is competent to handle an application for international protection. EU Member States, including the United Kingdom, apply these rules, as do Norway, Switzerland, Iceland and Liechtenstein. The CEAS is based on the principle of mutual trust. There is a - refutable - presumption that all EU Member States respect EU law and thus fundamental rights.⁴²⁷

Transit migrants report that they fear the Dublin III Regulation will be applied and they will be sent back to another EU Member State.⁴²⁸ Many transit migrants want to maximise their chances of obtaining international protection in the UK. They try to avoid giving fingerprints or applying for international protection in transit countries where they irregularly crossed the external borders of the EU, such as Italy or Greece, in order not to fall within the scope of the Dublin

⁴²⁶ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018.

⁴²⁷ ECtHR 4 November 2014, no. 29217/12, Tarakhel/Switzerland, §§103-104.

⁴²⁸ DOCTORS WITHOUT BORDERS, *Vlucht zonder einde. Psychische hulp in de humanitaire hub in Brussel* (Psychological assistance in the Humanitarian Hub in Brussels), 2019.

system. They hope for a better future and sometimes fear poor reception conditions, being sent back to their country of origin, or that the rules on family reunification might be stricter and access to legal assistance is thwarted.⁴²⁹

The current Dublin III Regulation has been criticised for some time and discussions on a reform of the system have been ongoing for several years.⁴³⁰ Myria believes that reform is indispensable, taking into account the needs and fundamental rights of the migrants in question, such as the right to family life, but also their social and economic rights and a fair redistribution between Member States.

General rules: Eurodac

When a third-country national enters the EU irregularly from a third country, the police will take fingerprints and upload them into the EURODAC system.⁴³¹ This also happens when a person makes an application for international protection. The fingerprints are stored in the Eurodac system, together with information on where and when they were taken.⁴³² In the case of irregular border crossings, data are retained for 18 months, in the case of an application for international protection, for 10 years.⁴³³

If a transit migrant is arrested on Belgian territory without possessing the necessary identity and travel documents, the police will fingerprint them and run these fingerprints through the Eurodac database.⁴³⁴

⁴²⁹ CALL 29 May 2019, no. 222021.

⁴³⁰ For more information, see: EUROPEAN PARLIAMENTARY RESEARCH SERVICE, *Reform of the Dublin system*, 1 March 2019; ECRE, *To Dublin or not to Dublin*, policy note #16, 2018. See also: MYRIA, *Een nieuw paradigma voor het Europese asiemodel? Toegang tot bescherming onder druk* (A new paradigm for the European asylum model? Access to protection under pressure), MyriaDocs #9, 2019.

⁴³¹ Art. 9(15) Eurodac Regulation.

⁴³² Art. 3, 12, 14, 16(1) Eurodac Regulation.

⁴³³ Art. 12, 16 Eurodac Regulation.

⁴³⁴ Art. 17(1), (b) and (c) Eurodac Regulation.

General rules: Dublin III Regulation

When an application for international protection is lodged in a Member State, that Member State will consider whether another Member State is responsible for examining the application for international protection.

If there are family members (in the strictest sense) who enjoy international protection or who are in the midst of their asylum procedures in another EU Member State, this is the responsible Member State.⁴³⁵

If this is not the case, it is examined whether another Member State is responsible, which is determined by the migrant having an (expired) residence status or a visa issued by the Member State (information found in the Visa Information System).⁴³⁶

If this is not the case, the responsible Member State, in application of the Dublin III Regulation is the Member State whose border the migrant crossed irregularly (via means of proof) or the Member State through which the migrant crossed the external borders of the EU less than 12 months previously (via the EURODAC system).⁴³⁷

Annex II of the rules of application of the Dublin Regulation specifies what type of proof can be used in the context of the aforementioned criteria.⁴³⁸

By way of derogation from the above rules, each Member State may decide to examine an application for international protection itself, even if it is not the responsible Member State according to the Dublin criteria (sovereignty clause).⁴³⁹ A Member State can also always ask another Member State to examine the

⁴³⁵ Art. 9, 10, 11 Dublin III Regulation.

⁴³⁶ Art. 12 Dublin III Regulation. This also applies to visas authorising entry into the territory of an EU Member State for a period of six months after their expiry.

⁴³⁷ Art. 13 Dublin III Regulation.

⁴³⁸ Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State that is responsible for examining an asylum application lodged in one of the Member States by a third-country national.

⁴³⁹ Art. 17(1) Dublin III Regulation.

application for international protection on humanitarian grounds, even if this is not the Member State that is responsible according to the Dublin criteria (humanitarian clause).⁴⁴⁰

Transit migrants who do not make an application for international protection anywhere

If no application for international protection has been made anywhere in the EU, pursuant to the Return Directive, the transit migrant can be sent back to their country of origin, a transit country in accordance with a European or bilateral readmission agreement or a third country to which they voluntarily return and to which they have a right of residence.⁴⁴¹ This is only possible subject to compliance with Article 3 of the ECHR (see 3.3.2).

Due to the introduction of a so-called 'implicit application for international protection' there is still an application for international protection and the Immigration Office will still be able to apply the Dublin rules. At that moment, a transfer to the EU Member State where fingerprints were taken following irregular entry into the EU is possible.

For an analysis on the implicit application for international protection, see 6.4.2.

Transit migrants who submit a first application for international protection in Belgium

It is possible that a transit migrant, despite having the intention to transit to the UK, nevertheless voluntarily submits an application for international protection in Belgium, for example to avoid deportation or because they change their plans (see 3.1.3).

The Geneva Convention provides that criminal penalties may not be imposed on refugees on the grounds of irregular entry or residence for those coming directly from a territory where their life or freedom has been threatened, provided that they convince the authorities

⁴⁴⁰ Art. 17(2) Dublin III Regulation.

⁴⁴¹ Art. 3(3) Return Directive.

that they have valid reasons for their irregular entry/stay.⁴⁴²

When a transit migrant submits an application for international protection in Belgium, it will be examined whether another Member State is competent under the Dublin Regulation (see: general rules).

If this is not the case, Belgium will examine the application for international protection.

Transit migrants who have already submitted an application for international protection in another Member State but do not submit a new application in Belgium

If a transit migrant is found on Belgian territory without the necessary documents, the police will take fingerprints and run them through the Eurodac database.⁴⁴³

If the transit migrant does not file a new application in Belgium, they can be sent back to the EU Member State where they already applied for international protection.⁴⁴⁴ If the transit migrant has already received a final negative decision in the EU Member State where they submitted an application, they can choose to be returned to their country of origin on the basis of the Return Directive.⁴⁴⁵

Until recently, there was no legal frame that allowed for the competent Minister or State Secretary to take decisions applying the Dublin III Regulation in the above-mentioned situations where no new application was made in Belgium. This was amended in the summer of 2019. Given that the Immigration Office was previously unable to implement this application of the Dublin III Regulation, it also invoked the 'implicit application for international protection' here. This made transfers to other EU Member States possible.

⁴⁴² Article 31 of the International Convention of 28 July 1951 relating to the Status of Refugees.

⁴⁴³ Art. 17(1), (b) and (c) Eurodac Regulation.

⁴⁴⁴ Art. 18(1)(b) and art. 20(5) Dublin III Regulation.

⁴⁴⁵ Art. 24(4) Dublin III Regulation; CALL, 8 March 2018, no. 200.933; CALL, 9 March 2018, no. 200.976 and no. 200.977.

For an analysis on the implicit application for international protection, see 6.4.2.

Transit migrants who have already submitted an application for international protection in another Member State, and who submit a new application in Belgium

If a transit migrant has already applied for international protection in another EU Member State in the past and files a new application in Belgium, they can be sent back to that EU Member State.⁴⁴⁶

Transit migrants who enjoy international protection in another Member State

The Immigration Office is recording cases of migrants who already have an international protection status in another Member State more frequently recently.⁴⁴⁷ The Dublin Regulation does not apply to these migrants.⁴⁴⁸

If they submit an application for international protection, this application will be transmitted to the CGRS. The CGRS will, in principle, a decision of inadmissibility is taken in respect of applicants who have already obtained refugee status or subsidiary protection status in another Member State, except in exceptional situations.⁴⁴⁹

⁴⁴⁶ Art. 18(1)(b) and art. 20(5) Dublin III Regulation.

⁴⁴⁷ Meeting with the Immigration Office on 29 July 2019; MYRIA, *Verslag contactvergadering internationale bescherming* (Report of contact meeting on international protection), 18 September 2019, r195-196.

⁴⁴⁸ Art. 2(c) Dublin III Regulation.

⁴⁴⁹ MYRIA, *Verslag contactvergadering internationale bescherming* (Report contact meeting on international protection), 19 June 2019, r105-106.



Dublin transfer and the risk of violation of fundamental rights

There are considerable discrepancies in the quality of reception facilities of applicants for international protection in the EU Member States. Where there is no adequate reception in the Member State that is responsible, a transfer within the meaning of the Dublin III Regulation cannot take place.

When the Dublin III Regulation is applied, the foreseeable consequences of a transfer for the person in question must be examined.⁴⁵² However, not every breach of the Reception Directive is enough to prevent a transfer. Still, where reception conditions in that Member State are so inadequate that there is a serious risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter and the Member State in which the person is present is aware of this, no transfer can take place.⁴⁵³ Transfers to Greece have been suspended in the past.⁴⁵⁴

In the context of transit migration, there are many Dublin transfers to Italy. The introduction of the 'Salvini Decree' of 5 October 2018, among other things, put transfers to Italy at risk in a number of cases. The Salvini Decree limited access for (adult) applicants for international protection to, among other things, regular health care and certain forms of reception, regardless of their vulnerability. The CALL suspended these transfers where it observed an inadequate examination of Article 3 ECHR.⁴⁵⁵

In 2018, 338 persons received a decision of inadmissibility for having already obtained an international protection status in another EU Member State.⁴⁵⁰ In October 2019, the figure for inadmissible decisions in this regard was already 599.⁴⁵¹

⁴⁵⁰ MYRIA, *Verslag contactvergadering internationale bescherming* (Report contact meeting on international protection), 20 February 2019, 8.

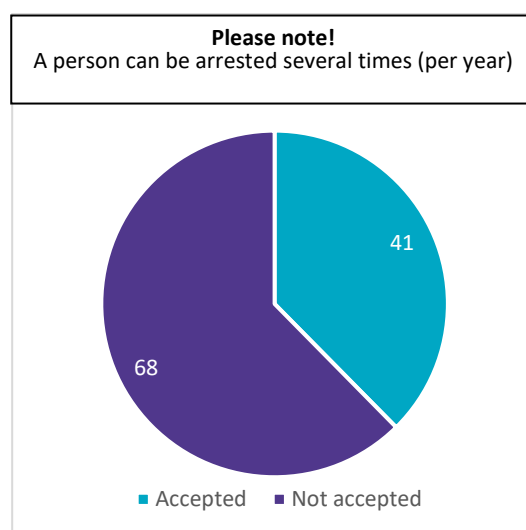
⁴⁵¹ X, "Près de 600 « réfugiés à la carte » déjà déboutés en 2019", *Sud Presse* 18 October 2019.

Myria observes that there are no figures available on admissibility decisions by the CGRS in such cases.

A transit migrant has a protection status in an EU Member State, they may be sent back to the same Member State, regardless of whether they submit an application for international protection in the other Member State.

Dublin in figures

In 2018, the UK made 109 requests to Belgium under the Dublin III Regulation, of which only around 40 were accepted.



Incoming Dublin requests from the UK to Belgium in 2018 (source: IO). These figures do not reflect the transfers actually executed.

Belgium made 32 requests to the UK in 2018, 19 of which were accepted. Incidentally, four of these requests were made to the UK for family reasons; only one was accepted.

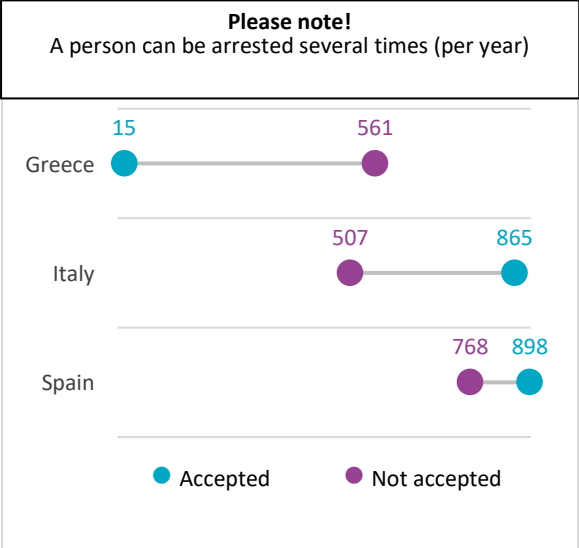
⁴⁵² ECtHR 11 October 2011, no. 46390/10, *Auad/Bulgaria*, §99 (c).

⁴⁵³ CJEU 21 December 2011, C-411/10 and C-493/10, *ECLI:EU:C:2011:865*, 'N.S.'.

⁴⁵⁴ *Ibid.*, ECtHR 21 January 2011, no. 30696/09, *M.S.S./Belgium and Greece*.

⁴⁵⁵ See for example CALL 8 January 2019, no. 214869; CALL 19 July 2019, no. 224129.

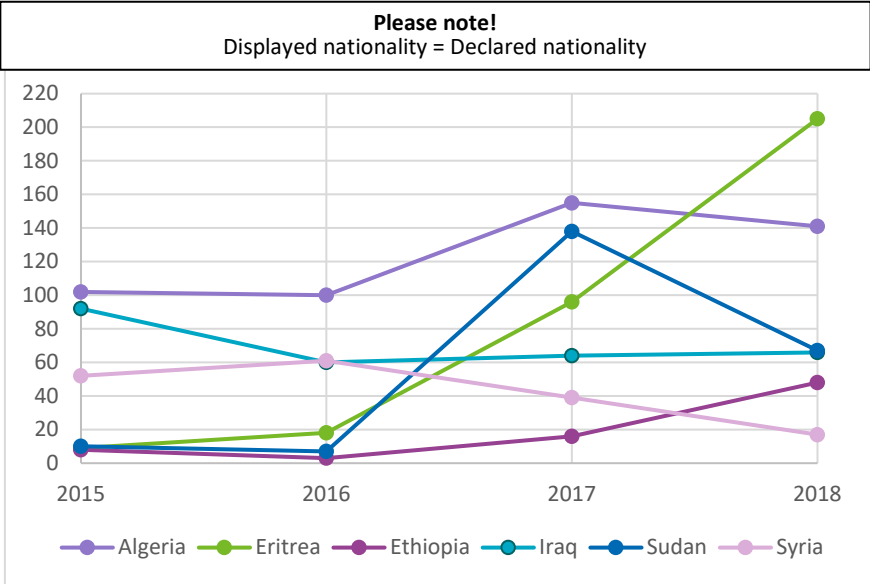
These figures are of a very different order of magnitude than the outgoing requests from Belgium to the transit countries at the southern border of the EU, where many transit migrants entered the EU.



Outgoing Dublin requests from Belgium to southern EU transit countries in 2018 (source: IO). These figures do not reflect the transfers actually executed.

The graph below shows that, since 2016, Belgium has been requesting many more transfers under the Dublin III Regulation for Eritreans. As regards Sudanese, some significant changes have also taken place in since 2016. For the other nationalities that often appear in interception statistics of transit migrants, it is striking that little has changed, despite the focus on detaining transit migrants. The effectiveness of the Dublin Regulation can be called into question. Transit migrants who manage to get to the UK are seldom effectively sent back, although arrivals in the UK are of a very different order of magnitude. In 2018, only 2 migrants were actually transferred from the UK to Belgium under the Dublin III Regulation.

