REDIAL PROJECT

National Synthesis Report – Belgium

Article 10 § 2 and 11 of the Return Directive

I. Legislation

The regime applicable to the unaccompanied minors is listed in the law of 15 December 1980[1].
a) Procedures

When an unaccompanied minor arrived in Belgium, two scenarios are possible:

- either he/she applies for asylum;
- or he/she does not apply for asylum or he/she dismissed his/her application.

In the first case, the unaccompanied minor has a temporary residence permit and is subjected to the same regime as adults.

In the second case, his/her guardian may request from the Aliens Office (below-mentioned: "AO") to issue a residence permit[2]. The unaccompanied minor is auditioned by the AO, with his/her guardian[3]. After this interview and an individual examination, the AO takes a decision[4]: either it issues an order to remove the minor, if the lasting solution is the return in another country or the family reunification in another country, or it issues a residence permit for six months, if a lasting solution was not found. At the end of this period, the guardian has to introduce the following elements: a lasting solution, the family situation of the minor, any other relevant information about his/her specific situation and the proof of a regular schooling. If a lasting solution is still not found, the residence permit is prolonged for six month again[5]. This temporary residence of twice six months may be a residence permit of one year if the minor's passport is produced[6]. At the end of this period, the guardian has to produce the elements mentioned above, plus the proof of the knowledge of a national language[7] and the procedure continues. The temporary residence permit may become residence permit for an indeterminate period[8].

b) Standard of "lasting solution"

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[1] Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *M.B.*, 31 décembre 1980, p. 14584.

[2] Art. 61/15.

[3] Art. 61/16.

[4] Art. 61/18.

[5] Art. 61/19.

[6] Art. 61/20.

[7] Art. 61/21.

[8] Art. 61/23.

The aim of the procedure described above is to find a lasting solution for the unaccompanied minor. Indeed, before taking an order to remove, the AO has to consider any proposition of lasting solution and to take into account his/her best interests[9]. According to the law, a lasting solution can be:

- either the family reunification in the country where the parents are legally living;
- or the return to the country of origin or to the country where the unaccompanied minor is authorized or permitted to stay with reception guarantees and adequate care, depending on its age and degree of autonomy, by parents or other adults (family member or guardian) who will take care of him or by governmental or non-governmental structures;
- or the permission to stay in Belgium[10].

To that end, the AO shall be satisfied:

- that there is no risk of human trafficking and;
- that the family situation is likely to allow the reception of the minor and that a return to a parent or family member is desirable and timely depending on the family's ability to assist, educate and protect him/her or;
- that there is an adequate reception facility and that it is on the best interests of the child to be placed in the reception facility[11].

The first condition – no risk oh human trafficking – has to be combined with one of the two following conditions, as indicated by he use of the linking words "and" and "or".

In short

National regulation implements the obligation, contained in Article 10, § 2, Return Directive, for the authorities to perform a positive approach to ensure that the minor will benefit from reception and care guarantees based on the needs identified by his/her age and degree of autonomy, in the country where he/she is removed.

II. Jurisprudence

The jurisprudence of the Council for Alien Law Litigation (below-mentioned: "CALL"), which decides on these issues in the legal framework of proceedings for annulment, gives very few lessons on the substantive analysis of the lasting solution, as soon as the CALL makes only a review of legality.

a) Decisions cancelling the order to remove the unaccompanied minor

Most of the decisions uploaded, and in general, rules on the obligation to provide the formal motivation for the administrative acts, on the general principle of good administration and on the manifest error of assessment.

Cancelling the order to remove the unaccompanied minor on the grounds of theses – or one of these – violations, the CALL considers in each decisions that it does not appear from the administrative file that the AO initiates steps to seek the most appropriate lasting solution for the minor, inquires about the reception and care guarantees or checks the reality of these guarantees in the country where he/she is removed (the CALL is not satisfied with assumptions). In others terms, the AO has a legal obligation to be satisfied/to insure the family situation can welcome, support and take care of the minor in the country where he/she is removed.

[9] Art. 74/16, § 1er.

[10] Art. 61/14 and art. 74/16, § 2.

[11] Art. 74/16, § 2.

