the federal **Ombudsman**

a bridge between citizens and the public services

ANNUAL REPORT

2008

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Realisation: Vanden Broele Grafische Groep

Mr Speaker of the House of Representatives,
Mr Chairman of the Petitions Committee,
Honourable Members of Parliament,

In accordance with Article 15 of the Federal Ombudsman Act of 22 March 1995, we have the honour of submitting the report of the Federal Ombudsman for 2008.

This twelfth annual report of the Federal Ombudsman brings to a close a special year, one during which the citizen entrusted us with no fewer than 5,466 complaints and requests for information.

2008 was an absorbing year. On 28 February 2008, the House of Representatives asked us to conduct 2 investigations on the running of closed centres managed by the Department of Immigration and Naturalisation and open centres, managed and accredited by the Federal Agency for the Reception of Asylum Seekers (known as "Fedasil"). Separate reports will be drawn up for these investigations.

2008 was also synonymous with modernisation. To improve accessibility and awareness, both of which are indispensable for every ombudsman, we have opted to revamp the logo and the website of the institution.

The report comprises the usual 4 parts:

The introduction reports on the operation and management of the institution.

Part II contains the general figures and graphs: number of complaints received, admissibility, assessment, result, complaint processing period, etc.

The third part provides a thematic approach of the ascertained problems, illustrated with striking samples from practice.

Part IV contains the general recommendations to Parliament and the official recommendations we sent to the federal administrative authorities in 2008.

We wish to thank all the members of our staff for their unwavering commitment throughout this particularly exacting year.

We wish you happy reading of this report and are always at your entire disposal to present and exemplify it before the Petitions Committee.

Yours faithfully,

The federal ombudsmen,

Guido Schuermans *Catherine De Bruecker*

I. Introduction

A bridge between citizen and government

The Federal Ombudsman is an independent institution that intervenes, free of charge, at the request of citizens, natural persons or legal persons. It helps them to solve their disputes with the federal administrative authorities and examines their complaints with impartiality. In doing so, it verifies whether the service against which a complaint has been lodged has complied with the regulations and principles that generally underpin good governance.

When the complaint seems justified, it tries to convince the administrative department to make the necessary improvements. To this end, it is vested with wide recommendation powers and can thus also contribute to improve the regulations and the administrative work in practice.

Since it was founded in 1997, the Federal Ombudsman has tried to help more than 45,000 citizens; it has made 99 official recommendations to administrative authorities and 59 general recommendations to Parliament.

On 17 December 2008, the federal ombudsmen received the Commissioner responsible for Human Rights at the Council of Europe, Mr Thomas Hammarberg.

I. How the service works

Citizens have through the years come to appreciate more and more the added value provided by the Federal Ombudsman as a second-line service in the processing of complaints. The quality of the complaints received and their admissibility percentage, which ranges from 75% to 80%, attest as much. The number of complaints keeps increasing. In 2008, it was up by 9%, whereas in 2007, it had risen by 16%. Compared with the previous 2 years, nearly 1,000 more complaints were lodged with the Federal Ombudsman in 2008.

During the year under review, we obviously continued our efforts to improve the quality of the service offered to citizens, with particular attention to accessibility, the corner stone of any ombudsman service.

Local office hours

Together with the other ombudsman services of the federated entities, the Federal Ombudsman has optimised its presence 'in the field' by continuing to expand joint office hours in the country's cities. These are held every week in Namur; every other week in Mons, Charleroi and Liège, as well as once a month in Antwerp, Bruges, Ghent, Hasselt, Leuven, Marche-en-Famenne and Neufchâteau.

In 2008, 184 citizens availed themselves of these office hours to file their complaint. These office hours are constantly assessed and adapted.

0800 99 961

Since 1 October 2008, citizens can contact the Federal Ombudsman free of charge thanks to a free phone number: 0800 99 961.

This newly introduced service should also help improve accessibility to the institution, in particular for citizens who have at times undertaken a good number of steps to find a solution with an administrative authority. When such efforts prove to no avail, people may get the impression that no solution can be found to their problem. In such a case, a free phone number may put them easier into contact with a second-line service such as the Federal Ombudsman.

Although the free phone number is already a real success just 3 months after it was introduced, it is still too early to assess its performance. Such an assessment will be carried out at the end of 2009.

Recognisability

Accessibility to the institution also has to do with its recognisability. The Federal Ombudsman has consequently focused on changes that had to be made.