There are also very low numbers of Dublin transfers from Belgium to the EU's southern border countries. Since 2011, the annual maximum number of transfers from Belgium to Greece has been 3 (in 2018). 33 transfers were made to Spain in 2018. This number is very low compared to the almost 900 requests accepted, although some of the transfers may have been executed in 2019. 190 transfers were made to Italy in 2018. This was a lot less than in 2017, but more than in 2016.



Dublin transfer per nationality (Total: not just for transit migrants)

Sovereignty clause

Belgium can always invoke the sovereignty clause provided for in the Dublin III Regulation (see: general rules). This means that Belgium can declare itself competent to examine the application for international protection even if it is not the competent EU Member State according to the Dublin rules. The Member State 'may decide independently - for political, humanitarian or practical reasons - to examine an application for international protection'⁴⁵⁶.

In 2018, the sovereignty clause was explicitly invoked 11,958 times throughout the European Union.⁴⁵⁷ However, it is not clear whether an explicit decision is always required from the EU Member State to examine the application itself. The fact that the Member State of residence of the applicant becomes competent to examine the application for international protection if the transfer to the competent Member State is not made in due time should also be taken into account.

The UK invoked this clause 18 times in 2016, but not at all in 2017 and 2018.⁴⁵⁸

Belgium invoked this clause 617 times in 2017 and 1,206 times in 2018.⁴⁵⁹ There is no transparency regarding which criteria the Immigration Office applies in order to decide to have the request examined by Belgium.

Many transit migrants fall within the scope of the Dublin rules (see profile) and therefore fear the application of these rules, either because they fear inhuman and degrading treatment in the competent Member State or if this Member State removed them to their country of origin, or because of their determination to travel on to the UK. For these reasons, many transit migrants do not apply for international protection in Belgium and so often miss out on international protection.

Myria stresses that fear of the application of the Dublin rules and the impact of an effective transfer to the competent Member State, which a transit migrant has consciously left, often stand in the way of effective international protection.

RECOMMENDATION

Myria recommends that the competent State Secretary of Minister **draws up clear guidelines regarding the sovereignty clause in the Dublin Regulation**. There must be flexibility in applying this clause when it comes to vulnerable persons.

⁴⁵⁶ CJEU 4 October 2018, C-56/17, EU:C:2018:803, 'Fathi', point 53.

⁴⁵⁷ Source: EUROSTAT.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

6.4.2 IMPLICIT APPLICATION FOR INTERNATIONAL PROTECTION

Outline of the situation

Many transit migrants do not apply for international protection in Belgium, but make it clear during their interview that they fear torture or ill-treatment in the country to which they may possibly be sent back.⁴⁶⁰ They are often in need of protection.

Of course, a number of transit migrants still voluntarily submits an application for international protection, for example when in immigration detention. However, some do not, because they fear their detention being prolonged. A request from a detention centre is examined as a matter of priority.⁴⁶¹ If a certain time limit is not exceeded, the applicant may be detained throughout the whole procedure. If not, the person in question must be released in principle.⁴⁶²

In the wake of 'Sudangate' (see 6.4.3) in 2018, a new administrative practice, a so-called 'implicit application for international protection', was established. This also followed in the wake of the ten-point plan, in which it was stated that efforts had to be made to convince transit migrants to submit an application for international protection (see 6.1).

This practice was explained in parliament⁴⁶³, during the contact meeting organised by Myria⁴⁶⁴ and in the interim report of the Bossuyt Commission⁴⁶⁵, but has no basis in Belgian or European legislation. The practice means that when the Immigration Office believes that there is a strong likelihood that

the stated fear of violation of Article 3 ECHR upon return to the country of origin is well-founded and 'cannot simply be refuted', they regard this statement as an implicit request for international protection, even if no such wish is expressed by the migrant.⁴⁶⁶

The introduction of this practice also facilitated the application of the Dublin Regulation before the recent amendment of the Delegation Decision⁴⁶⁷ (see 6.3). If a transit migrant still submits an application for international protection in Belgium, regardless of whether it is an implicit application, and falls within the scope of the Dublin III Regulation, they can be detained in accordance with Article 51/5 of the Immigration Act when there is a risk of absconding. This risk (as defined in art. 1, §2 of the IA) is interpreted very broadly.

It is unclear in exactly how many cases this is applied. The Immigration Office registers an implicit application as an 'ordinary' application for international protection.⁴⁶⁸

Necessity, appropriateness and legality of submitting an application

The implicit application for international protection is not based on a clear legal basis. Article 50 of the Immigration Act, which regulates applications, does not explicitly exclude the interpretation, but the provision contains no legal basis for this practice. The preconditions for qualifying an expressed fear as an implicit application for international protection are unclear. This may undermine legal certainty and the right to equal treatment.

⁴⁶⁰ MYRIA, *Verslag contactvergadering internationale bescherming* (Report contact meeting on international protection), 17 October 2018, 3-4.

⁴⁶¹ Art. 57/6, §2 Immigration Act.

⁴⁶² Art. 74/6, §1bis Immigration Act.

⁴⁶³ *Annals*. Chamber Commission Home Affairs, 2017-2018, 25 April 2018, 41- 46.

⁴⁶⁴ MYRIA, *Verslag contactvergadering internationale bescherming* (Report contact meeting on international protection), 17 October 2018, 3-4.

⁴⁶⁵ COMMISSION FOR THE EVALUATION OF POLICY ON VOLUNTARY RETURN AND FORCED REMOVAL OF FOREIGN NATIONALS, *Interim report*, 22 February 2019, 23, 91.

⁴⁶⁶ *Ibid.*; Based on meeting with the Immigration Office on 9 July 2019.

⁴⁶⁷ Draft law containing various provisions on asylum and migration and amending the Law of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals, *Parl. Doc.* Chamber 2018-2019, 54, 3618/001.

⁴⁶⁸ Meeting with the Immigration Office on 18 June 2019.

The cooperation of an applicant for international protection with the competent authorities is extremely important.⁴⁶⁹ In practice, the 'applicants for international protection' sometimes refuse to cooperate with the asylum authorities.⁴⁷⁰ Moreover, some of them explicitly refuse to lodge an application for international protection.⁴⁷¹ The Immigration Office indicates that once the procedure has been started, the persons in question usually cooperate.⁴⁷² But once they have started the procedure, there are still obstacles. The persons in question are often in immigration detention and it is more difficult for them to produce the necessary evidence to substantiate their request and or the fears they have expressed under Article 3 ECHR. For example, the competent institutions often do not have sufficient evidence to carry out an adequate examination.

Myria has repeatedly raised the issue of adequate examination under Article 3 ECHR.⁴⁷³ Myria reiterates that where the foreign national invokes a serious risk of inhuman or degrading treatment, or where such risk is manifestly due to the situation in the country of return or is specific to the person, this provision requires a thorough examination of this risk by an authority with the necessary expertise and resources.⁴⁷⁴ The authorities are in any case obliged to carry out an Article 3 ECHR test prior to issuing an order to leave the territory⁴⁷⁵, even if the foreign national does not cooperate by

providing evidence for that purpose.⁴⁷⁶ The authorities cannot justify the failure to carry out this test by the fact that no application for international protection has been made in Belgium.⁴⁷⁷

In any case, a specialised team must verify that the non-refoulement principle has been correctly applied. This obligation applies to the authorities issuing a return decision, whether or not an application for international protection is made in Belgium.

The added value of an implicit application for international protection for the protection of the fundamental rights of transit migrants therefore lies solely in the possibility that an international protection status is granted and the person in question would no longer be in irregular stay at that time. However, Myria raises serious questions as to how this can be achieved in view of the shortcomings mentioned above, which can seriously impede effective protection. Moreover, NGOs indicate that the willingness to lodge an application for international protection in Belgium increases as soon as a transit migrant has been adequately informed and has been able to take the time to think about it (see 7.3). Such an approach could reinforce the fundamental rights of transit migrants (such as the right to personal freedom) and reduce the costs associated with detention.

Myria regrets the fact that no figures are available to test the effectiveness of the approach. Myria therefore recommends focusing on data collection in this regard: what are the highly specific preconditions for an implicit application for international protection to be lodged by the authorities, how often does it take place, does it only take place for nationalities for which there is a high protection rate etc.?

⁴⁶⁹ Art. 48/6 Immigration Act.

⁴⁷⁰ CALL 30 July 2018, no. 207359, CALL 11 June 2018 no. 205154.

⁴⁷¹ H. DE VYLDER and P. VAN ROEYEN, "Het impliciet verzoek om internationale bescherming", *T.Vreemd*, 2019/2.

⁴⁷² Meeting with the Immigration Office on 9 July 2019.

⁴⁷³ Among others, see MYRIA, *Migratie in cijfers en rechten* (Migration in Rights and Numbers), Analysis: The final element of protection: the obligation to examine the risk of inhuman or degrading treatment before any removal, 2018, 54-68; MYRIA, intervention before the ECtHR in the case *V.M. v Belgium* (no. 60125/11).

⁴⁷⁴ ECtHR [GC] 23 February 2012, no. 27765/09, *Hirsi Jamaa and others/Italy*, §133.

⁴⁷⁵ CALL (united chambers) 26 September 2017, no. 192584.

⁴⁷⁶ ECtHR 23 March 2016, no. 43611/11, *F.G./Sweden*, §127.

⁴⁷⁷ Cass., 31 January 2018, P.18.0035.F.

 **Affum ruling****The facts**

A Ghanaian woman was found in France on a bus travelling from Ghent to the United Kingdom without valid identity or travel documents. She was detained awaiting removal to Belgium under the agreement of 16 April 1964.⁴⁷⁸ Mrs Affum believed that the detention was in breach of European law.

CJEU judgement

The CJEU held that **no minimum period should be exceeded, nor should the person in question have the intention to remain in the country so that the Return Directive would apply** (§48). A person who is in the territory, even if on a bus, is staying in the territory irregularly within the meaning of Article 3 (2) of the Return Directive (§49). There is a **strong correlation between 'irregular stay' and 'irregular entry'** in the context of the Return Directive (§60).

In principle, a return decision must be issued against third country nationals that are in irregular stay in accordance with Article 6(3) of the Return Directive (§79), including transit migrants.

This can be waived, for example, by taking back another Member State pursuant to a bilateral agreement (§80).

As the CJEU held in the Achughbabian⁴⁷⁹ judgement, a national regulation in which unlawful residence is prevented by means of criminal sanctions is in breach of the Return Directive if the coercive measures referred to in Article 8 of the Return Directive have not yet been applied and in respect of which the maximum period of detention has not yet expired (§52). Third-country nationals for whom the return procedure has not yet been completed should not be subject to detention for the sole reason of irregular entry/stay, as this may delay the application of the return procedure. This would reduce the effectiveness of the Return Directive (§63).

The CJEU also indicated that **third country nationals may be detained to determine whether their stay is regular**, although the government must clarify this as soon as possible (§53).

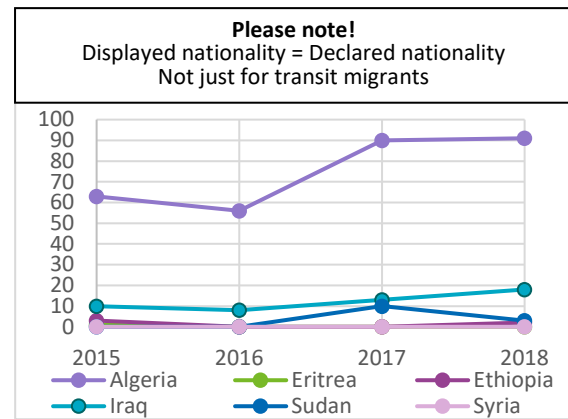
⁴⁷⁸ Agreement of 16 April 1964 between the Governments of the Kingdom of the Netherlands, the Kingdom of Belgium and the Grand Duchy of Luxembourg, of the one part, and the Government of the French Republic, of the other part, on the readmission of persons at the common frontier between the territories of the Benelux countries and France.

⁴⁷⁹ CJEU 6 December 2011, C-329/11, ECLI:EU:C:2011:807, 'Achughbabian'.

6.4.3 RETURN AND REMOVAL TO THE COUNTRY OF ORIGIN

Apart from the transit migrants arrested and sent to another European country via the Dublin procedure or a bilateral readmission, there are many migrants who have exhausted their procedure throughout the EU.⁴⁸⁰ In principle, they have to return to their country of origin in accordance with the Return Directive⁴⁸¹, which applies to third country nationals. In the Affum ruling⁴⁸² the CJEU ruled that this Directive applies to transit migrants. For the first time, the CJEU explicitly ruled on transit migrants.

According to the CGRS, there are no 'unsafe countries'. An individual investigation is necessary in each case.⁴⁸³ Nevertheless, data from the Immigration Office show that Belgium does not remove people to Eritrea. In 2018, there were 3 removals to Sudan, 2 to Ethiopia and 18 to Iraq.⁴⁸⁴ Although these were not specifically transit migrants, the data give an indication that Belgium removes very few transit migrants to their country of origin.



Year	Algeria	Eritrea	Ethiopia	Iraq	Sudan	Syria
2015	63	1	3	10	0	0
2016	56	0	0	8	0	0
2017	90	0	0	13	10	0
2018	91	0	2	18	3	0

Removals to country of origin (Source: IO)

One reason for the low rates of return is the political instability in the countries of origin, which makes return almost impossible for most of them.

Due to the reduction in capacity of the detention centres due to the reserved places for transit migrants, the overall removal figures have fallen⁴⁸⁵.

In view of the large influx from East Africa, the Immigration Office has taken steps to improve cooperation on identification and return and, more generally, to start a dialogue on migration with the countries of the Horn of Africa.⁴⁸⁶

⁴⁸⁰ Pursuant to Article 24(4) of the Dublin III Regulation, the Return Directive may be applied when an application for international protection has been rejected by a final decision in another Member State and no request to readmit the applicant is made to that Member State.

⁴⁸¹ Before a BGV is issued (Article 6 of the Return Directive/art. 7 IA), the best interests of the child, family and family life, the health of the persons concerned and the principle of non-refoulement (Article 5 of the Return Directive/art. 74/13 IA) must always be taken into account. Moreover, in certain circumstances an entry ban can or must be issued to a transit migrant (Art. 11 Return Directive).

⁴⁸² CJEU 7 June 2016, no. C-47/15, ECLI:EU:C:2016:408, 'Affum'.

⁴⁸³ CGRS, *Het respecteren van het non-refoulement principe bij de organisatie van de terugkeer van personen naar Soedan* (Respecting the principle of non-refoulement in organising the return of persons to Sudan), 8 February 2018.

⁴⁸⁴ Source: Immigration Office.

⁴⁸⁵ E-mail from the Immigration Office dated 8 November 2019.

⁴⁸⁶ Meeting with the Immigration Office on 27 July 2019.

Forced return to Sudan

The removal of migrants to Sudan has generated media attention for years. Representatives of the Sudanese government were invited in September 2017 to identify dozens of detained transit migrants who had not requested international protection, with a view to removal to Sudan. A *laisser-passer* was issued for 23 people.⁴⁸⁷ In a subsequent investigation, the CGRS did not find any violation of Article 3 ECHR in the implementation of the identification mission and removals, but warned that the risk of violation of Article 3 ECHR must be sufficiently investigated and that the Immigration Office had to adjust its working methods in this respect.⁴⁸⁸ The police now ensure the completion of an Immigration Office questionnaire at the time of arrest, and in the detention centre the questions on entry have been extended so that the right to be heard is respected.⁴⁸⁹ The 'implicit application for international protection' has also been introduced (see 6.4.2).