"As it happens, about the existence of reception guarantees for the minor, the Council observes that the defendant is limited to justify the contested decision by this way: '*Therefore, the parents are still the holders of the parental authority and, consequently, of the rights and duties relating thereto. Given that it appears the applicant maintains a positive, on-going and regular relationship with her mother (hearing AO p. 11/14), there are reception guarantees in Senegal close to her. After considering all of the different elements highlighted and because the mother and the rest of the siblings (except the sister […]) are living in Senegal, it appears that the lasting solution for the applicant is a return to Senegal via a family reunification*'. This cannot meet the formal requirements motivation of administrative acts. Indeed, the defendant could not be limited, in the motivation of the contested decision, to conclude that, as soon as the parents are still holders of the parental authority and as the minor is maintaining a positive relationship with her mother, reception guarantees are ensured in Senegal, without checking the reality of theses guarantees, given the particular situation. Moreover, it must be noted that it does not appear from the documents in the administrative file that the defendant made such investigations before taking the contested decision.

Therefore, the Council considers that the defendant did not adequately ensured that the return of the minor in her family in the country of origin was desirable and appropriate according to its ability to welcome her."[12]

Therefore, the AO has to investigate the family situation as a whole to be satisfied that reception and care guarantees are adequate. It cannot only be satisfied with:

- the fact that the minor still has contact with his/her parents in the country of origin

  "Therefore, the Council finds that merely claiming, about reception and care guarantees, the documents produced by the applicant and obtained after his arrival in Belgium imply that '*he still maintains contacts with members of his family in the country of origin*', which ones will be interested by him, without having previously investigated further the applicant's family situation in Albania, the defendant failed in its duty to provide formal motivation for the administrative acts. Indeed, the defendant could not be limited, in the motivation of the decision, to conclude that '*active contacts are still maintained with persons still living in the country of origin and interesting in the fate of the minor'* only because *'the dates of issue of [the] documents [submitted in support of the application] (…) take place after the departure of the minor towards Belgium, (…)*' without checking further the reality of theses reception and care guarantees compared to the evidence adduced by the applicant during his hearing and focus on a particularly troubled family background." [13]
- the fact that the parents are still alive

  "[…] the Council first states that nowhere the circular of 15 September 2005 on the residence permit of the unaccompanied minors shall exclude the minor whose parents are still alive in the country of origin so that the reason cannot justify that the applicant will be deprived of it."[14]
- the fact that the mother and/or the father is/are in charge of others brothers and sisters

  "As it happens, about the existence of reception guarantees of the minor, the Council observes that the defendant is limited to justify the contested decision in this way: '*We have to add that the half-brother and half-sister are still living in the country of origin with their father (AO hearing, p.4). So the mother supports her two other children. This element is appreciated as a recognized and assumed responsibility of the mother to her children and thus as an evidence that reception guarantees, insofar as possible, will be*

[12] CALL, 3 July 2014, § 3.4 (free translation).

[13] CALL, 20 June 2013, n° 105 411, § 4.1 (free translation).

[14] CALL 31 May 2010, n° 44 410, § 3.1 (free translation).

> *provided by the mother'*. This cannot meet the requirements of formal motivation of administrative acts. Indeed, the defendant could not be limited, in the motivation of the contested decision, to conclude that '*reception guarantees will be provided be the mother, as much as she can*' only because the minor explained during his hearing that the mother support the half-brother and half-sister, without checking further the reality of these guarantees, given the particular situation. Moreover, it is clear that is does not appear from the documents in the administrative file that the defendant investigated like that before taking the contested decision."[15]

Moreover, the CALL holds that the AO cannot exclude the precarious economic situation of the minor's family as part of the research of the lasting solution.

> "As it happens, about the economic situation of the minor's family, the Council observes that the defendant is limited to justify the contested decision in this way: '*regarding the precarious economic situation of his family and the difficulty for the parents to support the whole family, we have to note that the reasons invoked are economic and thus unknown by the conditions to enforce Articles 61/14 and followings of the law*', which cannot meet the requirements of formal motivation of administrative acts. Given to that, the defendant could not exclude the precarious economic situation of the minor's family from the examination of the lasting solution. Therefore, the Council considers that the motivation of the contested decision is inadequate given to the elements of the administrative file supporting the precarious situation of the minor's parents and the financial difficulties of the family."[16]

It also appears from the jurisprudence uploaded that the CALL judges that the AO cannot refuse to take into account the health of the minor in the context of the examination of the lasting solution. If it does, the AO does not adequately ensure that removing the minor is desirable and appropriate based on the ability of his/her family to receive and take care of him/her.

