

United Nations Special Rapporteur on the Human Rights of Migrants

*Call for input: Report on Revisiting migrants' contributions from a human rights-based approach: a discussion on facilitating and hindering factors*

Submission by NANSEN, the Belgian Refugee Council

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## Introduction and focus

NANSEN is a center of independent expertise on refugee law set up in 2017 and based in Brussels<sup>1</sup>. Its mission is to develop and make available quality legal aid for all those in need of international protection so that their fundamental rights are effectively upheld. To achieve this objective, NANSEN combines technical legal expertise with an interdisciplinary approach to asylum. NANSEN is an operational partner of the UNHCR since it was found.

This submission focuses on the obstacles hindering persons in need of international protection in contributing to the Belgian society and, in particular, those faced by asylum seekers<sup>2</sup> and stateless persons before, during and after the end of administrative and legal procedures, including in administrative detention, victims of torture, victims of sexual and gender-based violences and non-removable persons (whose forced return to their country of origin or residence would constitute a breach of article 3 European Convention on Human Rights). Daily work over the last 7 years provides NANSEN with a comprehensive overview of policy

<sup>1</sup> For more information about NANSEN, see: <https://nansen-refugee.be/en/>.

<sup>2</sup> Based on UNHCR definition of asylum seekers and stateless persons, including the 1951 International Convention relating to the Status of Refugee (Art. 1A) and the 1954 International Convention relating to the Status of Stateless Persons (Art 1).

trends, case law evolutions and administrative practices regarding the position of asylum seekers and stateless persons in the Belgian society.<sup>3</sup>

This submission focuses on the obstacles hindering persons in need of international protection in contributing to the Belgian society and, in particular, those faced by asylum seekers<sup>4</sup> and stateless persons before, during and after the end of administrative and legal procedures, including in administrative detention, victims of torture, victims of sexual and gender-based violences and non-removable persons (whose forced return to their country of origin or residence would constitute a breach of article 3 European Convention on Human Rights). The following selected findings show how the legal, procedural, administrative and practical obstacles faced by persons in need of international protection limit their contribution to Belgian society overall.

## The federal Belgian State and migrant's rights in a nutshell

The Kingdom of Belgium is a federal state, composed of Communities and Regions (Communautés et Régions/Gemeenschappen en Gewesten), each with their own set of competences. There are there three Communities: the Flemish, Walloon and German Community, and three Regions: the Flemish, Walloon and Brussels Region. The federal level has competences typically connected with matters of public interest, such as migration. The Communities on the other hand have competences typically connected with matters pertaining to the people, while the Regions have competences typically connected with matters pertaining to the territory.<sup>5</sup>

In terms of migration policy, the federal level is responsible for the entry, stay and removal of migrants and the stay of economic migrants. This power is partly exercised by the Asylum and Migration Secretary of State (below "The Secretary of State"), under the Ministry of Home Affairs. The Immigration Office (Office des Etrangers/Dienst Vreemdelingenzaken – below "IO") is responsible for processing residence applications and asylum procedures and the enforcement of residence regulations.<sup>6</sup> The Commissioner General for Refugees and Stateless Persons (Commissariat General aux réfugiés et aux apatrides/Commissariaat-Generaal voor de Vluchtelingen en de Staatlozen below "CGRS"), an independent federal-level body, is responsible for processing applications for international protection.<sup>7</sup> This body decides whether or not to grant refugee status to applicants. An appeal can be filed against decisions made by the IO and the CGRS before the Council for Aliens Law Litigation (below "CALL").<sup>8</sup> Lastly, the Federal Agency for the Reception of Asylum Seekers (below "Fedasil") is responsible for the reception and early integration of people who seek international protection.<sup>9</sup>

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<sup>3</sup> NANSEN will respond to Question 4 among those proposed by the Special Rapporteur: *What obstacles are there in law and practice which hinder the realisation and/or recognition of migrants' contributions in communities of origin, transit and destination?*

<sup>4</sup> Based on UNHCR definition of asylum seekers and stateless persons, including the 1951 International Convention relating to the Status of Refugee (Art. 1A) and the 1954 International Convention relating to the Status of Stateless Persons (Art 1).

<sup>5</sup> For information see: [https://www.belgium.be/en/about\\_belgium/government/federale\\_staat](https://www.belgium.be/en/about_belgium/government/federale_staat).

<sup>6</sup> For more information see: <https://dofi.ibz.be/en>.