Ever since it was established, the institution has used different logos and colours, at times even 2 logos at a time, without any coherence or consistency. Such recognisability as existed before did not contribute to a proper identification of the service by the citizen. So we have developed a new logo to be used in all documents and publications of the Federal Ombudsman.

the federal **Ombudsman**

a bridge between citizens and the public services

The logo summarises, in word and image, what it supports in reality: "*The Federal Ombudsman, a bridge between citizen and government.*" The bridge, designed in 3 dimensions, symbolises the mission of the Ombudsman, i.e. to build bridges between the citizen, the administrative authorities and the Parliament.

www.federalombudsman.be

The website of the Federal Ombudsman, which was designed in 1999, was also in need of revamping.

The new, revamped site will provide citizens with clearer information as well as a more user- friendly instrument for lodging complaints. The site will be operational in the spring of 2009.

2. Investigations at the request of the House of Representatives

In quite a number of European countries, the Parliamentary Ombudsman has a right of initiative. He may therefore take the initiative to carry out an in-depth investigation into how a department or service, or one of their elements is run, or examine very specific procedures introduced in an administrative authority. The reason for such an examination is not necessarily based on the complaints received. News in the press as well as indications from civil servants, or even his own observations, may give rise to an in-depth investigation.

In Belgium, the Federal Ombudsman does not have right of initiative. The Legislator has nonetheless provided, in the Act of 22 March 1995 establishing the federal ombudsmen, for the possibility of conducting investigations, albeit in a more restrictive manner. More specifically, the task of the federal ombudsmen is to conduct an investigation at the behest of the House of Representatives into such federal administrative authorities as said house should request.[1]

By virtue of this provision, on 28 February 2008 the House of Representatives asked the Federal Ombudsman to:

1. *Conduct investigations on the operation of the closed centres managed by the Department of Immigration and Naturalisation;*
2. *Conduct investigations on the operation of the open centres managed and accredited by Fedasil;*

[1] Article 1, paragraph 1, 2 and 3 of the Act of 22 March 1995 establishing the federal ombudsmen, amended by the Act of 5 February 2001, 'Belgisch Staatsblad/Moniteur Belge' [Belgian Official Gazette] of 23 March 2001, by the Act of 11 February 2004, Belgian Official Gazette of 29 March 2004, and by the Act of 23 May 2007, Belgian Official Gazette of 20 June 2007, pp. 153-157.

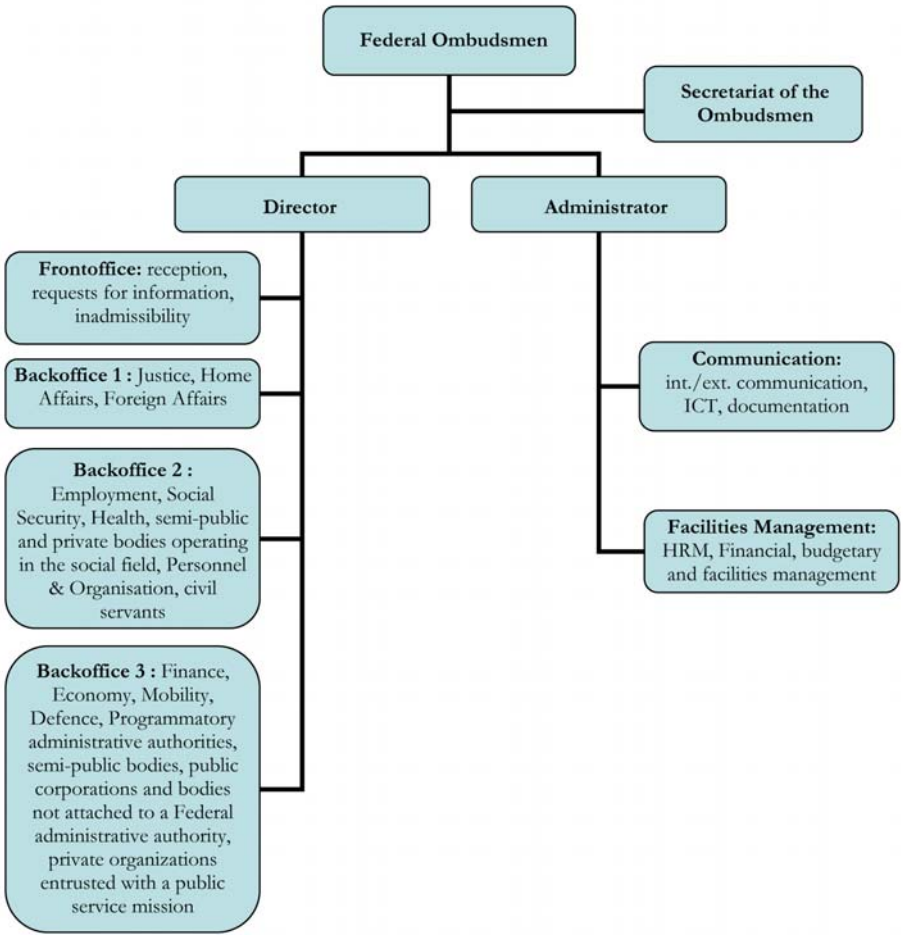
And to rely on the observations made when performing this assignment to make recommendations and to report to the House of Representatives as promptly as possible."[2]

The investigations have been concluded and the reports will be submitted presently.