> "As it happens, about the minor's health, the Council observes that the defendant is limited to indicate in the contested decision the reason why it considers that this element '*is not within the field of application of Articles 61/14 and followings of the law*'. However, the minor's health and its support in case of remove to the country of origin were precisely invocated by the guardian to justify the residence permit in Belgium as the lasting solution for the minor.
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> Therefore, the Council considers that the motivation of the contested decision is not sufficient. Given to that, the defendant could not refuse to take into account the minor's health in the examination of the lasting solution.
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> It should be noted that the defendant did not adequately ensure that removing the minor to his family, according to his health, was desirable and appropriate depending on the capacity of his family to welcome him."[17]

A last precision is that the CALL reproaches the AO not to provide any information on the identity of "adults" or "persons" who would be responsible to welcome and support the minor in the country where he/she would be removed.

> "The Council also notes that the defendant failed to provide any information about the identity of 'adults' or 'persons' who would be responsible to welcome and support the applicant in Albania. However, Article 74/16 of the above-mentioned law states that '*The Minister or his delegate ensures that the minor, who is removed, will benefit of reception and care guarantees in his*

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[15] CALL, 24 July 2013, n° 107 132, § 3.4 (free translation). See also: CALL, 23 February 2012, n° 75 677, § 3.2; CALL, 16 septembre 2014, § 3.5.

[16] CALL, 30 April 2013, n° 102 063, § 2.4 (free translation).

[17] CALL, 24 July 2013, n° 107 133, § 3.4 (free translation).

country or origin (...), either by his parents or by another member of his family (...)', steps which the defendant obviously failed to accomplish in the case in point."[18]

b) Decisions rejecting the action for annulment of the order to remove the unaccompanied minor

It appears from the decisions uploaded that the CALL rejects the action for annulment of the order to remove the unaccompanied minor, introduced by his/her guardian, because this one did not participate in the search for the lasting solution and failed to substantiate his/her allegations according to which there is neither reception nor care guarantees in the country where the minor is removed. When the guardian reproaches the AO not to carry out sufficient investigations on the search for a lasting solution, the CALL argues it is apparent from the legislation[19] that both parties – the guardian and the AO – have to collaborate in the burden of proof.

"Regarding the complaint that the defendant did not carry out sufficient investigations for the search of a lasting solution, the Council have to recall, as it appears from the provisions mentioned in 3.1. above, that both parties, the guardian and the defendant, have to collaborate in the burden of proof. In the case in point, it appears from the contested decision that the defendant considered to have sufficient information to rule as mentioned before.

After the examination of the administrative file, the Council notes that the motivation of the contested decision is not vitiated by any manifest error of assessment and that the applicant limits himself to take the opposing view and tries and leads the Council to substitute its own assessment to the defendant's assessment, which is not conceded for lack of demonstration of such an error. It is all the more so as it appears from the administrative file that the applicant failed to support his allegation following which there is no reception and adequate care guarantees for the minor, in case of return to the country of origin, while he has to help with the search of the lasting solution, according to Article 110sexies of the above-mentioned Royal Decree, and that he limited himself to provide medical reports about parents and sister's minor, a document certifying the imprisonment of his father and certificates of unemployment of his parents. The assessment's defendant of theses documents would not be regarded as manifestly unreasonable."[20]

In another decision rejecting the action for annulment of the order to remove, the CALL pointed out that it appears from the legislation that reception and care guarantees can be provided either by minor's parents or other adults who will care for him or by governmental or non-governmental structures. Therefore, an adult other than the minor's parents is allowed to take care for him/her in the country where he/she is removed. *In casu*, the "other adult" was the minor's adoptive mother[21].

[18] CALL, 20 June 2013, n° 105 411, § 4.1 (free translation).

[19] Arrêté royal du 8 octobre 1981 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, *M.B.*, 27 octobre 1981, p. 13740 (art. 110 *sexies*).

[20] CALL, 24 July 2013, n° 107 134, § 3.2 (free translation). See also: CALL, 19 July 2012, n° 84 936, § 3.2; CALL, 20 March 2014, n° 121 179, § 3.2.2.

[21] CALL, 16 July 2013, n° 106 771, § 3.2.5.

ARTICLE 11 – ENTRY BANS

Introduction

Articles 74/10, 74/11 and 74/12 of the Belgian Law of 15 December 1980 (hereafter 'Aliens Act') implement article 11 of the Return Directive[22]. They were adopted by the Law of 19 January 2012, which entered into force on the 27th of February 2012.

The Aliens Office is the Belgian administrative authority entrusted with the adoption of entry bans. Annulation of the Aliens Office's decisions can be sought before an administrative judge, the Council for Aliens Law Litigation (hereafter 'CALL'). Cassation of the CALL's judgements can be sought before the Council of State.