<sup>7</sup> For more information see: <https://www.cgrs.be/en>.

<sup>8</sup> For more information (only in French and Dutch) see: <https://www.rvv-cce.be/nl>.

<sup>9</sup> For more information see: <https://www.fedasil.be/en>.

However, the federal government is not the only competent authority when it comes to migration. The Regions are responsible for the labour migration policy<sup>10</sup>, while the Communities are, among other things, responsible for the healthcare of migrants.<sup>11</sup>

Although the three Regions share the same competences on migration, the Brussels Region bears a great responsibility as all migration related offices and institutions are located in the capital. As a consequence, the city infrastructure and the public institutions of Brussels must cope with the presence of a particularly large group of asylum seekers on its territory.

The local governments (villes et communes/steden en gemeenten) are responsible for the residence applications (with exception of requests of international protection and medical regularization). In addition, local authorities are involved in all integration programmes, particularly in the design of citizenship and language courses.

This fragmentation of competences is very complex to navigate for the all citizens including migrants and the phenomenon of non take-up (the fact that rights holders do not claim them, due to several factors including a high administrative threshold) is well documented in particular among persons in situation of poverty<sup>12</sup>.

### **Obstacles in law and practice that hinder asylum seekers' and stateless persons' contribution to society**

Based on public and its own findings, NANSEN respectfully draws the Special rapporteur attention on the following obstacles in law and practice which might hinder the realization and/or recognition of asylum seekers and stateless persons' human rights as well as impacting negatively on their contribution to the Belgian society.

#### **Obstacle I.A. - A deficient statelessness determination procedure resulting in a limbo situation**

In a Joint Submission to the Human Rights Council Universal Periodic Review<sup>13</sup> NANSEN flagged for the UN attention the precarious position and lacking status of stateless persons in Belgium. Since 2017, a person can be recognised as stateless by one of the family courts established at the six seats of the courts of appeal.<sup>14</sup> However, this procedure falls short of standards set out in the UNHCR Handbook on Protection of Stateless Persons in a number of areas cannot be considered a formal statelessness determination procedure.<sup>15</sup> During the procedure, applicants are not protected against removal and face a heightened risk of arbitrary detention particularly where procedural safeguards to identify and determine statelessness

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<sup>10</sup> For more information see the website of the Federal Migration Centre Myria: <https://www.myria.be/en/fundamental-rights/economic-migration-and-free-movement-1>. In 2022, the European Migration Network (EMN) conducted a study on the labour market integration of applicants for international protection in the EU during 2017-2022. The report can be consulted here: <https://emnbelgium.be/publication/integration-applicants-international-protection-labour-market>.

<sup>11</sup> For more information (only in Dutch): <https://www.agii.be/thema/vreemdelingenrecht-internationaal-privaatrecht/sociaal-medisch>.

<sup>12</sup> See Van Hoetegem Henk et De Boe Françoise, [Waarom mensen in armoede hun rechten niet kunnen realiseren](#), in Samenleving en politiek, n° 10, pp. 55-62, 10 décembre 2017 and more <https://socialsecurity.belgium.be/fr/belmod-projet/conference-finale-du-projet-belmod-et-take-23-juin-2022>

<sup>13</sup> NANSEN, Submission for the UNHCR Universal Periodic Review of Belgium, 3<sup>rd</sup> Cycle, 38<sup>th</sup> Session, p. 6, available at <https://nansen-refugee.be/wp-content/uploads/2020/11/Nansen-ENS-ISI-UPR-Submission-Belgium-Final.pdf>.

<sup>14</sup> For more information see the CGRS website: <https://www.cgrs.be/en/stateless-persons>.

<sup>15</sup> NANSEN, Submission for the Universal Periodic Review of Belgium, 3<sup>rd</sup> Cycle, 38<sup>th</sup> Session, p. 6, available at <https://nansen-refugee.be/wp-content/uploads/2020/11/Nansen-ENS-ISI-UPR-Submission-Belgium-Final.pdf>.

and related barriers to removal are lacking. Moreover, arbitrary and disproportionately lengthy detention can ensue when the particular vulnerabilities of stateless people are not addressed.<sup>16</sup>