In France, a Sudanese national was recognised as a refugee because he had been identified by the Sudanese authorities in the framework of the identification mission organised by the former State Secretary.⁴⁹⁰

Following the recent coup d'état and unstable political situation in Sudan, the Minister of Social Affairs and Health, and of Asylum and Migration, states that the situation in Sudan is being monitored, that each case is being dealt with individually and that she therefore sees no grounds for stopping the detention and return of Sudanese nationals for the time being.⁴⁹¹ In any case, it is only a small group. In 2018, Sudanese nationals were removed to Sudan.

Forced return to Eritrea

Although in practice Belgium does not remove Eritrean nationals to their country of origin, as is shown in the removal figures of the Immigration Office, this is not by definition impossible. For example, in 2017 the ECtHR ruled that the general human rights situation in Eritrea - which is alarming - does not necessarily prevent a state from removing Eritreans to their country of origin. Nevertheless, the ECtHR recognises that forced return increases the risk of violation of Article 3 ECHR. In addition, the heavy burden of proof must not make it impossible for the person in question to prove the likelihood of a breach of Article 3 ECHR, although they must provide sufficient evidence (indirect or otherwise) to make their account credible.⁴⁹²

Not all countries applying the Dublin Regulation prevent removal to Eritrea. Switzerland, for example, which drew up the COI report of 2019⁴⁹³, ruled that forced removal is possible. This possibility could create an additional fear among Eritreans whose fingerprints were taken in Switzerland.

⁴⁸⁷ CGRS, *Het respecteren van het non-refoulement principe bij de organisatie van de terugkeer van personen naar Soedan* (Respecting the principle of non-refoulement in organising the return of persons to Sudan), 8 February 2018.

⁴⁸⁸ Myria has discussed this in detail in the past, see: MYRIA, *Terugkeer, detentie, en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 31-32; MYRIA, *Migratie in cijfers en in rechten 2018. Recht op gezinsleven in het gedrang* (Migration in Rights and Numbers 2018. Right to family life in jeopardy), 2018, 54-68.

⁴⁸⁹ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 32; For more information, see: MYRIA *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 65-68.

⁴⁹⁰⁴⁹⁰ CNDA 26 July 2019, no. 18037534: "Au demeurant, le fait que les autorités soudanaises détiennent le formulaire rempli à la demande des autorités belges, et l'ont interrogé le 21 septembre 2017 sur sa famille et ses activités, donne des raisons sérieuses de penser que les craintes de M. d'être placé en détention à son arrivée à Khartoum et maltraité par des membres des forces de sécurité soudanaises sont fondées."

⁴⁹¹ Letter from the Minister of Social Affairs and Health and of Asylum and Migration to Charlotte Vandycke (Director of Vluchtelingenwerk), 8 August 2019.

⁴⁹² ECtHR 20 June 2017, no. 41282/16, M.O./Switzerland, §§69-72.

⁴⁹³ EASO, *Country of Origin Information report: Eritrea*, 2019.

6.5 THE REPRESSIVE APPROACH CALLED INTO QUESTION

A policy that focusses on deterrence cannot replace a holistic migration policy.⁴⁹⁴ Transit migration as part of the complete migration picture requires a cross-cutting approach involving different administrations and actors, at different levels of government. The various competent authorities all have their own objectives, priorities and resources, so it is not easy to develop a streamlined approach.

Migration has always existed, it is part of the human story. In the post-war period, European countries adopted a more liberal migration policy, based on the fundamental rights of migrants.⁴⁹⁵ Since 9/11 and subsequent attacks, this has changed dramatically and the EU's migration and security policies have become increasingly interlinked.⁴⁹⁶ This can be seen, among other things, in making assisting irregular migration a criminal offence (see 7.4).⁴⁹⁷ The measures taken often turn out to be ineffective and take a large human toll.⁴⁹⁸

Pursuing a purely repressive policy against transit migrants is at odds with respect for their fundamental rights. The authorities are clearly failing to respect the fundamental rights of transit migrants, including extremely vulnerable persons such as minors or victims of human smuggling. The focus on '*crimmigration*' is also manifesting itself in Belgium, where a repressive policy is being pursued with regard to transit migrants, including the ten-point plan. The federal government focuses primarily on repressive measures (as evidenced by the ten-point plan). This results in the police becoming the main front-line actor. However, this is not balanced by sufficient resources and facilities. The criminalisation of (attempts to) infiltrate port areas⁴⁹⁹ is also an illustration of this policy.

Repeated detention of people for whom there is no prospect of removal has a detrimental effect on their physical and mental health⁵⁰⁰ and this cycle creates a lot of uncertainty. Detention is used as a deterrent, although it has not proven effective as a deterrent in any case.⁵⁰¹

It also costs society a lot of money. The question is whether this approach sufficiently strengthens the fight against smuggling of human beings and sufficiently protects migrants. Not everyone agrees that police

⁴⁹⁴ S. DE TAPIA, "Introduction to the debate: Identification of issues and current and future trends of irregular migration in transit countries" in COUNCIL OF EUROPE, *Regional Conference on Migration. Migrants in the Transit Countries: Sharing Responsibilities in Management and Protection*, 2004, (110) 125.

⁴⁹⁵ Y. A. KRAMO, "The European Union's response to irregular migration and the problem of criminalization", *New Journal of European Criminal Law*, 2014.

⁴⁹⁶ V. MITSELEGAS, *The criminalisation of migration in Europe. Challenges for human rights and the rule of law*, Springer, 2015, 2.5.

⁴⁹⁷ *Ibid.*, 3.2.

⁴⁹⁸ F. CRÉPEAU & A. PURKEY, "Facilitating mobility and fostering diversity Getting EU migration governance to respect the human rights of migrants", *CEPS paper in Liberty and Security in Europe*, 2016.

⁴⁹⁹ Law of 20 May 2016 amending the Criminal Code in order to make it a criminal offence to enter or infiltrate a port facility or immovable or movable property within the boundaries of a port without authorisation or permission.

⁵⁰⁰ F. CRÉPEAU & A. PURKEY, "Facilitating mobility and fostering diversity Getting EU migration governance to respect the human rights of migrants", *CEPS paper in Liberty and Security in Europe*, 2016.

⁵⁰¹ V. MITSELEGAS, *The criminalisation of migration in Europe. Challenges for human rights and the rule of law*, Springer, 2015, 96.

intervention is necessary.⁵⁰² Many transit migrants suffer under this approach.

A direct example of this is the result of police actions in Maximilian Park. Transit migrants that were staying in the park were arrested and the park was evacuated. During the evictions, tents and sleeping bags that had been donated by citizens and organisations were thrown away. Myria regrets this type of repressive action which unnecessarily complicates humanitarian aid provided by volunteers and NGOs and is in violation of the right to respect for private life. Committee P has stated that the seizure of goods has since ceased in Brussels.⁵⁰³

Many transit migrants also commit acts of desperation as they continue to seek a safe and better future and try to do so under the radar as more repressive measures are enacted.

- Niknam Masoud wandered around Europe for 15 years, he applied for international protection 5 times in different European countries, despite the Dublin procedure. On 18 August 2019 he was spotted attempting to swim to the UK wearing a homemade lifejacket. He drowned in the attempt.

- On 9 October 2018, a transit migrant from Eritrea committed suicide in the detention centre in Vottem. At the time, the man had already been detained for 4 months with a view to removal to Bulgaria, in application of the bilateral agreement between Belgium and Bulgaria. He did not want to be sent back (see 3.3.2).⁵⁰⁴
- Recently, the macabre discovery of 39 bodies was made of (presumably) Vietnamese transit migrants, a group mentioned in the interception statistics (see 6.2.1), who were smuggled to the UK via Zeebrugge. Even if controls are stepped up, people will continue to attempt to migrate in search of security or a better life.

The question is whether the Belgian authorities should give priority to the repressive apparatus, in particular arresting, detaining and often releasing or transferring the most visible and vulnerable transit migrants under the Dublin III Regulation. Myria recommends a much stronger focus on the fight against smuggling of human beings, with priority also being given to the fundamental rights of transit migrants.

⁵⁰² As the reference magistrate for trafficking and smuggling of human beings of the judicial district of West Flanders said in 2015: "Why intervene when our country is a mere transit country and not the final destination for a large number of migrants?", MYRIA, *Annual report 2015. Mensenhandel en mensensmokkel. Schakels verbinden* (2015 Annual Report on trafficking and smuggling in human beings: Tightening the Links), 2015, 99; X, "Waarom laten we hen niet naar Engeland gaan?", *De Tijd* 20 August 2018.

⁵⁰³ STANDING POLICE MONITORING COMMITTEE, *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 19.

⁵⁰⁴ CITIZENS' PLATFORM SUPPORTING REFUGEES, CARITAS INTERNATIONAL, CIRÉ, NANSEN NON-PROFIT ASSOCIATION AND VLUCHTELINGENWERK VLAANDEREN, *Migranten op doortocht in België*, (Transit migrants in Belgium) 2019, 17.

7. HUMANITARIAN AID IN PRACTICE

7.1 BRUSSELS

For many years, the North Quarter of Brussels has been home to many migrants who have recently arrived in Belgium. During the European 'asylum crisis' in 2015, many migrants who wanted to apply for international protection and could not yet enter the reception network, stayed in Maximilian Park. In recent years, transit migrants have come more into the picture. Aid workers distribute food in the park and provide emergency medical care. However, the park is planned to be redeveloped to make way for a children's farm.⁵⁰⁵

The presence of transit migrants prompted many discussions between policy makers at different levels about who bears responsibility and for what. A final agreement has not yet been reached.

In recent years, many transit migrants have alternated between staying in the park and in Brussels-North Station. Police actions result in temporary relocations of transit migrants (e.g. from Brussels-North Station to Maximilian Park or vice versa).

In September 2017, several NGOs set up the so-called 'Humanitarian Hub' at the North Station.⁵⁰⁶ The hub, which moved within the North Quarter in June 2019, offers communal services. This includes medical and mental support, socio-legal information, clothing distribution, and tracing (searching for family members who have lost contact with each other). Visitors to the Hub can also phone family members twice a week, whether or not in the country of origin. Between January

2018 and June 2019, the Hub was open for 350 days and had 68,000 visits.⁵⁰⁷

In December 2017, the reception centre for transit migrants 'Porte d'Ulysse' in Haren was set up by BXL Refugees. Around 350 people are taken care of every day. The stay in the reception is made dependent on a future-oriented project that follows the person in question. That way, the reception centre excludes the reception of so-called 'chronically homeless people'. SOS Jeunes attends the reception centre twice a week to inform and help orient potential minors. For women, the Citizens' platform supporting refugees provides another shelter, 'Sister's House', where they can spend the night in a safe environment.

Every day in Brussels-North, the Citizen's platform supporting refugees also finds places among members of the public for migrants to sleep. This citizens' platform is managed by the non-profit BXL Refugees.⁵⁰⁸ There are currently around 500 families providing a place for a migrant once a week in their home.⁵⁰⁹

With regard to both the Humanitarian Hub and the Porte d'Ulysse reception centre, BXL Refugees has stated that there is more professionalism since its inception, with regards to (co-)operation and recruitment of paid staff members.⁵¹⁰

Following the clearance of Brussels-North station in May 2019, 140 places were set aside in the SamuSocial and Croix-Rouge Belgique homeless shelters in Brussels for transit migrants and other persons staying in the vicinity of Maximilian Park and the North

⁵⁰⁵ See: K. HENDRICKX, "Maximiliaanpark ruimt baan voor open Zenne", *Bruzz* 25 September 2019.

⁵⁰⁶ The following NGOs are currently still active: Médecins du monde, Doctors without Borders, Citizens' platform supporting refugees, SOS Jeunes, Red Cross. Vluchtelingenwerk Vlaanderen, Ciré and Nansen are no longer active. These range from NGOs working with many volunteers to NGOs that only work with paid staff.

⁵⁰⁷ Figures from the Humanitarian Hub, received on 20 September 2019.

⁵⁰⁸ See: www.bxlrefugees.be/nl/qui-sommes-nous/#.

⁵⁰⁹ They have a Facebook group with more than 40,000 followers:

www.facebook.com/groups/hebergementplateformecitoyenne/; meeting with BXL Refugees on 5 August 2019.

⁵¹⁰ Meeting with BXL Refugees on 5 August 2019.

Station.⁵¹¹ This concerns an agreement between the Minister for Asylum and Migration and the Government of the Brussels-Capital Region. It is unclear how long these places will remain set aside for this target group.

Future

In its administrative agreement of 2019, the Brussels Government stated that it will ensure the respect for the fundamental rights and human dignity of irregularly-staying migrants, including transit migrants. Health care and housing are explicitly mentioned in this regard.⁵¹² The government promised to negotiate financial interventions with the federal government to implement the ordinance on homelessness, including for transit migrants.⁵¹³ In the 'very short term', it guarantees the provision of a reception place for female migrants, whether or not accompanied by minors.

The Brussels Government supports the Porte d'Ulysse reception centre and the Humanitarian Hub, and will continue to do so in 2020.⁵¹⁴ The Government will also provide support through management agreements that will provide for cooperation with Fedasil and the Communities, in particular for

⁵¹¹ SAMUSOCIAL, *Dagopvang in het centrum Botanique: uitrusten in een kalme omgeving*, 31 August 2019; X, "Transmigranten vinden opvang bij Samusocial, Rode Kruis en Burgerplatform", *Knack* 17 May 2019; X, "Deal tussen De Block en Brussel over migranten aan Noordstation", *De Tijd* 17 May 2019.

⁵¹² GOVERNMENT OF THE BRUSSELS-CAPITAL REGION and UNITED COLLEGE OF THE COMMON COMMUNITY COMMISSION, *Joint General Policy Statement of the Government of the Brussels-Capital Region and the United College of the Common Community Commission. Legislature 2019-2024*, 2019.

⁵¹³ Ordinance of 14 June 2018 on the emergency assistance to and integration of the homeless; the various authorities also cooperate in the area of homelessness, see the Cooperation Agreement of 12 May 2014 on homelessness.

⁵¹⁴ MINISTER-PRESIDENT OF THE BRUSSELS-CAPITAL REGION, *The Brussels Government will continue its financial support to "La Porte d'Ulysse" and the "Humanitarian Hub" in 2019 and 2020*, press release 8 November 2019.

unaccompanied minors.⁵¹⁵

A draft law launched by the previous federal government intended to facilitate the entry of the home of migrants that are in irregular stay, including the entry of the homes of third parties. If there are 'reasonable grounds to assume that they are still reside at the address in question' and the person concerned does not cooperate, the authorisation may be granted. If the migrant in question is unable to produce identity documents, the police, with authorisation to enter the home, could also search for identity documents and verify the identity of other persons present.⁵¹⁶ Myria highlights the risk of infringement of the inviolability of the home.⁵¹⁷, the right to privacy⁵¹⁸, the principle of proportionality and the best interest of the child in Article 3 of the Convention on the Rights of the Child.⁵¹⁹ The draft law creates the possibility for the homes of volunteers offering shelter to transit migrants to be entered. The draft law was put on the back burner in August 2018.⁵²⁰ This proposal was recently raised again in the Federal Parliament.⁵²¹

⁵¹⁵ GOVERNMENT OF THE BRUSSELS-CAPITAL REGION and UNITED COLLEGE OF THE COMMON COMMUNITY COMMISSION, *Joint General Policy Statement Legislature 2019-2024*, 2019.

⁵¹⁶ Draft law amending the Law of 15 December 1980 on access to the territory, residence, settlement and removal of foreign nationals to ensure the implementation of removal measures, *Parl. Doc.*, 2017-2018, doc. 2798/001 (hereinafter: Draft law on home entering). For example, an irregularly-staying migrant does not cooperate in the following cases (translation): "*failure to comply with the removal measure, refusal to open the door to police officers or refuse them access to the person's place of residence, as well as any act or behaviour by which the foreign national evades or obstructs the expulsion procedure through their own actions*".