For the sake of clarity, this report first exposes the grounds for entry bans consecrated by the Aliens Act and interpreted by Belgian courts. It then examines the rules governing the length of entry bans in both Belgian legislation and jurisprudence. It merely mentions legislative provisions governing the withdrawal or suspension of entry bans, as no relevant jurisprudence was found on this issue.

I. Grounds for entry bans

- *Positive grounds. When the entry ban shall or may be adopted*

Article 11(1) of the Return Directive:

'Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.'

- *Negative grounds. When the entry ban shall not or may not be adopted*

Article 11(3) of the Return Directive:

'[…] Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.'

a) Legislation

- *Negative grounds. When the entry ban shall not or may not be adopted*

Article 74/10 of the Aliens Act provides that no entry ban shall accompany the refusal of entry issued in application of article 13 of the Schengen Borders Code.

[22] Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers/Wet van 15 December 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Moniteur belge/Belgisch Staatsblad*, 31 décembre/December 1980, p. 1584.

It also provides that no entry ban shall accompany the return decision issued against a third-country national who was arrested by a Member State while crossing the external border of the EU irregularly and who did not subsequently benefit from a right to stay in that Member State[23].

Article 74/11 of the Aliens Act provides in its second paragraph that no entry ban shall be issued against the third-country national who was the victim of human trafficking and cooperated with the authorities, provided that he/she did not ignore a previous order to leave the territory and that he/she does not represent a threat for the public order or the national security[24].

Article 74/11 of the Aliens Act also provides in its second paragraph that the Aliens Office may refrain from delivering an entry ban for humanitarian reasons[25].

- *Positive grounds. When the entry ban shall or may be adopted*

The Aliens Act refers to two mandatory grounds for entry bans: (1) no period for voluntary departure is granted and (2) a previous return decision was not executed[26].

The Aliens Act does not contain an exhaustive list of the grounds which may justify the adoption of an entry ban. It defines the entry ban as a decision 'which may accompany a return decision'[27], without specifying which return decisions are concerned. An entry ban may hence accompany every return decision, provided that it is adequately motivated.

b) Jurisprudence

The CALL requires the entry ban to be motivated on the account of all relevant circumstances of each case.

The CALL is not satisfied with a motivation that solely refers to the rejection of a request for regularisation of the stay. The entry ban differs from the return decision and must therefore get a separate motivation. In the case 139.936 of 27 February 2015, the CALL annulled the entry ban adopted by the Aliens Office on the ground that it was solely motivated by reference to the rejection of the request for regularisation introduced by the applicant[28]. It did not refer to the applicant's family situation. The applicant's parents, sisters, brothers-in-law and nephews reside in Belgium:

> 'considering that those elements [the applicant's family situation] did not constitute an exceptional circumstance which implies a regularisation of the stay, does not imply that they shall not be taken into account to determine the length of the entry ban. The Aliens Office must perform separate examinations'[29]

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[23] '[…] les dispositions du présent Titre ne s'appliquent pas au ressortissant d'un pays tiers faisant l'objet d'une décision de refus d'entrée conformément à l'article 13 du Code frontières Schengen ou qui est arrêté ou intercepté par les autorités compétentes lors du franchissement irrégulier par voie terrestre, maritime ou aérienne de la frontière extérieure d'un Etat membre et qui n'a pas obtenu par la suite l'autorisation ou le droit de séjourner dans ledit Etat membre'.

[24] 'Le ministre ou son délégué s'abstient de délivrer une interdiction d'entrée lorsqu'il met fin au séjour du ressortissant d'un pays tiers conformément à l'article 61/3, § 3, ou 61/4, § 2, sans préjudice du § 1er, alinéa 2, 2°, à condition qu'il ne représente pas un danger pour l'ordre public ou la sécurité nationale.'

[25] 'Le ministre ou son délégué peut s'abstenir d'imposer une interdiction d'entrée, dans des cas particuliers, pour des raisons humanitaires.'

[26] Article 74/11 of the Aliens Act. For further developments, see hereunder at pt II.

[27] Article 1, 8°, of the Aliens Act.

[28] CALL, 27 February 2015, case 139.936. On that case see Leboeuf, 'L'interdiction d'entrée, une décision accessoire qui suppose une motivation distincte' (May 2015) *Newsletter EDEM*, available at www.uclouvain.be/edem).