As applicants are considered undocumented migrants, they have only limited rights. In the judicial procedure, the burden of proof lies almost entirely with the applicant, and the standard of proof and documents required from the applicant are unclear. Delays in decision-making vary between courts but can be up to 12 to 18 months.<sup>17</sup> Persons recognised as stateless by the courts must apply for a residence permit on humanitarian grounds, and it is generally difficult for them to regularise their stay. This means they often stay illegally in Belgium.<sup>18</sup> Structural discrepancies between the status of recognized refugees and recognized stateless persons have been found in breach of the constitutional principle of equality by the Constitutional Court.<sup>19</sup>

A legislative amendment regarding stateless persons' rights is currently being prepared. One effect of this amendment would be to grant recognized stateless persons a right of residence. This upcoming change in legislation might impact the capacity to contribute to the society positively. However, NANSEN and the European Network on Statelessness have already stressed the limits of this amendment.<sup>20</sup>

The current lack of a legal residence both during and after the statelessness determination procedure prevents stateless people's to access the Belgian labour market. As a result, people in such situations live in precarious conditions, which often force them to turn to the informal economy. Without legal residence, they and their families have access only to urgent healthcare and are not permitted access to housing or social security. Children of stateless persons may also face difficulty in accessing primary and higher education or in exercising their right to leisure. Statelessness has severe detrimental effects on children<sup>21</sup> as for adults. The peculiar statelessness procedure split between the judiciary and Immigration Office, disconnecting the status determination from the right of residence creates a gap preventing stateless persons to meaningfully participate and contribute to society, in particular by preventing them to access the labour market and providing them only with a limited set of socio-economic rights<sup>22</sup>.

## Obstacle I.B. – A deficient asylum procedure

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<sup>16</sup> NANSEN, Submission for the UNHCR Universal Periodic Review of Belgium, 3<sup>rd</sup> Cycle, 38<sup>th</sup> Session, p. 7, available at <https://nansen-refugee.be/wp-content/uploads/2020/11/Nansen-ENS-ISI-UPR-Submission-Belgium-Final.pdf>. See also: <https://index.statelessness.eu/country/belgium>.

<sup>17</sup> Legal aid is available both in first instance and in appeal, under the same conditions. If the application is rejected, an appeal can be filed; NANSEN, Submission for the UNHCR Universal Periodic Review of Belgium, 3<sup>rd</sup> Cycle, 38<sup>th</sup> Session, p. 6, available at <https://nansen-refugee.be/wp-content/uploads/2020/11/Nansen-ENS-ISI-UPR-Submission-Belgium-Final.pdf>.

<sup>18</sup> For more information on the residence of stateless people in Belgium see <https://index.statelessness.eu/country/belgium>.

<sup>19</sup> Belgian Constitutional Court 17 December 2009, no. 198/2009; Belgian Constitutional Court 11 January 2012, no. 1/2012. Also see Court of Appeal Brussels 17 September 2014, no. 2014/7124.

<sup>20</sup> The report can be consulted (in French) here: <https://nansen-refugee.be/2023/12/06/projet-de-loi-sur-lapatridie-2023-une-analyse-par-ens-et-nansen/>

<sup>21</sup> See <https://www.statelessness.eu/issues/ending-childhood-statelessness> and <https://www.statelessness.eu/issues/stateless-refugees-and-migrants>

<sup>22</sup> <https://nansen-refugee.be/2020/06/24/guide-pratique-sur-lapatridie/>

A recent research report on vulnerable asylum seekers<sup>23</sup> found that the Belgian asylum procedure is characterized by the relegation of asylum seekers to the role of passive bystanders. The long waiting periods during the procedure do not only place an enormous emotional burden but also prevent these people from planning both the present and the future, which leaves them feeling stuck.<sup>24</sup>

As noted in the VULNER Research Report 2 *Through the Eyes of the “Vulnerable”: Exploring Vulnerabilities in the Belgian Asylum System*, poor information management and dissemination and lack of control over the path of the process, create a feeling of disempowerment for protection seekers. This is striking in that protection seekers feel undermined by the process dedicated to supporting them in their asylum path. The place where protection seekers spend this waiting period also comes up as a major source of vulnerability. “Forced passivity” and repetitive schedules in the reception centre, as well as unfulfilled primary needs, combine over time and exacerbate former vulnerabilities in a way the current asylum policy can hardly address.<sup>25</sup>