⁵¹⁷ Art. 15 of the Constitution.

⁵¹⁸ Art. 8 ECHR and art. 22 Constitution

⁵¹⁹ MYRIA, *Advies wetsontwerp woonstbetreding* (Opinion on draft law on home entering), 30 January 2018; MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 22.

⁵²⁰ D. LIESSE, "Le projet de loi sur les visites domiciliaires mis au frigo", *L'Echo* 21 August 2018.

⁵²¹ X, "De Block: vraag over wet op woonstbetredingen komt niet van DVZ, maar van commissie-Bossuyt", *De Morgen* 18 September 2019.

7.2 BELGIAN COAST

The coastal region has long been familiar with the phenomenon of transit migration. Ten years ago, there were around a hundred transit migrants. Their numbers subsequently declined before rising sharply four years ago.⁵²² On the West coast, the phenomenon is visible primarily because of the nearby French border. Transit migrants often travel between Dunkirk and the West coast, with or without smugglers.⁵²³ In Zeebrugge, Pastor Fernand Maréchal, together with about 50 volunteers, has been providing food and often night shelter for countless people who stay in Zeebrugge for a short or longer period of time. Their numbers increased sharply in 2015. Many of these people are transit migrants. Médecins du Monde and Caritas International support the volunteers in providing humanitarian aid to the transit migrants.⁵²⁴

During the first years that Pastor Maréchal worked in Zeebrugge, the volunteers saw large groups of 20 to 30 people a day. This number fluctuated over the years.

The mayor of Bruges, Dirk De Fauw, is in turn in favour of setting up an information point for transit migrants outside the port area.⁵²⁵ After all, Zeebrugge is strategically located for transit migrants, although many already start their attempt to get to the UK inland in Belgium (see 3.2.6).

The appropriateness of humanitarian aid to transit migrants is the subject of much debate in the coastal region. Many policy-makers and members of the public believe that this encourages irregular migration and smuggling

⁵²² Meeting with the Maritime police on 24 May 2019 and Pastor Maréchal on 6 September 2019.

⁵²³ Meeting with local police "Westkust" on 23 May 2019.

⁵²⁴ These are on-call on Monday. In addition to the on-call medical service, there is the possibility to shower and clothes are handed out; meeting with Pastor Maréchal on 6 September 2019.

⁵²⁵ X, "'Geen razzia's meer op transitmigranten in Zeebrugge": nieuwe burgemeester wil andere aanpak", *De Morgen* 4 February 2019.

of human beings.⁵²⁶ A number of (far) right-wing groups have organised several demonstrations at the house of Pastor Maréchal and he has received death threats. On the other hand, he receives enormous support and recognition.⁵²⁷

7.3 PROVISION OF INFORMATION

7.3.1 PROVISION OF INFORMATION BY PUBLIC AUTHORITIES

Various government services have already taken initiatives to provide information to (transit) migrants:

- The federal police had information on the rights of arrested persons translated into 40 languages, accessible via PORTAL, the intranet of the police. However, this is rarely used in practice.⁵²⁸
- To replace the paper leaflets with information on the asylum procedure, Fedasil developed a website in 12 languages on the legal status of foreign nationals in Belgium where there is the option of having the text read out in certain languages.⁵²⁹
- The Immigration Office drafted and distributed leaflets in the main languages of the transit migrants, in cooperation with Fedasil, and visited transit migrants at Maximilian Park and Brussels-North Station, to inform them verbally.

⁵²⁶ See, for example, the debate of the Bruges municipal council and statements by the West Flemish governor, STADSBESTUUR BRUGGE, *Livestream gemeenteraad*, 26 February 2019, published on YouTube; See also X, "Decaluwé: 'Deel geen voedsel uit aan illegale vluchtelingen'", *De Morgen* 1 February 2016.

⁵²⁷ Meeting with Pastor Maréchal on 6 September 2019; M. MARIËN, "Priester Fernand Maréchal krijgt Damiaanprijs voor inzet voor vluchtelingen", *HLN* 13 May 2019.

⁵²⁸ VAST COMITÉ VAN TOEZICHT OP DE POLITIEDIENSTEN (Permanent Oversight Committee on the Police Services), *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 26.

More info: ⁵²⁹ www.fedasilinfo.be

- A temporary (English-language) Facebook page was created for migrants. Messages such as *'no money, no house, no future'* were published in an album *'no trespassing. Belgium fights against illegal migration'* which was later taken offline⁵³⁰. The Immigration Office subsequently set up a website and a new Facebook page that provides limited information on Belgian migration legislation.⁵³¹ In Myria's opinion, the website in combination with the Facebook campaign serves as a deterrent campaign to potential migrants in countries of origin and residence and to refugees in transit countries, with specific target groups, such as Palestinians or Moroccans, and transit migrants in Belgium. Selective information is provided: for example, there is no (accessible) information on the possibilities to apply for a visa or the family reunification procedures.⁵³²

Myria welcomes the development of informative websites and Facebook pages, since accessible online information, whether or not disseminated via social media, has a greater impact than traditional means of communication, such as flyers and leaflets. Information provided orally in a sufficiently detailed conversation, facilitated if necessary by the presence of an interpreter, also remains crucial. Wherever possible, the use of a family member, friend or other migrant should be avoided in order to ensure the quality and effectiveness of the discussion.⁵³³ Myria emphasizes the importance of complete information.

⁵³⁰ K. HENDRICKX, "Omstreden Facebookpagina Vreemdelingenzaken offline", *Bruzz* 10 December 2018.

⁵³¹ www.factsaboutbelgium.be; www.facebook.com/factsaboutbelgium.

⁵³² Myria wrote to the responsible Minister in a letter dated 26 April 2019.

⁵³³ ENNHRI, *Migrants' access to information in their rights. Recommendations to bridge theory and practice*, 2017, 9-11.

7.3.2 PROVISION OF INFORMATION BY NGOs

Many NGOs and also the UNHCR have been working for years to ensure that (transit) migrants are correctly and adequately informed regarding their rights. For example, Caritas International offers weekly socio-legal information to (transit) migrants in Zeebrugge.

The non-profit Nansen, Vluchtelingenwerk Vlaanderen and Ciré also offered legal services in the Humanitarian Hub for a while.⁵³⁴

Minor Ndako also leads the Xtra Mena project, funded by Fedasil, which focuses on providing information to minors in Maximilian Park and around the North Station in Brussels, among other places.⁵³⁵

NGOs are often forced to stop providing information due to lack of resources. Myria emphasises the importance of sustainable support for the organisations.

7.3.3 PROVISION OF INFORMATION BY LAWYERS

For many years, the French Commission for legal aid in the judicial district of Brussels made lawyers available to provide advice to transit migrants in the Humanitarian Hub. At present, the Commission is no longer active there.

Myria welcomes this initiative and stresses the benefit of accurate and complete information provided by experts in the field.

⁵³⁴ Discussion with UNHCR dated 17 May 2019; www.vluchtelingenwerk.be/nieuws/wat-is-de-humanitaire-hub.

⁵³⁵ For a description of the project, see: www.fedasil.be/sites/default/files/projecten_2019.pdf.

7.3.4 PROVISION OF INFORMATION BY VOLUNTEERS

Many volunteers and aid workers such as the Citizens' platform supporting refugees provide information to transit migrants. However, the provision of information by, for example, citizens who let migrants stay at their homes is not without risk. Given the complexity of the issue, it is often more useful to refer to official bodies, specialised lawyers or helpdesks for individual information.⁵³⁶ Actors on the ground have noted that the information provided by members of the civil society is often wrong or incomplete.⁵³⁷ For members of the civil society or volunteers, the personal preferences of the people in question or the mission of the organisation sometimes play a role in deciding which information is given.

There is a risk of limited or inaccurate information in particular for unaccompanied minors, who often stay in host families for long periods of time. Host families often do not have any experience with providing administrative support to minors and do not have sufficient knowledge of the procedures.⁵³⁸ The *Délégué général aux droits de l'enfant* stated the following (translation): "Not informed, barely informed or ill-informed about their rights and attracted by the warm and informal reception provided by the volunteers of the Citizens' platform, many young people have abandoned the official routes, which nevertheless offer them serious guarantees for which many organisations and NGOs have fought for years".⁵³⁹

To mitigate this risk, in 2017 the Guardianship Service gave information sessions to volunteers of the Citizens' platform, who often take in minors.⁵⁴⁰

Myria emphasises the importance of training volunteers who come into contact with transit migrants in the context of volunteer work, as confirmed by ENNHRI.⁵⁴¹ In the event of a specific request for advice from a transit migrant, a referral to an NGO with expertise or a government agency is always necessary.

⁵³⁶ This is also the instruction communicated to the volunteers from the Citizens' Platform; Meeting with BXL Refugees on 5 August 2019.

⁵³⁷ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 27.

⁵³⁸ *Ibid.*

⁵³⁹ DÉLÉGUÉ GÉNÉRAL DE LA COMMUNAUTÉ FRANÇAISE AUX DROITS DE L'ENFANT, *Rapport annuel 2017-2018*, 12.

⁵⁴⁰ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 26.

⁵⁴¹ ENNHRI, *Migrants' access to information in their rights. Recommendations to bridge theory and practice*, 2017, 11; MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 60-64.

7.4 CRIMINALISATION OF SOLIDARITY

Assisting a migrant with irregular entry and stay for lucrative purposes is qualified as smuggling of human beings in the Immigration Act and is punishable (see 9).⁵⁴² In addition, Belgium is one of the many European countries that criminalise facilitating irregular entry and stay, even if there is no profit motive.⁵⁴³ The Immigration Act makes an exception to this, namely when this assistance was provided 'mainly for humanitarian reasons'.

According to the applicable EU Directive, this humanitarian exception is not mandatory.⁵⁴⁴ However, Myria believes that this exception is the essential guarantee that acts of solidarity will not be punished.

The fundamental rights of transit migrants are to a large extent guaranteed by the help of NGOs and volunteers. The latter should therefore be protected from criminal prosecution in their assistance.

In deciding whether there are mainly humanitarian reasons for helping irregularly-staying persons in the territory or to hold someone criminally liable, magistrates can rely on certain indications, laid down in the confidential circular COL 13/2018, to determine.⁵⁴⁵ However, for aid workers, the boundaries remain unclear and the vagueness of the concept 'mainly for humanitarian

reasons' creates uncertainty. The current wording does not prevent the prosecution or conviction of members of the public, NGOs or human rights defenders for solidarity actions.⁵⁴⁶ It is also observed in practice that this provision is used to intimidate aid workers.⁵⁴⁷

RECOMMENDATION

Myria recommends clarification of the concept of 'mainly humanitarian reasons' in Article 77 of the Immigration Act. Also, the penalization and prosecution of people providing assistance without a profit motive should be handled very carefully. The possibility of prosecution in this context should not be used to intimidate aid workers.

⁵⁴² Artikel 77bis Immigration Act.

⁵⁴³ Art. 77 IA, in application of art. 1(1)(a) Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. See S. CARRERA, L. VOSYLIUTE, S. SMIALOWSKI J. ALLSOPP and G. SANCHEZ, "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", Committee on petitions, European Parliament, December 2018, 182 p.

⁵⁴⁴ Art. 1(2) Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.

⁵⁴⁵ For more information, see MYRIA, *Jaarverslag Mensenhandel en mensensmokkel 2019: slagkracht voor slachtoffers* (Annual Report Trafficking and Smuggling of human beings 2019: strength for the victims) 2019, 102-103.

⁵⁴⁶

Court of First Instance Brussels 20 December 2018, HV.55.RB.59770/2017; Corr. Brussels (Fr.), 47th Ch., 12 December 2018; Meeting with volunteers in Bruges on 6 September 2019.

⁵⁴⁷ Meeting with volunteers in Bruges on 6 September 2019; Y. DELEPELEIRE; "Geen razzia's meer tijdens voedselbedeling Zeebrugge", *De Standaard* 4 February 2019.

7.5 CONCLUSION AND OVERARCHING RECOMMENDATION

NGOs and volunteers in particular guarantee the right to a dignified standard of living for transit migrants, with possible logistical support from the government, such as the provision of buildings.

In the Humanitarian Hub in Brussels, support is mainly provided by professionals. However, some of these NGOs are only competent for humanitarian aid and cannot provide a structural solution in Belgium.⁵⁴⁸ Such an initiative is therefore inherently temporary.

In addition, the assistance provided by volunteers has limits in terms of adequate support. Often shelter, clothing and food are the priority, and the migrant's future is not necessarily discussed. Also, volunteers do not always have the necessary knowledge or neutrality to adequately inform a transit migrant about which legal residence options he has, which risks he runs, etc. The information a migrant receives depends on the volunteer they stay with.

The growing number of stakeholders also means that the same information is not always given and that the different actions for transit migrants are poorly coordinated.⁵⁴⁹

The authorities cannot hide behind NGOs and citizens' initiatives when it comes to their obligations to protect fundamental rights. The authorities remain responsible and should take the initiative themselves. The basic needs of transit migrants must be met so that they can think about their future in Belgium or elsewhere. Priority should therefore be given to this basic assistance. In addition, Myria reiterates the importance of accurate, complete information in a language the transit migrant understands.

⁵⁴⁸ For example Doctors Without Borders; meeting with Humanitarian Hub on 12 July 2019

⁵⁴⁹ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 27.

RECOMMENDATION

Myria recommends **the consolidation of the Hub**. In other words, the authorities must be responsible for financing, organising and supervising the Hub.

Myria believes that this is the only way for the authorities to guarantee a dignified standard of living for transit migrants and to inform them adequately and correctly. In this way, **respect for the fundamental rights of transit migrants is not made dependent on aid organisations**, which often have limited resources and are unable to provide a structural approach to the issue.

In order to guarantee ease of access and accessibility for transit migrants, who often shun government agencies, Myria advises to work closely with **the Citizens' platform and NGOs** who have since built up broad expertise (including Doctors Without Borders, Médecins du Monde, Croix Rouge, Vluchtelingenwerk Vlaanderen, Ciré, etc.).

Brussels is **not the only region where a Hub should be set up**. This should also be considered in the other regions and big cities, where many transit migrants are staying.

In Myria's opinion, these hubs should include at least the following **services**:

- Socio-legal services, with a specific focus on vulnerable groups;
- Medical and psychological assistance, with a specific focus on vulnerable groups;
- Tracing (searching for missing family members);
- Active referral and cooperation with homeless shelters, with a specific focus on vulnerable groups.

Myria also recommends investing in **outreach work** to trace (vulnerable) transit migrants and to inform them about their options in Belgium.

Myria also recommends that sufficient places should always be provided in **homeless shelters** to accommodate transit migrants who don't have a place to sleep.

8. VULNERABLE PERSONS: FOCUS ON UNACCOMPANIED MINORS

The Immigration Act defines a vulnerable person as follows (translation): "*both accompanied and unaccompanied minors, persons with disabilities, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence*".⁵⁵⁰ Despite this specific focus in the Immigration Act, vulnerable groups are not always treated differently in practice.

Many transit migrants are highly vulnerable and often have a history of severe physical and psychological suffering.