[29] Ibid. at pt 3 : 'Or, le fait d'avoir considéré que lesdits éléments ne constituaient pas une circonstance exceptionnelle justifiant l'introduction d'une demande d'autorisation de séjour au départ du territoire belge,

Such distinction between the entry ban and the return decision can also be deduced from the jurisprudence of the Council of State. In the case 225.455 of 12 November 2012, the Council of State squashes a judgement of the CALL which inferred the illegality of a return decision from the illegality of the entry ban accompanying that return decision. The Council of State underlines that:

> 'if an entry ban necessarily accompanies a return decision, the latter […] has a legal existence which is independent of the former. Therefore, the illegality of the entry ban does not necessarily entail the illegality of the return decision'[30]

The requirement of a specific motivation of the entry ban implies the obligation for the Aliens Office to hear the concerned foreigner. In accordance with the jurisprudence of the CJEU on the right to be heard, the CALL annuls entry bans that were adopted without a prior hearing, when this 'actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different'[31].

In the case 128.272 of 27 August 2014, the CALL annuls the entry ban on the ground that the applicant was not heard prior to its adoption[32]. The CALL notes that the applicant, whose two brothers reside in Belgium, shows convincing reasons for reducing the length of the entry ban:

> 'The applicant does not limit his arguments to a purely theoretical discussion on the right to be heard. He shows specific elements that reasonably establish that, if the right to be heard had been respected, the administrative authorities might have shorten the length of the entry ban'[33]

On the contrary, in the case 139.207 of 24 February 2015, the CALL notes that the applicant's claim of a violation of her right to be heard is not supported by convincing arguments, which could have influenced the Aliens Office's decision. The CALL therefore confirms the entry ban:

> 'the applicant does not precise which elements specific to her personal situation could have led the Aliens Office to adopt a different decision. She merely refers to her private life, because she resides in Belgium for more than four years, her bad health and her pending appeal against the refusal to regularise her stay on medical grounds'[34]

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n'implique nullement qu'ils ne devraient pas être examinés en vue de la fixation de la durée de l'interdiction d'entrée envisagée, la partie défenderesse devant se livrer à cet égard à des examens distincts' (free translation).

[30] Council of State, 27 August 2014, 128.272, at p. 4 : 'si une décision d'interdiction d'entrée est nécessairement l'accessoire d'une décision d'éloignement, celle-ci, tel un ordre de quitter le territoire, peut en revanche exister légalement, indépendamment de celle-là, de sorte que l'illégalité de la première citée n'entraîne pas nécessairement celle de la seconde' (free translation).

[31] CJEU, C-383/13 PPU, *G. and R.*, 10 September 2013.

[32] CALL, 27 August 2014, case 128.272. On that case see Lys, 'Les conséquences de la violation du droit d'être entendu sur la légalité d'une mesure d'interdiction d'entrée' (September 2014) *Newsletter EDEM* ; d'Huart et Saroléa, *La réception du droit européen de l'asile en droit belge : la directive retour* (UCL-CeDIE, 2014) at p. 79.

[33] Ibid. at pt 3.7.: 'De verzoeker beperkt zijn kritiek niet tot een louter theoretische discussie omtrent de hoorplicht, maar brengt specifieke elementen aan waarvan het aannemelijk is dat zij het bestuur, mits naleving van de hoorplicht, er mogelijks hadden toe kunnen brengen om de termijn van het inreisverbod in te korten' (free translation).

[34] CALL, 24 February 2015, 139.207, at pt 3.1.: 'la requérante ne précise pas les éléments afférents à sa situation personnelle dont elle se prévaut à l'appui de son moyen, se référant laconiquement à « [sa] vie privée, [elle] qui réside en Belgique depuis plus de quatre ans, [à] son état de santé, [et au] fait qu'un recours est actuellement toujours pendant devant [le] Conseil » et qui aurait pu, selon elle, amener la partie défenderesse à prendre une décision différente de sorte que le Conseil ne perçoit pas l'intérêt de la requérante à soulever pareils griefs' (free translation).

II. Length of entry bans

Article 11(2) of the Return Directive:

'The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.'

a) Legislation

Article 74/11 of the Aliens Act requires the length of the entry ban to be determined following an individual assessment of each case:

> 'The length of the entry ban depends upon all relevant circumstances of each case'[35]

It fixes a maximum length of three years in two circumstances:

> 'The return decision contains a 3 year entry ban in the following circumstances:
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> 1° no period for voluntary departure is granted or;
>
> 2° a previous return decision was not executed.'[36]

The Law of 2 June 2013, which entered into force on the 3rd of October 2013, extended the maximum length to five years if the third-country national committed immigration-related offences. It added the following sentence to Article 74/11 of the Aliens Act:

> 'The maximum length of three years is extended to five years when:
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> 1° the third-country national used fraud or other illegal means to be admitted to the Belgian territory or to obtain the extension of his/her right to stay on the Belgian territory;
>
> 2° the third-country national entered into a marriage, partnership or adoption with the sole purpose of being admitted to the Belgian territory or to obtain the extension of his/her right to stay on the Belgian territory'[37]

Article 74/11 of the Aliens Act also lifts the maximum length when the third-country national represents a serious threat to public order or national security:

> 'The return decision can be accompanied by an entry ban of more than five years when the third-country national represents a serious threat to public order or national security'[38]

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[35] 'La durée de l'interdiction d'entrée est fixée en tenant compte de toutes les circonstances propres à chaque cas' (free translation).

[36] 'La décision d'éloignement est assortie d'une interdiction d'entrée de maximum trois ans, dans les cas suivants: 1° lorsqu'aucun délai n'est accordé pour le départ volontaire ou; 2° lorsqu'une décision d'éloignement antérieure n'a pas été exécutée' (free translation).

[37] 'Le délai maximum de trois ans prévu à l'alinéa 2 est porté à un maximum de cinq ans lorsque : 1° le ressortissant d'un pays tiers a recouru à la fraude ou à d'autres moyens illégaux afin d'être admis au séjour ou de maintenir son droit de séjour; 2° le ressortissant d'un pays tiers a conclu un mariage, un partenariat ou une adoption uniquement en vue d'être admis au séjour ou de maintenir son droit de séjour dans le Royaume' (free translation).

[38] 'La décision d'éloignement peut être assortie d'une interdiction d'entrée de plus de cinq ans lorsque le ressortissant d'un pays tiers constitue une menace grave pour l'ordre public ou la sécurité nationale' (free translation).

b) Jurisprudence

This section first analyses how Belgian Courts enforce motivation requirement. It then turns to the specific issue of public order.

- *Each entry ban must be motivated according to the specific circumstances of the case*

In the case 230.543 of 17 March 2015, the Council of State underlined the requirement to motivate the entry ban according to the specific circumstances of the case. The Aliens Office cannot solely refer to one of the grounds listed in the Aliens Act. Rather, it must justify why it opted for an entry ban and why its duration is appropriate. The Council of State further emphasises that the burden of proof does not rest on the foreigner concerned but on the Aliens Office:

> 'As the applicant correctly put it, the obligation to adopt an entry ban does not imply that the entry ban must reach the maximum length of three years. The length of the entry ban must, in accordance with article 74/11, first sentence, of the Aliens Act, be determined while taking into account all the relevant circumstances of the case. The CALL violated that legal provision by judging that there was no need of a specific motivation […]. The CALL wrongly imposed on the applicant the burden of proving that the maximum length should not be applied whereas that burden of proof lies on the Aliens Office.'[39]

The same interpretation was reached by the Council of State in the prior cases 227.898 and 227.900 of 26 June 2014. Similarly, in the case 138.911 of 20 February 2015, the CALL judges that the applicant must not prove that he will have to come back to Belgium in order to obtain a reduction of the length of the entry ban.

In the case 230.543 of 17 March 2015 mentioned hereinabove, the Council of State also underlined that the evaluation of the specific circumstances of each case cannot be limited to a control under article 8 ECHR:

> 'Contrary to the judgement of the CALL, the obligation to take into account the specific circumstances of the case cannot be limited to a control of the respect of article 8 ECHR. The fact that an entry ban is imposed on all family members does not suffice to motivate why the maximum length was imposed'[40]

Elements taken into account by the CALL include family situation, health and the best interest of the children concerned by the entry ban.

In the case 139.793 of 26 January 2015, the CALL annuls a three-year entry ban that failed to take into account the care provided by the applicant to her ill aunt:

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[39] Council of State, 17 March 2015, 230.543, at p. 10-11 : 'Zoals de verzoekers terecht laten gelden, impliceert het verplicht opleggen van een inreisverbod niet dat daarbij ook de maximumtermijn van drie jaar moet worden opgelegd. De duur van het inreisverbod moet overeenkomstig artikel 74/11, § 1, eerste lid, van de vreemdelingenwet immers worden vastgesteld "door rekening te houden met de specifieke omstandigheden van het geval". In strijd met deze bepaling, oordeelt de Raad voor Vreemdelingenbetwistingen dat geen specifieke motivering is vereist om de maximumtermijn op te leggen […]. Op die manier legt de Raad voor Vreemdelingenbetwistingen een verplichting die op de verwerende partij rust bij de vreemdeling zelf, die zou moeten aantonen waarom het maximum niet zou moeten worden opgelegd' (free translation).