In addition, Belgium practices the systemic detention of people who apply for asylum at the state borders. According to NANSEN, the systematic detention of applicants at the border violates EU regulations and international law. The United Nations Human Rights Committee considers that the detention of applicants for international protection is arbitrary when individual circumstances are not taken into account and the possibility of implementing less coercive measures is not explored. Illegal entry alone is not sufficient to justify detention<sup>26</sup>. The United Nations Human Rights Committee has also examined the circumstances in which applicants for international protection who enter the country illegally may be detained for a short period. On this occasion, the Committee recalls the conditional and subsidiary nature of such detention and emphasises that detention based on a mandatory rule applicable to a broad category of people is arbitrary<sup>27</sup>. The application of this procedure should take place after an individual assessment when there are indications that the application for international protection is unfounded.<sup>28</sup> The impact of immigration detention on well-being and mental health is well documented<sup>29</sup>. Systemic detention at the border with insufficient consideration

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<sup>23</sup> See the VULNER Project <https://www.vulner.eu> exploring the concrete meanings, practical consequences, and legal implications of “vulnerability” in the legal and policy instruments of the Common European Asylum System, in the case law of the European Court of Human Rights and the Court of Justice of the European Union as well as domestic courts, and in the resettlement practices of the EU Member States. NANSEN was a member of the Advisory Board. The Belgian Research Team produced two reports available at <https://www.vulner.eu/115831/Research-Reports>

<sup>24</sup> Population Europe, Better Policies and Laws to Address Migrants’ Vulnerabilities 10 Key Messages from the VULNER Project, Discussion Paper No 18, June 2023, p. 8, available at <https://population-europe.eu/research/discussion-papers/better-policies-and-laws-address-migrants-vulnerabilities>.

<sup>25</sup> Population Europe, *Through the Eyes of the “Vulnerable”: Exploring Vulnerabilities in the Belgian Asylum System*, VULNER Research Report 2, p. 85, available at [https://www.vulner.eu/117832/VULNER\\_WP2\\_Report-2.pdf](https://www.vulner.eu/117832/VULNER_WP2_Report-2.pdf).

<sup>26</sup> Comité des Droits de l’Homme des Nations unies 30 avril 1997, CCPR/C/59/D560/93, A. c. *Australie* § 9.4.

<sup>27</sup> Comité des Droits de l’Homme des Nations unies 25 juillet 2013, CCPR/C/108/D/2136/2012, *M.M.M. e.a. c. Australie*, § 10.3.

<sup>28</sup> NANSEN, Tegen de systematische detentie van asielzoekers aan de grens, p. 9, <https://nansen-refugee.be/wp-content/uploads/2021/09/3.-Tegen-systematische-detentie-van-asielzoekers-aan-de-grens.pdf>.

<sup>29</sup> “*There is significant and consistent evidence that refugees are more vulnerable to mental illness, particularly depression and PTSD, compared to the general population. In addition to pre-migration factors such as exposure to torture or human-trafficking, post-migration factors, including prolonged asylum procedures; prohibition from working; poverty; and poor housing are also significantly associated with poor mental health.*”

for alternatives is negatively affecting the individual's capacities and prospects to participate and contribute to the society while potentially also threatening their fundamental rights.

These elements create a state of being and environment for the asylum seeker that is not conducive to his participation and contribution to society.

## Obstacle II – Systemic violation of asylum seekers' right to reception

Since November 2019, Belgium has failed to implement the ECJ Grand Chamber judgment *Zubair Haqbin*<sup>30</sup>, recalling the obligation to ensure “*a dignified standard of living*” for all asylum seekers, including those subjected to disciplinary sanctions. While such sanctions “*cannot deprive the applicant of the possibility of meeting his or her most basic needs*”, and a sufficient standard of living must be guaranteed “*continuously and without interruption*”.<sup>31</sup>

As noted by the UNHCR, the reception crisis' of asylum seekers in Belgium is concerning and has now lasted more than two years leaving many asylum seekers without a roof over their heads and access to basic provisions such as drinking water, sanitation and medical assistance.<sup>32 33</sup>

The Belgian NGO Coordination et initiatives pour réfugiés et étrangers (CIRÉ) stated in 2023 that since November 2019, the authorities have failed to put in place a clear and transparent process for organising the entry into the reception network of beneficiaries left on the street<sup>34</sup>. In addition to waiting lists, there are lists of people who have been convicted by Fedasil in court, and a parallel list of vulnerability criteria. Recently, an application has also been set up to enable emergency services to register requests to take in people in emergency accommodation. People left on the street do not have access to this application.<sup>35</sup> In the same report, MSF alerts on the severe deterioration in the mental health of asylum seekers living on the streets, with mental conditions exacerbated by insecurity that can lead to suicidal thoughts or attempted suicide<sup>36</sup>.