Adult transit migrants with, for example, serious psychological problems or women who have undergone sexual violence are not followed up by government policy. Nevertheless, in signing the Istanbul Convention, the Belgian government undertook to take the necessary measures to protect women from all forms of violence.⁵⁵¹

However, (slightly) adapted detention and removal conditions are possible for certain vulnerable persons through the "Special needs" programme.⁵⁵² According to Nansen, vulnerability should be taken into account in advance when assessing whether detention is necessary and proportionate.⁵⁵³ Moreover, removal may prove impossible in certain cases for persons suffering from serious physical or mental illnesses, as this could lead to a

violation of Article 3 ECHR.⁵⁵⁴ This may be the case when serious suffering is caused by a naturally occurring physical or mental illness which is aggravated or is likely to be aggravated as a result of detention conditions or after removal.⁵⁵⁵ However, this is sometimes difficult to prove. The authorities should consider the circumstances of the individual situation and in the country to which the person would be transferred. The authorities should then assess whether the person in question will have access to adequate medical care, taking into account, inter alia, the cost, the social network and the distance to the place where the treatment can take place.⁵⁵⁶

Another vulnerable group is that of families with minor children. In principle, if they are in irregular stay, they can receive material assistance via Fedasil.⁵⁵⁷ Myria notes, however, that these families are accommodated in the FITT residences, which are managed by the Immigration Office. In certain cases, these families could also be detained in a detention centre.⁵⁵⁸

⁵⁵⁰ Art. 1, §1, 12° IA; Art. 3(9) Return Directive.

⁵⁵¹ Art. 4, 5 Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011. This convention entered into force in Belgium on 1 July 2016.

⁵⁵² This programme provides assistance during detention and counselling during and after removal. For more information, see MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België. Terugkeer, tegen welke prijs?* (Return, detention and removal of foreign nationals in Belgium. Return, at what price?), MyriaDocs #5, 2017, 71; According to Nansen, this programme often falls short, see: NANSEN non-profit association, *Kwetsbaarheid in detentie*, (Vulnerability in detention) 2018, 5.

⁵⁵³ NANSEN non-profit association, *Kwetsbaarheid in detentie* (Vulnerability in detention), 2018, 4.

⁵⁵⁴ ECtHR 27 May 2008, no. 26565/05, N./United Kingdom, §43; "The Court considers that the "other very exceptional cases" within the meaning of the judgment in *N. v. the United Kingdom* (§43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness.", ECtHR 13 December 2016, no. 41738/10, *Paposhvili/Belgium*, §183.

⁵⁵⁵ *Ibid.*, §§174-175.

⁵⁵⁶ *Ibid.*, §§186-188, 189-191.

⁵⁵⁷ Royal Decree of 24 June 2004 laying down the conditions and modalities for granting material aid to a foreign minor staying irregularly in the State with his parents.

⁵⁵⁸ Art. 17 Return Directive.

However, following a suspension judgment of the Council of State in April 2019, this is currently not possible.⁵⁵⁹

Myria strongly opposes the detention of children, as this is never in their interest.⁵⁶⁰ Myria has been arguing for years for this prohibition to be enshrined in law. The UN Committee on the Rights of the Child and the Council of Europe also oppose this practice.⁵⁶¹ The case law of the ECtHR does not formally prohibit detention, but states that it must be of short duration and must not take place when there is noise disturbance from a nearby airport.⁵⁶² In any case, the overriding interests of the child must be taken into account in any decision relating to a minor.⁵⁶³ This applies to both accompanied and unaccompanied minors. In this context, Myria refers to the checklist it has drawn up to help all actors, including the authorities, comply with this obligation.⁵⁶⁴

Finally, there is also the group of UM. Given the young age of transit migrants in Belgium

⁵⁵⁹ CoS 4 April 2019, no. 224.190. The Council of State has yet to give its final verdict in this case.

⁵⁶⁰ MYRIA, *Terugkeer, detentie en verwijdering van vreemdelingen in België* (Return, detention and removal of foreign nationals in Belgium), MyriaDocs #8, 2018, 40 et seq.

⁵⁶¹ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, §5; COUNCIL OF EUROPE, *The Commissioner calls on Belgium not to resume the practice of detention of migrant children*, 5 June 2018.

⁵⁶² MYRIA, *Migratie in cijfers en in rechten 2016, De detentie van gezinnen met minderjarige kinderen in gesloten centra* (Migration in figures and in rights 2016, The detention of families with minor children in detention centres), 230-233;

⁵⁶³ Art. 22bis Constitution; Article 24(2) of the Charter of Fundamental Rights of the EU; Art. 24(1), 25 and 39 UNCRC; Art. 3 Convention on the Rights of the Child Adopted by the General Assembly of the United Nations on 20 November 1989 (hereinafter: Convention on the Rights of the Child).

⁵⁶⁴ "De belangen van het kind: de checklist van Myria" (The interests of the child: Myria's checklist), annex 3 to MYRIA, *Migratie in cijfers en rechten*, (Migration in rights and figures) 2015.

(see 3.2.3), this target group is the focus of this chapter. A specific framework has been created for UM, which includes certain protection measures. This also applies to transit-UM, but they nevertheless often slip through the net.

8.1 VULNERABILITY OF TRANSIT-UM

UM are suspicious of governments, even more so than adult transit migrants, but they are also suspicious of civil society organisations. This mistrust may be explained by the traumatic experiences in their country of origin or during the migration journey, or the determination to reach the UK and possibly live with relatives there.⁵⁶⁵ In addition, there are smugglers of human beings who exploit the determination of UM to get to the UK. Family members also sometimes give instructions to the minor on where to go, whom they can (or can't) talk to, where they can sleep, etc.⁵⁶⁶ Both smugglers and other travellers often give incorrect information about rights and future prospects in Belgium (see 4.7).

Their mistrust and their lack of information make UM highly vulnerable to, among other things, smuggling and trafficking in human beings.⁵⁶⁷

According to a UNICEF study⁵⁶⁸ many UM from the smuggling camps that are smuggled into the UK via Belgium and elsewhere are then

⁵⁶⁵ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 26.

⁵⁶⁶ For example, a minor who refuses to apply for international protection because his brother is still on his way to Belgium and has said that he has to wait for him for all decisions; the story of an Eritrean transit migrant in the homeless shelter.

⁵⁶⁷ This is confirmed by the volunteers in Bruges and the various NGOs involved; For more information, see: MYRIA, *Jaarlijks evaluatieverslag 2018. Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018.

⁵⁶⁸ UNICEF FRANCE, *Neither safe nor sound, Unaccompanied children on the coastline of the English Channel and the North Sea*, juni 2016.

economically exploited. The victims from Vietnam and Eritrea end up as domestic servants, the Vietnamese also often end up in sewing workshops. Albanian victims are more likely to be exploited in the agricultural sector. Iraqis and Afghans try to pay off their debt from the journey and are exploited, for example, in the hospitality sector (kebab shops and other fast food restaurants), carwashes and hairdressing salons.⁵⁶⁹

In 2017 and 2018, the Guardianship Service, the Immigration Office and Fedasil organised on-call services in Maximilian Park and Brussels-North Station to provide transit migrants, including UM, with information on the various procedures (international protection, the Dublin system, reception facilities and voluntary return).⁵⁷⁰ Since 2017, there are also guardians who are specialised in supporting transit-UM and UM who are victims of human trafficking.⁵⁷¹ In 2019, the Guardianship Service set up a *pool* of specialised guardians in the province of West Flanders, to immediately appoint a guardian for UM intercepted in Zeebrugge and for whom there is no doubt as to their age.⁵⁷²

⁵⁶⁹ Ibid.

⁵⁷⁰ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 26.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

8.2 NOTIFICATION AND GUARDIANSHIP

The police and any other authority (youth services, Immigration Office, etc.) that has knowledge of the presence on the territory of a person who is unaccompanied and presumed to be a minor is obliged to report this person to the Guardianship Service.⁵⁷³ Also from Porte d'Ulysse and the Hub, minors are immediately forwarded to SOS Jeunes to start the identification procedure.⁵⁷⁴

Alertness to vulnerable persons, such as minors, is increased in the event of irregular border crossings. For example, the Schengen Borders Code requires border guards to pay special attention to minors.⁵⁷⁵ In view of the average young age of transit migrants, the police must also be very attentive to possible minors. Even if the young person in question does not indicate that he is a minor, the police must pay particular attention to signs that he is a minor.

It is important that UM found in coastal cities, ports or along motorways are first and foremost seen as potential victims of trafficking or smuggling in human beings. During an arrest, young people will sometimes not be given special treatment, as (the lack of) residence status takes priority for the police. According to Myria, this is inconsistent with the case law of the ECHR, which stated in February 2019 concerning minors in Calais that "In cases concerning foreign minors, whether accompanied or unaccompanied, the child's situation of extreme vulnerability is the decisive factor and it takes precedence over considerations relating to his or her status as an irregular migrant".⁵⁷⁶

When a minor over the age of fourteen is intercepted on the territory, the local police carries out an initial identification, takes the digital fingerprints and a photograph and

⁵⁷³ Art. 6 of the Programme law (I) of 24 December 2002 (art. 479) *juncto* art. 33quater *in fine* Police Function Act.

⁵⁷⁴ Meeting with BXL Refugees on 5 August 2019.

⁵⁷⁵ Annex VII Schengen Borders Code.

⁵⁷⁶ ECtHR 28 February 2019, no. 12267/16, Khan/France, §74. .

seizes the identity documents.⁵⁷⁷ An administrative report is drawn up of the check on the foreign national and this is forwarded to the Immigration Office. If the person appears to be a minor or if they declare being a minor, the police will also complete the description sheet and send it to the Guardianship Service and Immigration Office. The Guardianship Service indicates that the maximum detention period of 24 hours is not exceeded for UM. However, during large-scale police actions against smuggling in human beings, UM are regularly detained in police stations or transferred to the ACT (see 6.2.3).⁵⁷⁸

Good practice⁵⁷⁹

In 2019, the Guardianship Service launched the pilot project 'Kust' (Coast) in Zeebrugge, whereby a guardian comes to the police station as soon as possible after an alert of a transit UM, to have a discussion with the UM together with the police officer. Since September 2019, the project has been extended to the whole of West Flanders. The task of the guardian is to clarify their role and to inform the UM about the (legal) options in Belgium. The guardian will encourage the UM to go to a Fedasil observation and orientation centre (OOC). For each notification, it is assessed whether appointing a guardian can be an added value.

Since the start of the project, 30 UM have been assigned a guardian in the context of this project.

⁵⁷⁷VAST COMITÉ VAN TOEZICHT OP DE POLITIEDIENSTEN (Permanent Oversight Committee on the Police Services), *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 36. UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 20.

⁵⁷⁸ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 26.

⁵⁷⁹ Source: Guardian Service.

RECOMMENDATIONS

Myria recommends that the **police be particularly attentive** to potential minors given the young age of the average transit migrant. Even if the young person in question does not indicate that he or she is a minor, the police must pay particular attention to signs that he or she is a minor, and take the necessary steps. At the **slightest doubt**, the young person must be treated as a minor and should **not be locked up** in a cell or a detention centre.

During the identification procedure, the minor should not be detained in a cell in the police station.

8.3 RECEPTION AND DISAPPEARANCES

Following the notification to the Guardianship Service, the (presumed) UM is dropped off at the Dispatching Service of Fedasil for transfer to a Fedasil observation and orientation centre (hereinafter: OOC). However, many minors refuse reception when they are assigned a reception place at the Dispatching Service of Fedasil.

Outside office hours, the Guardianship Service or the police will transfer the presumed minor to an OOC. The UM will then stay at the police station until the Guardianship Service has found a reception place and comes to collect the minor.⁵⁸⁰

Since 2018, the Guardianship Service has had a team of four drivers, one of whom can provide transport for UM during the night. However, due to a lack of resources, the UM are often transferred by the police themselves.⁵⁸¹ During the transfer of the UM, the police sometimes use plastic handcuffs, which are taken off on arrival at the OOC.⁵⁸² Myria stresses that this practice is not in keeping with the best interest of the minor.

The minor stays in the OOC for two to four weeks.⁵⁸³ After this period, the UM goes either to a regular Fedasil reception centre or

to an institution of a youth care service.⁵⁸⁴ There are also agreements between Fedasil and special youth care services that make places in the community institutions directly accessible to UM, without having to go through the juvenile court or Community procedures.⁵⁸⁵

For the UM's own protection, he or she cannot have contact with external persons for at least 7 days from their arrival at the OOC.⁵⁸⁶ This means that the UM may not leave the reception centre unaccompanied, may not receive visitors and may not have telephone contact. These restrictions do not apply to essential contacts in the context of procedures and identification of the young person.

In the OOC, the risk of disappearing is very high. Fedasil statistics show that there were 570 disappearances in 2017, 448 in 2016 and 166 in 2015.⁵⁸⁷ Fedasil confirms that more than 50% of UM disappeared from the OOC in 2017 and 2018.⁵⁸⁸ However, Fedasil also stresses that the available figures are not reliable, as the practice of recording a disappearance varies from one OOC to another.

⁵⁸⁰ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 23.

⁵⁸¹ *Ibid.*

⁵⁸² *Ibid.*

⁵⁸³ Art. 40 of the Law of 12 January 2007 on the reception of asylum seekers and certain other categories of foreign nationals (hereinafter: Reception Law); Royal Decree of 9 April 2007 laying down the system and operating rules for the observation and orientation centres for unaccompanied foreign minors.

⁵⁸⁴ If, after the observation and orientation phase, the UM has not submitted an application for international protection, he or she will in principle fall under the competence of the Integral Youth Assistance; see: art. 3 and 59 Reception Law; art. 5, §1, II, 6° Special Law on Institutional Reform. In practice, there often appears to be a shortage of reception places in special youth care and UM are often further accommodated in a Fedasil reception centre. See: art. 7 of the Royal Decree of 9 April 2007 laying down the system and operating rules for observation and orientation centres for unaccompanied foreign minors; Q&A Senate 2011-2012, 28 December 2011, (Question no. 5-4811 B. ANCIAUX).

⁵⁸⁵ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 43.

⁵⁸⁶ Art. 10 of the Royal Decree of 9 April 2007 laying down the system and operating rules for observation and orientation centres for unaccompanied foreign minors.

⁵⁸⁷ UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 28.

⁵⁸⁸ *Ibid.*

Dissapearances from the OOC often occur within three days of arrival, even before a guardian has been appointed.⁵⁸⁹ This hampers the effective functioning of the reception centre, given that this is aimed at lasting support and orientation of the minor.

According to Fedasil's policy, UM cannot be reintegrated into the reception network an unlimited number of times. This means that if they left voluntarily, it will be evaluated afterwards to see if they can still be housed in an OOC.

The young people who disappear are often those who did not ask for reception or did not apply for international protection.⁵⁹⁰ Possible reasons for leaving the reception centre are to stay with a host family (e.g. via the Citizens' Platform), the desire to live independently, the will to travel on to the UK, etc.⁵⁹¹ It is important to note that transit UM often travel with friends to the UK and stay overnight with a host family or in a homeless centre. The restrictions on freedom during the first week in the OOC, intended to protect the minor, are in contrast to how the young person has lived up until that point.

Under no circumstances can UM be held in a detention centre.⁵⁹² Nor can they be given an order to leave the territory, but only the guardian can be served with an annex 38 'order to return'.⁵⁹³ Before an order to return can be issued to the guardian of an unaccompanied minor, the best interests of the child must be weighed up.⁵⁹⁴

⁵⁸⁹ According to a sample taken in 2000, 53% of the cases of absconding from the OOC took place within 14 days; see: *Annals. Senate 2000-01*, 21 June 2001, 18-19; UNHCR, *Naar een sterkere bescherming van niet-begeleide en van hun ouders gescheiden kinderen in België*, 2019, 28.

⁵⁹⁰ *Ibid.*, 40.

⁵⁹¹ Based on consultation with the UNHCR on 17 May 2019; *Annals. Senate 2000-01*, 21 June 2001, 18-19.

⁵⁹² Art. 74/19 Immigration Act.

⁵⁹³ Art. 74/16 Immigration Act.