[40] Ibid., at p. 11 : 'Anders dan in het bestreden arrest wordt voorgehouden, kan de plicht om rekening te houden met de specifieke omstandigheden van het geval, niet worden beperkt tot een toetsing aan artikel 8 van het EVRM. Evenmin kan worden ingezien waarom het feit dat aan alle gezinsleden een inreisverbod wordt opgelegd, een verantwoording zou vormen om zonder nadere motivering de maximumtermijn op te leggen' (free translation).

> 'Given the importance of a three-year entry ban, the CALL judges that the motivation of the contested entry ban does not show that the Aliens Office took all relevant circumstances into consideration'[41]

In the case 137.958 of 5 February 2015, the CALL annuls an entry ban that did not give consideration to the relationship entertained by the applicant with a Belgian citizen who is pregnant by him:

> '[The Aliens Office] could not ignore the serious indications that the entry ban might violate article 8 ECHR. It should have, at the very least, performed an examination of the particular family situation of the applicant to make sure that the interference with his right to family life is proportionate with the aim pursued by the entry ban'[42]

Similarly, in the case 98.002 of 27 February 2013, the CALL suspends an entry ban pending the examination of the annulation request because the applicant, who complains that his love relationship with a Dutch citizen residing in Belgium and his intent to marry her were not taken into account, invokes serious reasons to question the legality of the entry ban:

> 'Leaving aside the question of determining whether the applicant's relationship […] enjoys the protection of article 8 ECHR, the negative impact of the entry ban for that relationship is *prima facie*, for every reasonable man, obvious. This is even truer that […] the motivation of the contested decision does not show that the Aliens Office took every specific circumstances of the case into account'[43]

In the case 107.890 of 1st August 2013, the CALL annuls an entry ban that failed to give consideration to the social integration of the applicants, a couple with two minor children. The Aliens Office should have assessed the consequences of the entry ban on the children's schooling:

> 'The CALL notes that the Aliens Office was informed of the particular situation of the applicants […] [who] mentioned their social integration and the schooling of their children. […] The CALL cannot consider that the Aliens Office proceeded to a rigorous examination of the elements regarding the applicants' private life'[44]

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[41] CALL, 26 January 2015, 139.793, at pt 3: 'Compte tenu de la portée importante d'une interdiction d'entrée dans le Royaume d'une durée de trois ans, le Conseil estime que la motivation de la décision d'interdiction d'entrée que comporte le second acte attaqué ne garantit pas que la partie défenderesse a respecté l'obligation de prendre en considération l'ensemble des éléments pertinents de la cause avant de prendre sa décision' (free translation).

[42] CALL, 5 February 2015, 137.958, at pt 3.2. : 'la partie défenderesse ne pouvait ignorer qu'il existait des indications sérieuses et avérées que la prise de l'acte attaqué puisse porter atteinte à un droit fondamental protégé par l'article 8 de la CEDH. Il lui incombait, à tout le moins, de procéder à un examen de la situation familiale particulière du requérant en vue d'assurer la proportionnalité entre le but visé par l'acte attaqué et la gravité de l'atteinte portée à sa vie privée et familiale' (free translation).

[43] CALL, 27 February 2013, 98.002, at pt 4.4.2.3. : 'Daargelaten de vraag of de relatie […] als een beschermenswaardig gezinsleven kan worden aanzien in de zin van artikel 8 van het EVRM, is de negatieve impact van het inreisverbod op hun relatie *prima facie* voor ieder redelijk denkend mens evident. Dit geldt des te meer omdat […] uit de beslissing niet blijkt dat met de specifieke omstandigheden van het geval rekening werd gehouden' (free translation). See also : CALL, 15 January 2013, 95.142.

[44] CALL, 1st August 2013, 107.890, at pt 4 : 'Or, le Conseil doit constater que la partie défenderesse était informée de certains aspects de la situation personnelle des parties requérantes […] [qui] avaient notamment fait valoir leur intégration en Belgique et la scolarité des enfants. […] Il n'est dès lors pas permis au Conseil de considérer que la partie défenderesse a procédé à un examen rigoureux des éléments de vie privée invoqués par les parties requérantes' (free translation).