3. Management of the institution

Structure of the organisation

The Front Office handles the first contact with the citizen who calls on the Federal Ombudsman. It investigates the admissibility of incoming complaints, processes requests for information and, insofar as possible, refers the complaints not intended for the Federal Ombudsman to the right authority. The 3 back offices deal with complaints relating to their respective fields. The Communication department supports and implements the communication policy of the federal ombudsmen, whereas the logistical staff are responsible in particular for the management of human resources and the financial and material management of the institution.



[2] Parl. Doc. 52 0144/055.

Number of employees and personnel policy

On 1 January 2009, the institution had 46 employees, divided over 4 levels, as shown in the table below.

Grade	Language		Gender		Legal Status		Total workforce in FTE[3]	Staff Framework Total
	F	N	M	F	Statutory	On contract		
A	14	14	14	14	19(a)	9(b)	28	24 (+2)
B	7	6	3	10	8	5(c)	13	12 (+2)
C	1	1	2	0	0	2	2	2
D(d)	1	2	0	3	0	3	2.5	(2.5 FTE)
Total	23	23	19	27	27	19	45.5	38 (+6.5)

(a) of which 5 agents with a temporary remit (one director and 4 auditors-coordinators);
(b) of which 2 contract staff members, article 4 of the establishment plan (urgent and temporary need), one contract staff member for the temporary replacement of an employee in full-time career interruption owing to illness, and one contract staff member for the temporary replacement of staff members who are absent, and one full-time post temporarily not filled.
(c) Of which, 2 contract employees for the Front Office, article 4 of the establishment plan (urgent and temporary need).
(d) Cleaning staff, equivalent to Level D, article 4 of the establishment plan (urgent and temporary need)

The number of employees increased by 3 units by comparison with the situation on 1 January 2008.

Organised in cooperation with Selor, the procedure for the external recruitment of a manager was restarted in the course of 2008 and brought to a close in the beginning of 2009 with the designation of a laureate.

The investigations carried out at the request of the House of Representatives in the open and closed centres as indicated above, required in particular measures in terms of personnel organisation so as not to jeopardise the efficient running of the institution. While some of our own staff members were conducting these investigations, a team of 4 temporary staff was hired in June 2008, with the prior approval of the House of Representatives, to ensure continuity in the efficient processing of complaints.

The constant increase in workload due to the rise in the number of complaints for several years was still absorbed in 2008 with additional staff. To be able to continue to provide the quality of its service to the citizen, the institution obtained the approval of the House of Representatives to bolster its current team by hiring 2 contract staff members, one French-speaking and one Dutch- speaking, who were able to take up their duties in the beginning of 2009.

Financial and budgetary management

The estimate and monitoring of the expenses of the Federal Ombudsman have for years been based on a long-term vision. For personnel expenditures, a multi-year forecast, updated every year, is used for budget proposals. At 82.5%, these expenditures constitute the most important item of the budget by far. They are monitored closely during the financial year. The current multi-year forecast runs from 2005 to 2010.

The bookkeeping management is based on an economic bookkeeping system and is organised almost entirely in-house. The accounts and the budget are each year submitted to an a posteriori audit by the Auditor's Office.

[3] Full-Time Equivalent.

Like every institution, the Federal Ombudsman had to face a sharp increase in salary and operating costs in 2008 due to the high rate of inflation. These additional expenditures have been offset entirely in the budget, as have those relating to the initiatives geared to optimising the performance of the institution, i.e. the new website and the new logo.

The basic budget figures for 2007-2009 are given in the table below.

Budgetary year	Accounts 2007	Budget[4] 2008	Budget 2009
Expenditures	**3 659 588,24**	**4 322 260,00**	**4 505 290,00**
Revenues	**3 918 777,17**	**4 322 260,00**	**4 505 290,00**
Endownment	3 547 000,00	3 858 000,00	4 108 000,00
Transferred surplus	352 560,00	251 160,00	397 290,00
Other revenues	19 217,17	213 100,00	
Balance	**259 188,93**		

The heading *'Accounts 2007'* mentions, for expenditures in 2007, the amount of the actual expenditures made; the headings *'Budget 2008'* and *'Budget 2009'* the amount of the total expenditure allocations granted by the House of Representatives. These expenditure allocations are financed by the proprietary endowment (the amount entered each year in the federal government's general expenditure budget), the surplus carried forward from previous years and other revenues.