⁵⁹⁴ Art. 10 Return Directive.

Good practice

In April 2019, Minor-Ndako and Caritas launched the Xtra Mena project, which works with 'proactive outreach'⁵⁹⁵ with transit UM.⁵⁹⁶ The aim of this project is to inform the UM at Maximilian Park and the Brussels North, but also to make front-line actors and organisations aware of the specific context and to train them to integrate UM in the reception network.

RECOMMENDATIONS

Myria recommends the development of a specific methodology to attract transit UM to make use of the reception network.

For further analysis and the elaboration of a specific policy, Myria believes it is necessary to have **clear figures** on the number of cases of dissapearances of individual transit UM in an OOC, the length of stay and the profile of the UM (age, gender, nationality, etc.).

Myria recommends that the **appointment of a guardian** by the Guardianship Service takes place as a matter of priority after the notification of a UM with transit profile. Given the large number of cases of dissapearing from the OOC, it is recommended that these guardians are always specifically trained to work with transit UM.

⁵⁹⁵ Facebook message by Minor-Ndako on 2 August 2019.

⁵⁹⁶ "Xtra Mena", subsidised by Fedasil with funds from AMIF, www.fedasil.be/sites/default/files/projecten_2019.pdf, 13

8.4 AGE ASSESSMENT

A young person from a third country is an unaccompanied minor when he or she is definitively identified as such by the Guardianship Service.⁵⁹⁷ Merely stating that one is an unaccompanied minor is therefore not enough. The Guardianship Service only assigns an administrative guardian to the minor after it has been established that they are actually a minor.⁵⁹⁸

If the Immigration Office or the police have doubts as to the age of the individual, the Guardianship Service will have a medical examination carried out (triple radiography of teeth, collarbone and wrist) and on the basis of all other elements such as genuine documents and observation reports of the Guardianship Service and the reception centres, determine the age of the young person.⁵⁹⁹ If there is still doubt at the end, the young person is given the benefit of the doubt.⁶⁰⁰ This examination is often criticized for its margin of error and the Eurocentric approach to age and body.⁶⁰¹ Myria emphasizes the importance of taking into account comments and reports from support workers and persons close to the minor. Both medical and non-medical elements should play a role in the age assessment.⁶⁰²

If a young person does not declare him or herself to be a minor when arrested by the police and the police have no suspicion that they are a minor, or if the police express doubts as to the young person's age, the

young person may be transferred to a detention centre. Once in this centre, it is always possible to apply for an age test in case of doubt about the individual's age. This can take several days. If a young person turns out to be a minor as a result of an age test and is, for example, in a detention centre, the Guardianship Service will be notified immediately and the minor will be transferred to an OOC.

The detention centre in Bruges and the detention centre 127bis in Steenokkerzeel both confirmed that once it was established that the individual was a minor, the Guardianship Service reacted quickly and in many cases picked up the young people themselves in the detention centre.⁶⁰³

Myria reiterates its recommendation not to detain young people in a detention centre for whom there are doubts as to their age.⁶⁰⁴

⁵⁹⁷ Art. 61/14, 1° Immigration Act.

⁵⁹⁸ The tasks of the guardian are laid down in the General Guidelines for Guardians of UM of 2 December 2013.

⁵⁹⁹ Art. 7 of the Law on Guardian (Programme Law (I) of 24 December 2002 - Title XIII - Chapter VI: Guardian over unaccompanied foreign minors).

⁶⁰⁰ See: art. 25.5 Procedural guidelines; ORDE DER GENEESHEREN, *Testen voor leeftijdsbepaling bij niet-begeleide minderjarige vreemdelingen*, 20 February 2010.

⁶⁰¹ For a critical analysis of the age test, see: PLATFORM KINDEREN OP DE VLUCHT, *Leeftijdsschatting van niet-begeleide minderjarigen (NBMV) in vraag: Probleemstelling, analyse en aanbevelingen*, 2017.

⁶⁰² See for example: EASO, *Practical guide on age assessment*, 2018, 106.

⁶⁰³ Based on the visit to the CIB on 24 May 2019 and the visit to the 127bis centre on 27 May 2019.

⁶⁰⁴ This recommendation was already put forward by Myria in the context of its report on the regional INAD centres and the fundamental rights of foreign nationals, published in June 2013.

8.5 PROCEDURES

The special residence procedure was set up for UM.⁶⁰⁵ During this procedure, the MINTEH cell of the Immigration Office looks for a durable solution for the minor, these being (in order of preference):

- or family reunification;
- or return to the country of origin or other country where the minor is authorised to stay;
- or authorisation to stay in Belgium.

This procedure may be initiated in parallel with the procedure for international protection.⁶⁰⁶ During the procedure the UM receives a certificate of registration.⁶⁰⁷ As long as no durable solution has been specified, a UM will receive a temporary residence document, renewable until a durable solution is found, until the UM reaches the age of majority, or until three years have elapsed.⁶⁰⁸

The usual Dublin rules do not simply apply to UM.

In any Dublin procedure, the best interest of the child must, in theory, come first. Among other things, the wishes of the minor, the possibilities for family reunification (inside and outside the EU) and the safety of a minor who is a victim of trafficking are all taken into account.⁶⁰⁹ The presence of family members of the minor on EU territory must be verified as soon as possible, with or without the help of (international) organisations.⁶¹⁰

In certain cases, the UK is responsible for examining an application for international protection from a UM who has not yet set foot in the country. This is the case if, in the first instance, the family members of the UM are staying there regularly or are in the asylum procedure. This concerns family members in the broad sense, namely parents, brothers

and sisters, aunts and uncles and grandparents.⁶¹¹ This applies only insofar that it is in the interests of the UM.⁶¹² As such, in a number of cases, submitting an application for international protection in Belgium opens up the possibility of family reunification with family members in the UK.

If there are no family members who have a residence status in the EU or who have an ongoing asylum procedure, the Member State responsible will be the one where the UM has lodged an application for international protection, insofar as it is in his or her interest to do so.⁶¹³ If there are several Member States in which an application for international protection has been lodged, the Member State where the UM stays will examine the application.⁶¹⁴

Both the special residence procedure and the filing of an application for international protection can lead to family reunification with relatives in the UK. Both procedures must be started by the minor and his or her (administrative) guardian. Myria stresses the importance of correctly informing the minor and giving him or her time to process the information.

In addition, the smuggling of a minor is an aggravating circumstance within the meaning of the Immigration Act. As a victim of human smuggling, the UM can therefore obtain a residence status in Belgium (see 9.3.1).

⁶⁰⁵ Unaccompanied minors from the EEA cannot initiate this procedure; Article 61/14, 2° Immigration Act.

⁶⁰⁶ Art. 61/15, Immigration Act.

⁶⁰⁷ This is until the age of majority as long as no solution has been found; Article 110undecies of the Immigration Act.

⁶⁰⁸ Art. 61/18-61/19 Immigration Act.

⁶⁰⁹ Art. 6(3)(a) Dublin III Regulation.

⁶¹⁰ Art. 6 Dublin III Regulation.

⁶¹¹ Art. 8 Dublin III Regulation.

⁶¹² Ibid.

⁶¹³ Ibid., §4.

⁶¹⁴ CJEU 6 June 2013, C-648/11, ECLI:EU:C:2013:367, 'MA and others'.

9. SMUGGLING OF HUMAN BEINGS

Many migrants live in transit at the external borders of the EU. According to Europol, 90% of the people who managed to reach the EU in 2015 were helped in one way or another, primarily by criminal networks.⁶¹⁵ This is also the case for secondary movements within the EU. The preferred countries of destination are Germany, Sweden and the UK.⁶¹⁶

Criminal profits from smuggling migrants to and within the EU were estimated at €3-6 billion for 2015.⁶¹⁷ The phenomenon of smuggling of human beings has also grown since the introduction of the Dublin system, among other things.⁶¹⁸

The migration and smuggling routes and so-called *hotspots* can be identified, but change according to weather conditions, new border controls, etc.⁶¹⁹ In 2016, Zeebrugge was identified as one of the main criminal *hotspots* for intra-EU-movements.⁶²⁰

Year	Number of persons
2016	60
2017	46
2018	23
2019 (Jan-Sept)	49

Number of persons found in the port of Zeebrugge for whom a report was drawn up with a suspicion of smuggling. Source: Maritime Police

⁶¹⁵ EUROPOL, *Migrant smuggling in the EU*, February 2016, 5.

⁶¹⁶ Ibid.

⁶¹⁷ Ibid. 13.

⁶¹⁸ F. CRÉPEAU & A. PURKEY, "Facilitating mobility and fostering diversity Getting EU migration governance to respect the human rights of migrants", *CEPS paper in Liberty and Security in Europe*, 2016.

⁶¹⁹ EUROPOL-INTERPOL, *Migrant Smuggling Networks*, May 2016, 4; MYRIA, *Jaarlijks evaluatieverslag 2018. Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018, 103.

⁶²⁰ EUROPOL, *Migrant smuggling in the EU*, February 2016, 7.

Europol found that organised crime groups (OCG) in Belgium and France provide smuggling services to migrants seeking to reach the UK.⁶²¹ Major transport hubs, such as Brussels or Paris, are used to recruit migrants in irregular stay and organise smuggling. Albanian OCG are particularly well established in this region and play an important role in smuggling primarily Albanian migrants, who also often want to reach the UK.⁶²²

Transit migration and smuggling of human beings are considered a security risk in Belgium. Smugglers of human beings specialise more than ever in bringing transit migrants to the UK for considerable sums of money.⁶²³

Smuggling of human beings is defined in the Belgian Immigration Act as follows (translation):

*The offence of smuggling of human beings contributes by any means, directly or through an intermediary, to the entry into, transit through or residence on the territory of a Member State of the European Union or of a State party to an international convention on the crossing of external borders which binds Belgium, in breach of the legislation of that State, with a view to obtaining, directly or indirectly, a financial advantage.*⁶²⁴

⁶²¹ EUROPOL, *Activity report January 2017 – January 2018*, 2018, 9.

⁶²² See for example: A. VANRENTERGHEM, "Via Gents hotel en omgebouwde auto's van België naar Engeland", *VRT NWS* 27 September 2019. The fact that Albanian nationality is not at the top of the list of countries of origin in administrative arrests may have several explanations, see 6.2.1.

⁶²³ VAST COMITÉ VAN TOEZICHT OP DE POLITIEDIENSTEN (Permanent Oversight Committee on the Police Services), *De controle en opsluiting van transmigranten door de politie naar aanleiding van grootschalige bestuurlijke aanhoudingen, toezichtsonderzoek* (The control and detention of transmigrants by the police as a result of large-scale administrative arrests, supervisory investigation), 2019, 1.

⁶²⁴ Art. 77bis, 2nd paragraph Immigration Act.

However, in the absence of a profit motive, it can be a situation of assistance to irregular migration, unless this assistance is provided mainly for humanitarian reasons (see 7.4).⁶²⁵

Once arrived, the smuggled migrants are vulnerable to exploitation, as they often have large debts to repay to the smugglers. In some cases, this is part of the initial plan: a person is exploited during the journey in order to repay the debts incurred.⁶²⁶ In the specialised centre for UM who are victims of trafficking or smuggling of human beings, there are reports of, for example, young girls from Vietnam or China, whose final destination is almost always the UK.⁶²⁷

9.1 OBLIGATIONS OF THE STATE

The lack of clarity about the obligations of transit countries helps smugglers conduct their operations with impunity.⁶²⁸ However, the state has a responsibility to fight against trafficking and smuggling of human beings and against all other factors that promote irregular migration, e.g. the existence of a shadow economy.⁶²⁹

The Protocol against the Smuggling of Migrants by Land, Sea and Air and Supplementing the United Nations Convention Against Transnational Organised Crime calls for an integrated international approach in countries of origin, transit and destination.⁶³⁰

⁶²⁵ Art. 77, 2nd paragraph Immigration Act..

⁶²⁶ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019, 3.

⁶²⁷ MYRIA, *Jaarlijks evaluatieverslag 2018 Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018, 49.

⁶²⁸ B. PERRIN, "Just Passing Through? International Legal Obligations and Policies of Transit Countries in Combating Trafficking in Persons", *European Journal of Criminology* 2010, (11) 15.

⁶²⁹ Ibid.

⁶³⁰ Preamble to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000; This Protocol entered into force in Belgium on 10 September 2004.

This approach includes measures to prevent smuggling of human beings (e.g. border controls⁶³¹), punish smugglers⁶³² and protect the victims⁶³³.

In addition, the EU Directive on the facilitation of irregular migration lays down the obligation to provide for sanctions against individuals who assist with irregular entry and transit and individuals who intentionally assist people in staying in the territory for financial gain.⁶³⁴ In the event of assistance to irregular entry and transit for humanitarian reasons, each Member State may choose not to impose a sanction (see 7.4).⁶³⁵

In this context, the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking⁶³⁶ also usefully emphasise that States should, inter alia, ensure that victims of trafficking in human beings are not prosecuted for violations of immigration law as a direct consequence of their situation as victims of trafficking in human beings or are in any case not held in immigration detention or other forms of detention.

This principle, the *non-punishment principle*, i.e. relating to trafficking in human beings, has already been addressed in depth by Myria in the past in its annual evaluation report on trafficking and smuggling of human beings. It is worth mentioning here because of the situations in which trafficking and smuggling of human beings are linked.

⁶³¹ Ibid., art. 11.

⁶³² Ibid., art. 6.

⁶³³ Ibid., art. 16.

⁶³⁴ Art. 1(2) Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence; transposed into Belgian law in 2005.

⁶³⁵ Ibid., art. 1.2.

⁶³⁶ Added as an addendum to the report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (E/2002/68Add. 1).

9.2 SMUGGLING VIA BELGIUM TO THE UK

Criminal organisations are often run from the UK.⁶³⁷ For example, vehicles with British number plates are often used to take transit migrants to car parks.⁶³⁸

Turnovers from smuggling people into the UK must be extremely high. In one case, the turnover turned out to be €3,125,000 for a period of 9 months.⁶³⁹

The smugglers primarily use the E40 motorway. The car parks and the surrounding area are used to allow the victims to crawl into trucks. Car parks along the E40 are considered their property and their criminal territory. There are also confrontations with smuggling gangs and truck drivers are threatened.⁶⁴⁰ The smuggling networks have established that this route gets a lot of attention from the police. In the last two years, there have therefore been major shifts towards motorways in Wallonia and from car parks to industrial areas. That is why some networks organise themselves on a national level and no longer operate on a strictly local basis.

There are also smugglers who use vans to take transit migrants from the north of France to motorway car parks in Belgium to climb into lorries.⁶⁴¹

The smugglers have shelters in various cities where they provide a place to sleep for smuggled persons until the journey to the UK

can be continued. Other smugglers of the network also reside in the UK.⁶⁴²

The smugglers use residence, assembly and recruitment sites as a base for their operations in Belgium. In Brussels, these include, for example: rental houses, cheap hotels, cafes, eateries, night shops, shelters, vacant warehouses and parks.⁶⁴³

Maximilian Park has already been linked to various smuggling cases in the past. The park is internationally known by smugglers, who conduct their business there.⁶⁴⁴

The Stella Maris church in Zeebrugge, which was opened by Pastor Maréchal (see 7.2), was also used by smugglers.⁶⁴⁵ For example, at one point, there was a hierarchy and the smugglers decided who was allowed to stay and/or eat, for a fee. The smugglers had come from the camp in Dunkirk, among other places. Pastor Maréchal contests this and claims that he never saw anything.⁶⁴⁶

The reception centre for asylum seekers "Klein Kasteeltje" has also been referred to as a site where 'clients' were recruited.⁶⁴⁷

In northern France there are still camps controlled by smugglers.⁶⁴⁸ The camps are an important base for the supply of victims smuggled into the UK via motorway car parks

⁶³⁷ See case analyses and case law in Myria's annual reports on trafficking and smuggling of human beings. These are available at www.myria.be.