In the case 139.781 of 26 February 2015, the CALL annuls a five-year entry ban that was adopted against an applicant whose marriage was annulled by a civil court because it was a marriage of convenience. The CALL notes that the Aliens Office failed to give consideration to the events that took place since that annulation, which occurred in 1998. The Aliens Office should have taken the applicant's actual situation into account. It should have given consideration to the applicant's family and private ties in Belgium and his subsequent good conduct:

> 'The CALL notes that the motivation of the contested entry ban does not allow the applicant to understand the reasons why, *in specie*, the Aliens Office decided to apply the maximum length of the entry ban […]. […] the fraud it refers to dates back from 1998 […] Therefore, the motivation is not actual'[45]

- *The threat to public order and to national security can be deduced from a prior criminal conviction*

In the case 139.754 of 26 February 2015, the CALL judges that the reference to a prior criminal conviction for drug-related offences sufficiently motivates the entry ban. It considers that the Aliens Office must not detail the reasons why the applicant was convicted:

> 'The entry ban is sufficiently and adequately motivated because its motives are manifestly sufficient to make the applicant understand why it was adopted. The Aliens Office must not give further details because the applicant knows why he was convicted. Such requirement would amount to require from the Aliens Office to state the motives of the motives of its decision'[46]

Similarly, in the case 137.852 of 3 February 2015, the CALL validates an eight-year entry ban adopted towards the applicant following his conviction for theft-related offences. The CALL notes that the entry ban does not solely refer to the applicant's conviction, but also mentions Police reports which show that the applicant represents a threat for the public order:

> 'That conclusion is indeed not only based on the conviction but also on the numerous police reports which suffice by themselves to conclude that the applicant represent a serious threat for the public order.'[47]

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[45] CALL, 26 February 2015, 139.781, at pt 3.2. : 'Le Conseil ne peut que constater que la motivation de la décision attaquée ne permet pas au requérant de comprendre les raisons qui ont conduit, in specie, la partie défenderesse à lui appliquer la sanction la plus sévère […]. […] la fraude dont se prévaut la partie défenderesse date de 1998 […] il n'apparaît pas que la motivation de la partie défenderesse présente encore un caractère actuel au jour de la prise de l'acte attaqué' (free translation).

[46] CALL, 3 February 2015, 137.852, at pt 4.2. : 'La décision d'interdiction d'entrée est partant, suffisamment et adéquatement motivée dans la mesure où les motifs de l'acte attaqué sont manifestement suffisants pour permettre au requérant de connaître les raisons qui ont conduit l'autorité compétente à statuer en ce sens. Il n'appartenait pas à la partie défenderesse d'étayer plus avant sa motivation, le requérant ayant une connaissance complète et effective des condamnations dont il a fait l'objet. Exiger davantage de précisions reviendrait à obliger l'autorité administrative à fournir les motifs des motifs qu'elle a retenus pour justifier sa décision' (free translation).

[47] CALL, 3 February 2015, 137.852, at pt 2.4.11. : 'Deze vaststelling is immers niet louter gebaseerd op de veroordeling waarnaar verzoeker verwijst doch evenzeer op de talrijke processen-verbaal die werden opgesteld en die op zich volstaan om te concluderen dat hij een ernstige bedreiging vormt voor de openbare orde' (free translation).

III. Withdrawal or suspension of entry bans

Art. 11(3) of the Return Directive:

'Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

[…]

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.'

Art. 11(5) of the Return Directive:

'Paragraphs 1 to 4 shall apply without prejudice to the right to international protection […]'

a) Legislation

Article 74/12 of the Aliens Act enshrines three grounds for withdrawing or suspending an entry ban.

First, the entry ban can be withdrawn or suspended at any time for humanitarian reasons. Second, the entry ban can be withdrawn or suspended for professional or study reasons, when two-third of the entry ban's length has elapsed. Third, the entry ban adopted on the ground that the foreigner did not respect a previous return decision can be withdrawn or suspended if the applicant proves that he actually left the Belgian territory in conformity with that previous return decision.

The Minister also keeps the competence to suspend or withdraw the entry ban in case of humanitarian disasters.

Finally, article 74/11 of the Aliens Act specifies in its last sentence that an entry ban may not be opposed to the foreigner who requests international protection or a regularisation of his/her stay for medical reasons.

b) Jurisprudence

No relevant jurisprudence was found on this issue.

Conclusion

The jurisprudence of Belgian Courts focusses on the motivation requirement of the entry ban. The Council of State and the CALL require the entry ban to be specifically motivated on account of all relevant circumstances of each case. It is not sufficient for the Aliens Office to refer to the motivation of the return decision which the entry ban is the ancillary of, nor to refer to one of the grounds of adoption of entry bans listed in the Aliens Act. The individual situation of the concerned foreigner must be assessed.