Over the last year and a half, the Brussels Labour Court handed down more than 7,000 judgments against Fedasil for failing to meet its reception obligations towards asylum seekers. In response to the non-enforcement of these individual judgments, the European Court of Human Rights (ECHR) issued more than 1,656 interim measures ordering Belgium to provide

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See <https://www.helenbamber.org/sites/default/files/2022-09/Impact%20of%20detention%20research%20summary%20Final.pdf> See also <https://pubmed.ncbi.nlm.nih.gov/37338992/> and [https://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper\\_Does-Detention-Deter\\_April-2015-A4\\_web.pdf](https://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web.pdf)

<sup>30</sup> Court of Justice of the European Union 12 November 2019, ECLI:EU:C:2019:956, *Zabair Haqbin v. Federaal Agentschap voor opvang van asielzoekers*.

<sup>31</sup> See State of the rule of law in the European Union Report from Belgium, p. 6, available at <https://institutfederaldroitshumains.be/sites/default/files/2023-07/Rule%20of%20law%20belgium.pdf>.

<sup>32</sup> For more information see: <https://www.unhcr.org/be/98821-unhcr-reception-crisis-in-belgium-is-concerning-but-solutions-are-at-hand-2.html>.

<sup>33</sup> For more information see: <https://www.unhcr.org/be/98821-unhcr-reception-crisis-in-belgium-is-concerning-but-solutions-are-at-hand-2.html>.

<sup>34</sup> Eight human rights institutions drew the attention of the international authorities to the current situation of asylum seekers in Belgium, in a joint communication addressed to the United Nations Special Rapporteurs, the European Commission, the Commissioner for Human Rights and the Council of Europe's Special Representative on Migration and Refugees, available at <https://institutfederaldroitshumains.be/fr/crise-de-laccueil-8-institutions-de-defense-des-droits-humains-invitent-leurope-et-les-nations-unies>

<sup>35</sup> Ciré, Crise d'accueil Etat des lieux, May 2023, p. 3, available at <https://www.cire.be/communiquede-presse/rapport-crise-accueil/>.

<sup>36</sup> Idem, p.8.

adequate material reception conditions.<sup>37</sup> The reception crisis has fed into a growing problem of non-enforcement of court decisions by the Belgian state when it is convicted for human rights violation.<sup>38</sup> On 18 July 2023, Belgium was condemned by the European Court of Human Rights (ECtHR) for our country's failure to comply with court decisions mandating the provision of reception for people seeking international protection in our country. The Court ruled that this is a violation of the right to a fair trial (Article 6 of the European Convention on Human Rights).<sup>39</sup>

On 20 February 2023, a Dutch tribunal of first instance annulled a *Dublin*-transfer to Belgium because given a risk of inhuman or degrading treatment, in breach of the European Convention on Human Rights, if the asylum seeker in question were to return to Belgium, the principle of mutual trust between member states could no longer be applied. A French Administrative Tribunal took the same decision in January 2024.<sup>40</sup>

## Recommendations

Based on the above information, NANSEN respectfully suggests the Special Rapporteur to consider the following recommendations for Belgium:

- I. Provide a full and robust legal status and rights for stateless persons, in particular a right to residence, to avoid prolonged periods of limbo situations and facilitate their contribution to Belgian society
- II. To inquire the Belgian government on the denial of reception to asylum seekers, and to urge the government to immediately provide all applicants for international protection, access to reception in conformity to human dignity.

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<sup>37</sup> Ciré, Crise d'accueil Etat des lieux, May 2023, p. 5, available at <https://www.cire.be/communiquede-presse/rapport-crise-accueil/>.

<sup>38</sup> See State of the rule of law in the European Union Report from Belgium, p. 2, available at <https://institutfederaldroitshumains.be/sites/default/files/2023-07/Rule%20of%20law%20belgium.pdf>.

<sup>39</sup> European Court of Human Rights, 18 July 2023, nr. 49255/22, *Camara v. Belgium*

<sup>40</sup> See <https://institutfederaldroitshumains.be/fr/crise-de-laccueil-8-institutions-de-defense-des-droits-humains-invitent-leurope-et-les-nations-unies>