⁶³⁸ Meeting with local police "Westkust" on 23 May 2019.

⁶³⁹ MYRIA, *Jaarrapport 2017. Mensenhandel en mensensmokkel. Online* (2017 Annual Report trafficking and smuggling of human beings: Online_), 2017, 43.

⁶⁴⁰ See case analyses and case law in Myria's annual reports on trafficking and smuggling of human beings. These are available at www.myria.be.

⁶⁴¹ See for example: A. VANRENTGHEM, "16 mensen aangetroffen in laadruimte bestelwagen op parking langs E17 in Gentbrugge", *VRT NWS* 25 October 2019.

⁶⁴² MYRIA, *Jaarlijks evaluatieverslag 2018 Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018, 89.

⁶⁴³ See for example Albanian smuggling network: The victims were received by the smugglers upon arrival in Brussels or Ghent and accommodated in hotels or private sites near Brussels South Station, see: *ibid.*

⁶⁴⁴ Regarding the Kurdish smuggling networks, see: *ibid.*, 30-31; MYRIA, *Jaarrapport 2016. Bedelaars in de handen van mensenhandelaars* (2016 Annual Report trafficking and smuggling of human beings: Beggars in the hands of traffickers), 2016, 103, 107.

⁶⁴⁵ Judgement of the Court of First Instance, West Flanders, subsection Bruges, 19 October 2016; three smugglers sentenced from 3 to 5 years, the victim of human smuggling made a civil claim.

⁶⁴⁶ Meeting with Pastor Maréchal on 6 September 2019.

⁶⁴⁷ Upheld by the judgement of the Court of Appeal of Ghent on 28 March 2017.

⁶⁴⁸ At the end of 2016, the smuggling camps of northern France were cleared, but new camps have since sprung up.

in Belgium.⁶⁴⁹ The woods in the vicinity of these camps (e.g. Saint-Omer) are also considered criminal territory, where armed confrontations sometimes occur. Witness statements confirm rapes, looting, beatings and injuries, and child prostitution.

The smuggled people are often transported in distressing and dangerous conditions, sometimes behind false walls or in specially converted suitcases.⁶⁵⁰ Smuggling victims are also transported in refrigerated lorries.⁶⁵¹ This entails a serious risk of suffocation. The victims are sometimes given sleeping pills for the journey.⁶⁵²

Victims mainly pay for transport 'with guarantee (obligation of result)', also called a 'subscription' to get to the UK.⁶⁵³ Payments are sometimes made in kind by women and children.⁶⁵⁴

With guarantee	Without guarantee
Driver is informed	Driver is not informed
Sometimes forged documents	
Payment on arrival	Mostly paid/paid for the half
Higher prices e.g. €4,000	Lower prices e.g. €800 - €1,500

It is important to note that in some cases, smuggling victims themselves become a link in the smuggling chain due to a lack of money to

pay the high prices. For example, young transit migrants have to close the door of the lorries for several nights after others have climbed in, before they get the right to climb in the lorry themselves. This blurs the boundaries between victim, accomplice and perpetrator. This makes it all the more difficult for the police to accurately assess the situations. It is important to differentiate between, on the one hand, someone who receives, for example, €10 for an interesting tip or someone who has discovered a new car park and, on the other hand, someone who coordinates an entire network in exchange for considerable sums of money.

RECOMMENDATION

Both within the hubs and the specific homeless shelters where assistance is provided to transit migrants, a **strategy** must be developed in cooperation with the police authorities to **prevent and detect infiltration by smugglers of human beings**. Potential victims also need to be identified and informed about both the risks related to their irregular status and migration route, and the possible residence status. Employing staff with an affinity for the target groups is therefore recommended.

⁶⁴⁹ MYRIA, *Jaarlijks evaluatieverslag 2018 Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018, 89.

⁶⁵⁰ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019, 4.

⁶⁵¹ MYRIA, *Jaarverslag 2015. Mensenhandel en mensensmokkel. Schakels verbinden* (Annual Report on trafficking and smuggling in human beings: Tightening the Links), 2015, 78-79.

⁶⁵² See case analyses and case law in Myria's annual reports on trafficking and smuggling of human beings. These are available at www.myria.be.

⁶⁵³ MYRIA, *Jaarlijks evaluatieverslag 2018 Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018, 89.

⁶⁵⁴ MYRIA, *Jaarrapport 2017. Mensenhandel en mensensmokkel. Online* (2017 Annual Report trafficking and smuggling of human beings: Online_), 2017, 89.

Illustration: a Kurdish smuggling case

The main defendant ran the smuggling camp at Tétéghem (Northern France) where he ruled the roost. Smuggling of human beings was his 'full-time' occupation for years. The smuggling victims came from Afghanistan, Syria, Turkey and Iran. They included families with underage children and pregnant women. Around 10% of the victims were children.

Interceptions of telephone conversations showed that the smugglers ensured that the smuggling victims could stay in the refugee camp or the 'jungle' until they made the crossing to the UK. The smugglers were in the camp themselves and took care of food and groceries. Smuggling candidates who did not have enough money first had to work in the 'jungle' and only then could be transported to the UK.

The smuggling leader made the decisions regarding the transport, and who was and who wasn't selected. The smugglers collected the smuggling victims before departure and selected the vehicles in which they were smuggled. For transport 'without guarantee' of success, the smuggling victims, including several families with children, were taken from the 'jungle' to the car parks in Belgium and put on a truck to the UK. During his interrogation, the main defendant explained the procedure: ten to fifteen people were smuggled from the Tétéghem camp in vans. A car with one or two smugglers scouted the car parks in advance. A call was then made to signal that the smuggling victims could come.

The smuggling victims were let out of the van near the car parks and hid in nearby meadows or bushes. The smuggler then instructed the smuggling victims to find him on the car park, and he hid them in a truck or a refrigerated lorry. The smuggling of families from the camp at Tétéghem

was much more lucrative for the smugglers, so they focused on this target group of smuggling victims. Logically, there were also many families with children in the camp. The telephone tap showed that families with children of all ages were being smuggled, even pregnant women.

An unaccompanied female Afghan minor made statements in this case in the context of the smuggling status. The girl had just turned seventeen and was together with an adult Afghan male. They had paid €60,000 for transport from Afghanistan to the UK. The family of her boyfriend had covered this cost. She had fled Afghanistan because her life was in danger there.

She stated that she was staying in the camp at Tétéghem, a kind of tent camp in a forest. She stayed there in a tent herself. Regarding her smuggling transport in Belgium, she stated: "We left the camp with two cars. There were seven people in our car. There were even two people in the boot. The smugglers never give us their numbers and they change them all the time. They call us but we can never call them, they don't answer. I'm scared of them and tell them everything I know, but I don't know their names, I can't describe them very well... In the United Kingdom we would turn ourselves in to the police. We would apply for asylum there. We have no family there. My brother lives there, but since I ran away with my boyfriend, I will not go to him."

She added that she had escaped death in a previous smuggling attempt: "A week ago I made a similar attempt and we were put in a freezer truck in the same car park. The police did not show up. But we were able to alert the driver to open the trailer. Otherwise we would have died. I don't know the name of whoever put us on the trailer. We were pressured to get in. It's different smugglers all the time."

MYRIA, *Jaarlijks evaluatieverslag 2018, Mensenhandel en mensensmokkel*, (2018 Annual report trafficking and smuggling of human beings) 32.

9.3 TACKLING SMUGGLING OF HUMAN BEINGS

Belgium has more than twenty years of experience in tackling smuggling of human beings. In the fight against trafficking and smuggling of human beings, Belgium has taken a multidisciplinary approach.⁶⁵⁵ This is reflected in the Interdepartmental Coordination Unit for tackling smuggling and trafficking in human beings. This cell brings together all relevant actors and coordinates policy.⁶⁵⁶

In Belgium, identifying and prosecuting trafficking (and smuggling) of human beings and protecting victims is the responsibility of various actors: magistrates (reference magistrates, federal prosecutor's office), federal police, the Immigration Office (for issuing residence permits) and specialised reception centres.

Every year, dozens of legal cases on smuggling of human beings are successfully concluded. In 2017 there were 105 definitive convictions for smuggling of human beings.⁶⁵⁷ To this end, there are specialised reference magistrates for smuggling (and trafficking) in human beings and specialised police units.

The Belgian model is based on a criminal law approach to smuggling of human beings, with a focus on tackling the smugglers, not the people smuggled. The emphasis must be on financially squeezing and dismantling the international smuggling network. In this way, the smugglers' business model must be destroyed.

⁶⁵⁵ Circular letter of 23 December 2016 on the establishment of multidisciplinary cooperation with regard to victims of trafficking in human beings and/or certain more serious forms of smuggling of human beings

⁶⁵⁶ See: <https://www.myria.be/en/traff-and-smuggling>.

⁶⁵⁷ A conviction pertains to one person; MYRIA, *Jaarlijks evaluatieverslag 2018. Mensenhandel en mensensmokkel. Minderjarig, in hoogste nood* (2018 Annual Report Trafficking and Smuggling of human beings. Minors at major risk), 2018, 150.

The Mawda case

In May 2018, two-year-old toddler Mawda died when the police opened fire on the van she was in. Mawda was in the van together with around thirty other transit migrants. They were on their way from Grande-Synthe, where they were staying in a sports hall, to a motorway car park in Belgium to try to hide in a truck to get to the UK.

Following the death of Mawda Shawri, Myria brought civil proceedings in the human smuggling section of this case. In the context of the cooperation protocol with Committee P, Myria asked the Committee questions on three aspects related to the treatment of arrested migrants:

- The refusal of the police to allow one of the parents to accompany their seriously injured daughter in the ambulance;
- The support and information provided to Mawda's family members and the consideration for the child's interests, especially Mawda's minor brother, during his detention by the police;
- More structurally, the measures taken to ensure that the rights of persons arrested as potential victims of a more serious form of smuggling of human beings are taken into account and the information provided about them, especially with regard to the minors present.

Committee P has requested and obtained access to the legal case file in order to process our application, but unfortunately it does not provide much clarification. Committee P is of the opinion that the police officers involved are not to blame, and they underline the humanity with which the arrested persons were treated.

Myria will continue the dialogue with the relevant police and judicial authorities in order to better respect the fundamental rights of the arrested foreign nationals, and combat smuggling of human beings more effectively, in particular by mobilising as rapidly as possible a centre specialising in the reception of victims of smuggling of human beings.

With regard to the fatal shot that killed Mawda, Myria highlights the ECtHR's settled case-law concerning the right to life, which is protected by Article 2 of the ECHR. According to the Court: "The obligation to protect the right to life under this provision [...] requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State [...]. The State must therefore ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished."⁶⁵⁸ An effective investigation must be independent and adequate. "The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony". The Court reiterates that "Where a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation". "In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case". Finally, "a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts".

⁶⁵⁸ ECtHR [GC] 30 March 2016, no. 5878/08, Armani Da Silva/United Kingdom, §230. The following citations come from the same ruling (§§231, 233, 234, 237).

A structural approach to smuggling of human beings, including in West Flanders, has been pursued for many years through integrated and judicial control combined with intensive cooperation with France and the UK, from where smugglers of human beings generally operate. This chain-oriented approach has produced results.⁶⁵⁹

Myria recommends extending the expertise of certain regions of the country to regions that have only recently come into contact with transit migrants, such as Wallonia.

9.3.1 STATUS

Belgium is one of the few countries where it is possible for victims of smuggling of human beings in aggravating circumstances (e.g. life-threatening situations with refrigerated trucks) to apply for victim status.⁶⁶⁰ Every year, around twenty victims of smuggling of human beings make use of this status.⁶⁶¹

Aggravating circumstances include, inter alia, the victim's minority, the fact that the victim's life is endangered, abuse of the victim's irregular or precarious situation, use of violence, etc.⁶⁶²

Application of the procedure is subject to three conditions. The victim must:

- cooperate with the investigation (except in a first phase of 45 days, the so-called reflection period);
- cease all contact with the suspected perpetrators of the crime;
- accept support from a specialised centre.

In many cases, important information implicating the smugglers is obtained from the victims themselves. It is therefore important to gain the trust of the victims and see them as victims, and not focus on repression to tackle irregular migration.

⁶⁵⁹ Q&A. Chamber 2018-19, 13 March 2019, 54/182, 270-271 (Question no. 3839 F. DEMON).

⁶⁶⁰ Art. 61/2 to 61/5 Immigration Act.

⁶⁶¹ For exact figures, see MYRIA, *Jaarverslag Mensenhandel en mensensmokkel 2019: slagkracht voor slachtoffers* (Annual Report Trafficking and Smuggling of human beings 2019: strength for the victims) 2019, 164.

⁶⁶² Art. 77quater Immigration Act.

In taking measures to combat irregular migration, it is important to take into account the risk that vulnerable persons may become victims of smuggling of human beings even more quickly or become even more deeply embedded in the networks of smugglers.⁶⁶³

9.3.2 MEASURES

While smuggling of human beings used to be included in the Action Plans to tackle trafficking in human beings, the "Action Plan to tackle smuggling of human beings 2015-2018" was drawn up in 2015.⁶⁶⁴ This action plan was updated in 2019.⁶⁶⁵

The fight against smuggling of human beings was also one of the points on the so-called 'ten-point plan' that was drawn up in September 2018 (see 6.1).

Control actions

Various control actions have already been organised in the past: the control actions of the police zones and the federal road police in the coastal region (car parks along the E40), the integrated police actions (police zones, road police, Federal Judicial Police) in the ports, in petrol stations and on car parks, controls on the trains, controls along the E40 carried out by the police zone Ghent, the road police of West Flanders and the Federal Judicial Police, etc.⁶⁶⁶

The local police "Westkust" region has indicated that, for example, actions during the summer months are impossible due to tourism.⁶⁶⁷ In the past, actions also depended

⁶⁶³ COMMISSIONER FOR HUMAN RIGHTS, *Time to deliver on commitments to protect people on the move from human trafficking and exploitation*, 12 September 2019.

⁶⁶⁴ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018*, (Action plan to tackle smuggling of human beings 2015-2018) 2015.

⁶⁶⁵ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018 – actualisatie 2019*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019.

⁶⁶⁶ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018*, (Action plan to tackle smuggling of human beings 2015-2018) 2015, 5, 8-9.

⁶⁶⁷ Meeting with local police "Westkust" on 23 May 2019.

on the number of places available in the ACT.⁶⁶⁸

The existing actions will be continued in the future, although, given the shift of the phenomenon nationwide, a comprehensive approach to controls will also be envisaged.⁶⁶⁹

Sanctions

Since 2013, fines for both smuggling and trafficking in human beings have been multiplied by the number of victims.⁶⁷⁰

Information programmes

In some countries, the Immigration Office organises information programmes on the risks associated with irregular migration, such as, for example, the risk of smuggling of human beings.⁶⁷¹

There is also a campaign to inform and raise awareness among truck drivers and transport companies about the activities of smugglers of human beings in motorway car parks, and the steps to be taken if they find a person hiding in their truck.⁶⁷²

In 2019, the Immigration Office set up a digital information campaign on the existing regular migration channels and the risks of smuggling of human beings.⁶⁷³

⁶⁶⁸ Ibid.

⁶⁶⁹ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018 – actualisatie 2019*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019, 8.

⁶⁷⁰ The Criminal Code was amended in this regard by the Law of 24 June 2013 punishing the exploitation of begging, prostitution, trafficking and smuggling of human beings in proportion to the number of victims.

⁶⁷¹ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018*, (Action plan to tackle smuggling of human beings 2015-2018) 2015, 13 et seq.

⁶⁷² CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018 – actualisatie 2019*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019, 13. This campaign is organised in collaboration with FEBETRA.

⁶⁷³ Source: Immigration Office.

Circulars from the Minister of Justice

In addition, smuggling of human beings is the subject of the confidential circular COL 13/2018 of December 2018.⁶⁷⁴ This was a confidential, joint circular from the Minister of Justice, the Minister of home affairs, the State Secretary for Migration and Asylum Policy and the Board of Public Prosecutors on tackling smuggling of human beings.⁶⁷⁵

Specific measures

There are two specific measures that can be taken in the context of smuggling of human beings and transit migration:

- The mayor may, after prior consultation with the judicial authorities, decide to close a site (e.g. car park) for a maximum of 6 months if there are serious indications that trafficking or smuggling of human beings is happening at that location.⁶⁷⁶ For example, the car park in Wetteren was closed for 3 months in September 2018.⁶⁷⁷
- Property may be declared forfeited by the court in the context of smuggling of human beings, for example *safehouses* or temporary shelters.⁶⁷⁸

⁶⁷⁴ For more information on this circular, see MYRIA, *Jaarverslag Mensenhandel en mensensmokkel 2019: slagkracht voor slachtoffers* (Annual Report Trafficking and Smuggling of human beings 2019: strength for the victims) 2019, 102 et seq..

⁶⁷⁵ This replaces the earlier circular COL 4/2011 of 13 May 2011.

⁶⁷⁶ Art. 134quinquies New Municipal Law.

⁶⁷⁷ Decision of the Mayor of Wetteren of 12 September 2018.

⁶⁷⁸ Art. 77sexies Immigration Act; art. 42,1° Criminal Code.

Special detection techniques

In 2016, the Criminal Code and the Code of Criminal Procedure were amended to extend the application of special detection techniques to cases of smuggling of human beings without aggravating circumstances.⁶⁷⁹

Training⁶⁸⁰

Smuggling of human beings is part of the training of both judicial and police services. The Immigration Office also provides support with training and information sessions that are organised for police services, for example.

In the context of the Action Plan 2015-2018, training courses were organised at judicial and police level.

North Sea Taskforce⁶⁸¹

Judicial cooperation ("North Sea Task Force") between Belgium, France, the Netherlands and the UK in the fight against smuggling in human beings will be set up in the future, with the support of Europol, in order to make a thorough analysis of the active networks of smugglers of human beings in the four countries.

⁶⁷⁹ Law of 25 December 2016 containing various amendments to the Code of Criminal Procedure and the Criminal Code with a view to improving the special detection methods and certain investigation methods relating to the Internet and electronic and telecommunications and creating a voiceprint database.

⁶⁸⁰ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018* (Action plan to tackle smuggling of human beings 2015 - 2018), 2015, 12 et seq.; CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018 – actualisatie 2019* (Action plan to tackle smuggling of human beings 2015-2018 - update 2019), 2019, 11.

⁶⁸¹ CRIMINAL POLICY DEPARTMENT, *Actieplan ter bestrijding van mensensmokkel 2015-2018 – actualisatie 2019*, (Action plan to tackle smuggling of human beings 2015 - 2018 - update 2019) 2019, 15 et seq.

10. DEFENDING FUNDAMENTAL RIGHTS AND COMBATING SMUGGLING OF HUMAN BEINGS

In this Myriadoc, we have attempted to bring the phenomenon of transit migration into focus, with the necessary nuance. We have provided an overview of the typical transit migrant in Belgium. To provide a picture of the complete phenomenon, attention was given to the national, but also to the international context of transit migration and the cooperation around it. The lack of accurate and complete figures is a significant obstacle to obtaining an accurate and nuanced picture of the phenomenon and current practice in Belgium. Broad interdisciplinary monitoring is therefore an important recommendation in this report.

Nevertheless, from the combination of fieldwork, data analysis and literature review, one thing became clear: it is impossible to avoid the presence of transit migrants on Belgian territory. Belgium is located right in the heart of Western Europe, next to the UK. Up until now, the authorities at all levels have mainly taken a repressive approach. The focus is primarily on police actions, detention and removal of transit migrants, a trend that indicates a growing criminalisation of transit migrants.

However, the reality is that removal to countries of origin of many transit migrants is often very difficult or even impossible. In order to make removal to the country of origin of a transit migrant possible, many preconditions must be met. For example, identifying the person in question is a prerequisite. National authorities must be prepared to take back their nationals and no removal should be carried out in contravention of the prohibition of torture and the *principle of non-refoulement*. Many transit migrants are in need of international protection, being nationals of countries for which there is a high recognition rate, such as Eritrea or Sudan.

At the present time, removals of transit migrants are primarily to other European countries in application of the Dublin III Regulation. However, many transit migrants are so determined that they even try to return to the UK after a forced deportation. Transit migrants therefore regularly end up in a cycle of arrest, transfer to detention centres, and release. Many of them are in a state of confusion and uncertainty.

Even if transit migrants are systematically held in detention centres, and even if they are successfully removed to another European country, they are likely to show up again at the border with the UK in search of a better future. This repressive approach puts pressure on the fundamental rights of transit migrants, for instance when they are detained or when they are minors.

Myria recommends developing a clear policy that respects the fundamental rights of transit migrants. The Belgian authorities must continue to seek an answer to the challenge at hand, while honouring the international and European commitments agreed in, among others, the Geneva Convention, the ECHR, the Charter, the Common European Asylum System and the Return Directive. In this regard, Belgium will have to make a strong commitment to international cooperation. When Rome and Athens sneeze, Brussels and Berlin catch a cold. The EU is founded on common values of respect for human dignity, freedom, democracy, the rule of law and respect for human rights.⁶⁸² A sustainable policy in line with Europe's basic values cannot therefore only be based on repressive measures.

⁶⁸² Art. 2 TEU.

This Myriadoc shows that in the search for a sustainable solution for the migrants in question, many constructive measures have already been taken, both by the government and by civil society. Many NGOs, both professional ones and those working largely with volunteers, are committed to helping guarantee the human dignity of transit migrants, with or without government support. A great deal of information, medical assistance, clothing, food and shelter is provided by civil society. However, the (financial) government support that some organisations receive is rarely guaranteed in the long term.

Leaving much of this basic assistance to civil society entails limitations and risks, such as inadequate or incorrect information, a great deal of uncertainty about the future, etc. The specific context of transit migration and the risk of smuggling of human beings is often insufficiently taken into account, both by government officials and NGOs, meaning that the right steps are not always taken or assistance is not always adequately provided. For example, attention is not always given to potential victims of smuggling of human beings. Many UM also disappear from the reception network because the reception is not adapted to their specific context.

A purely repressive policy is not enough and a pragmatic solution is needed. An important recommendation of Myria is therefore to consolidate the so-called Humanitarian Hub in Brussels in order to guarantee respect for human dignity and not make it dependent on volunteers or NGOs which are normally responsible for acute humanitarian aid. We outline the specific recommendations below.

10.1 MONITORING

Myria recommends the collection of **reliable, transparent and comparable data** on the phenomenon of transit migration, by:

- the development of a **uniform working definition** of the concepts 'transit migration' and 'transit migrant' by the administrations concerned (police forces, the Immigration Office, Fedasil, Guardianship Service, etc.);
- **Identifying** the (average) number of **individual persons** in all available data on transit migrants and the provision of this statistical information to governments (including Parliament);
- Ensuring the validation of available information and the **publication** of non-confidential **information**.

Myria also recommends implementing **multidisciplinary monitoring** of the phenomenon of transit migration, with due consideration of the European and international context. The various actors in the field need to be involved in this regard (the relevant public services, civil society organisations, academics, etc.).

10.2 CONSOLIDATION OF THE HUMANITARIAN HUB

Myria recommends the consolidation of the Hub. In other words, the authorities must be responsible for financing, organising and supervising the Hub.

Myria believes that this is the only way for the authorities to guarantee a dignified standard of living for transit migrants and to inform them adequately and correctly. In this way, **respect for the fundamental rights of transit migrants** is not made dependent on **civil society**, where resources are often insufficient and it is difficult to provide a structural approach to the issue.

10.3 MINORS

In order to guarantee ease of access and accessibility for transit migrants, who often shun government agencies, Myria advises to **work closely with the Citizens' platform and NGOs** who have since built up broad expertise (including Doctors Without Borders, Médecins du Monde, Croix Rouge, Vluchtelingenwerk Vlaanderen, Ciré, etc.).

Both within the hubs and the specific homeless shelters where assistance is provided to transit migrants, a **strategy** must be developed to **prevent and detect infiltration by smugglers of human beings**, in cooperation with the police authorities. Potential victims also need to be identified and informed about both the risks related to their irregular status and migration route, and the smuggling status. Employing staff with an affinity for the target groups is therefore recommended.

Brussels is not the only region where a Hub should be set up. This should also be considered in the other regions and big cities, where many transit migrants are staying.

In Myria's opinion, these hubs should include at least the following services:

- Socio-legal services, with a specific focus on vulnerable groups;
- Medical and psychological assistance, with a specific focus on vulnerable groups;
- Tracing (searching for missing family members);
- Active referral and cooperation with homeless shelters, with a specific focus on vulnerable groups.

Myria also recommends investing in **outreach work** to trace (vulnerable) transit migrants and to inform them about their options in Belgium.

Myria also recommends that sufficient places should always be provided in the **homeless shelters** to accommodate transit migrants who don't have a place to sleep.

Upon arrest

Myria recommends that the police be **particularly attentive to potential minors** given the young age of the average transit migrant. Even if the young person in question does not indicate that he or she is a minor, the police must pay particular attention to signs that he or she is a minor, and take the necessary steps. At the **slightest doubt**, the young person must be treated as a minor and **should not be locked up** in a cell or a detention centre.

During the identification procedure, the minor should not be detained in a cell in the police station.

In the OOC

Myria recommends the **development of a specific methodology to attract transit UM** to make use of **the reception network**.

For further analysis and **the elaboration of a specific policy**, Myria believes it is **necessary to have clear figures on the number of cases of disappearances of individual transit UM in an OOC**, the length of stay and the profile of the UM (age, gender, nationality, etc.).

Guardian

Myria recommends that the **appointment of a guardian** by the Guardianship Service takes place **as a matter of priority** after the notification of a UM with transit profile. Given the large number of cases of absconding from the OOCs, it is recommended that these guardians are always specifically trained to work with transit UM.

10.4 BROADER APPLICATION OF THE SOVEREIGNTY CLAUSE AND ADDITIONAL GUARANTEES IN THE EVENT OF ARREST AND DETENTION

Myria recommends that the competent State Secretary of Minister **draws up clear guidelines regarding the sovereignty clause in the Dublin Regulation.** There must be flexibility in applying this clause when it comes to vulnerable persons.

The practice of repeated arrest, detention and release jeopardises legal certainty. Myria recommends that, with respect for the right to freedom, **a decision to detain a transitmigrant should only be taken after the Immigration Office has checked in the administrative file whether the identification procedure is sufficiently far advanced and/or a Dublin transfer can already be performed or removal to the country of origin will be possible within a reasonable time frame,** taking into account the possible risk of violation of Article 3 ECHR. This applies a fortiori where there is a high protection rate for persons from the country of origin of the person in question.

The **right to be heard** must always be observed. This applies to interviews conducted **by the police** after arrest, as well as those conducted **by the Immigration Office.** In this regard, **all relevant aspects in the context of the test provided for in Articles 3 and 8 of the ECHR** must be mentioned by the official conducting the

interview, and they must explain the importance of this, in a language which the person in question understands. This relates to, among other things, links in and with Belgium and the country of origin, the risk of torture, inhumane or degrading treatment or punishment upon return, etc. The importance of this must be explained in advance. The right to be heard must be exercised **in a language which the transit migrant understands sufficiently,** if necessary with free assistance from a **qualified interpreter or intercultural mediator.**

When a person's individual circumstances change, e.g. because they submit a first **application for international protection,** and people from their country of origin benefit from a high protection rate on average, Myria recommends that the person in question **should be released from the moment this application is submitted.**

10.5 CLARIFICATION OF THE CONCEPT OF 'MAINLY HUMANITARIAN REASONS'

Myria recommends clarification of the concept of **'mainly humanitarian reasons'** in **Article 77 of the Immigration Act.** Also, the penalization and prosecution of people providing assistance without a profit motive should be handled very carefully. The possibility of prosecution in this context **should not be used to intimidate aid workers.**

	RECOMMENDATION	ADDRESSEE
2020/01	Structured and effective monitoring <ul style="list-style-type: none"> - Reliable, transparent and comparable data on the phenomenon of transit migration <ul style="list-style-type: none"> o Uniform working definition o Identification of individual persons o Publication of non-confidential information - Multidisciplinary monitoring in a broad context 	Local police Federal Judicial Police Maritime Police Immigration Office Fedasil Guardianship Service
2020/02	Consolidation of the Humanitarian Hub <ul style="list-style-type: none"> - Financing/organisation and supervision - Cooperation with NGOs - Raising awareness among staff at the hub(s) regarding detection of smuggling of human beings - Hubs in various regions are possible - Broader approach through outreach - Referral to homeless shelters 	Federal government Local authorities Communities
2020/03	Effective protection of minors <ul style="list-style-type: none"> - Police proactive towards minors - No detention in police cells - Draft an adapted working method in the OOC with regard to transit-UM - Improve the quality of (individual) disappearing figures - Priority appointment of a guardian 	Local police Federal Judicial Police Guardianship Service Minister of Justice Fedasil Immigration Office
2020/04	Broader application of the sovereignty clause and additional guarantees in the event of arrest and detention <ul style="list-style-type: none"> - Directives application of Dublin III Regulation sovereignty clause - Detention only when identification or removal procedure is sufficiently advanced - Right to be heard sufficiently extended, with the assistance of an interpreter or intercultural mediator where necessary - End of detention on first application for international protection with a high protection rate 	The responsible Minister/State Secretary for Asylum and Migration Local police Federal Judicial Police
2020/05	Protection of aid workers <ul style="list-style-type: none"> - Clarification of the concept of 'mainly humanitarian reasons' in Article 77 of the Immigration Act. - No intimidation of aid workers via potential prosecution of assistance in cases of irregular migration 	Local police Federal Judicial Police Minister of Justice Minister of Home Affairs

11. ANNEXES

Actor	Date
Citizens' Platform Supporting Refugees	5/08/2019
Detention centre 127bis	27/05/2019
Detention centre in Bruges	24/05/2019
Directorate of Administrative Police Operations	24/05/2019
Guardianship Service FPS Justice	11/07/2019
Immigration Office	
- Department of Inland & Frontier Control	18/06/2019
o Control and interceptions	27/06/2019
o Identification and removal	9/07/2019
- Statistics Department	29/07/2019
FPS Home Affairs: international cell	22/03/2019
Humanitarian Hub Brussels	12/07/2019
Independent Chief Inspector of Borders and Immigration	8/08/2019
"Westkust" police zone	23/05/2019
Porte d'Ulysse	30/08/2019
Maritime Police	24/05/2019
Transit migrants in Maximilian park	12/07/2019 14/10/2019
UK Home Office: European Migration policy	5/07/2019
UNHCR	17/05/2019
VLB Parking	23/05/2019
Volunteers in Bruges: Ronny, Myriam and Pastor Maréchal	6/09/2019



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Myria is an independent public institution with three mandates: promoting the fight against trafficking and smuggling of human beings, informing the authorities about the nature and extent of migratory flows and protecting the fundamental rights of foreign nationals. It is the Belgian independent National Rapporteur on trafficking in human beings.

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