IT and facilities management

In 2008, the Federal Ombudsman invested considerably in the security of its buildings, as regards both fire protection and access control. The security and accessibility of the buildings for visitors and staff remain an important concern for logistics management in 2009 as well.

As regards IT management, as indicated above, the Federal Ombudsman embarked on the revamping of its website in 2008 with the help of an external company. For its part, the daily management of the IT infrastructure and facilities pertained to the renewal of the existing hardware population.

[4] The accounts for 2008 will be audited by the Belgian Court of Audit and closed by the House of Representatives in the course of 2009.

II. General Figures

1. Introduction

In this part, general statistical data provide an overall view of the number of case files, language, means of communication used, processing phase, admissibility and forwarding of case files. Part IV of this annual report contains the data on the various federal departments.[5]

This Annual Report pertains to the entire calendar year 2008. The figures contained in this part reflect the situation as at 31 December 2008.

To give a clear picture of the case files introduced in the year under review, unless expressly indicated otherwise, the tables and graphs will be based on the new case files for the period, thereby avoiding case files from previous years, still in progress in 2008, from being booked twice. The case files introduced in previous years are indicated globally in the comments and explicitly included in certain graphs, so that the overall workload per year is illustrated all the same.

Inasmuch as possible, the general figures compare developments in the years 2007 and 2008. The statistics of this annual report are established on the basis of the evaluation method published in the Annual Report 2006.[6]

2. General Statistics

2.1. New case files

New case files

	Complaints	Requests for information	Total
2007	4,116 **complaints** 78.3%	1,141 **Requests for information** 21.7%	**Total:** 5,257
2008	4,509 **complaints** 82.5%	957 **Requests for information** 17.5%	**Total:** 5,466

5 pp. 103-124.
6 Annual Report 2006, pp. 17 ff.

During the year 2008, the total number of new case files amounted to 5,257, including 957 requests for information (compared with 5,257 new case files in 2007, of which 1,141 requests for information). This is the largest number of new case files registered since the establishment of the Federal Ombudsman 12 years ago. It is worth noting that the substantial increase of case files in 2008 by comparison with 2007 (+3.98%) is in line with an increase in the proportion of complaints compared to requests for information (82.5/17.5 in 2008 for 78/22 in 2007).

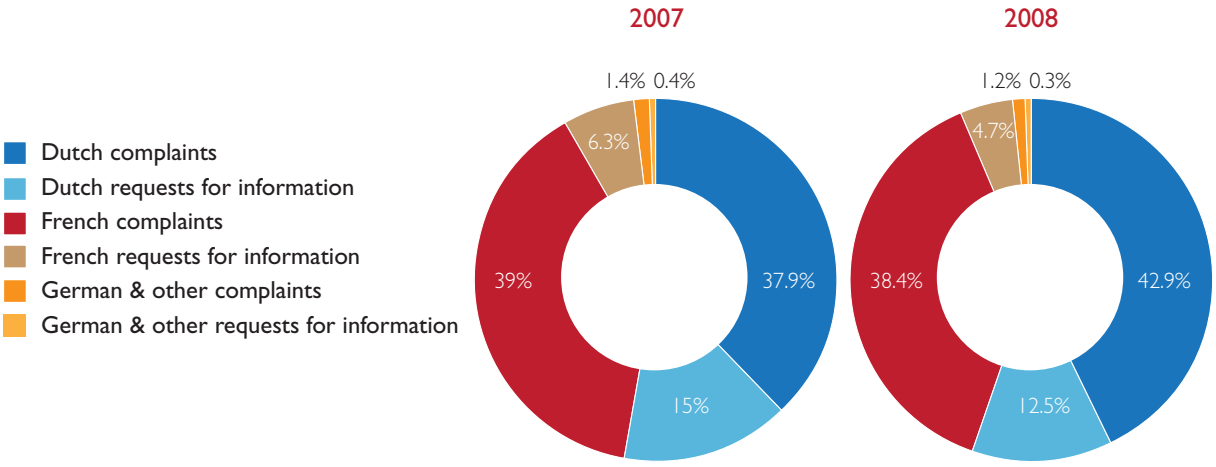
In addition to complaints and requests for information, the Federal Ombudsman receives many telephone calls with queries that are not considered as case files, and are answered immediately by the Front Office.

The workload involved in answering written or telephone requests for information must not be under-estimated. The Federal Ombudsman nonetheless tries to help people who have no complaints, but a request for information.

In the last 12 years, the Federal Ombudsman opened 45,381 case files, of which 35,991 were complaints.

2.2. New case files by language

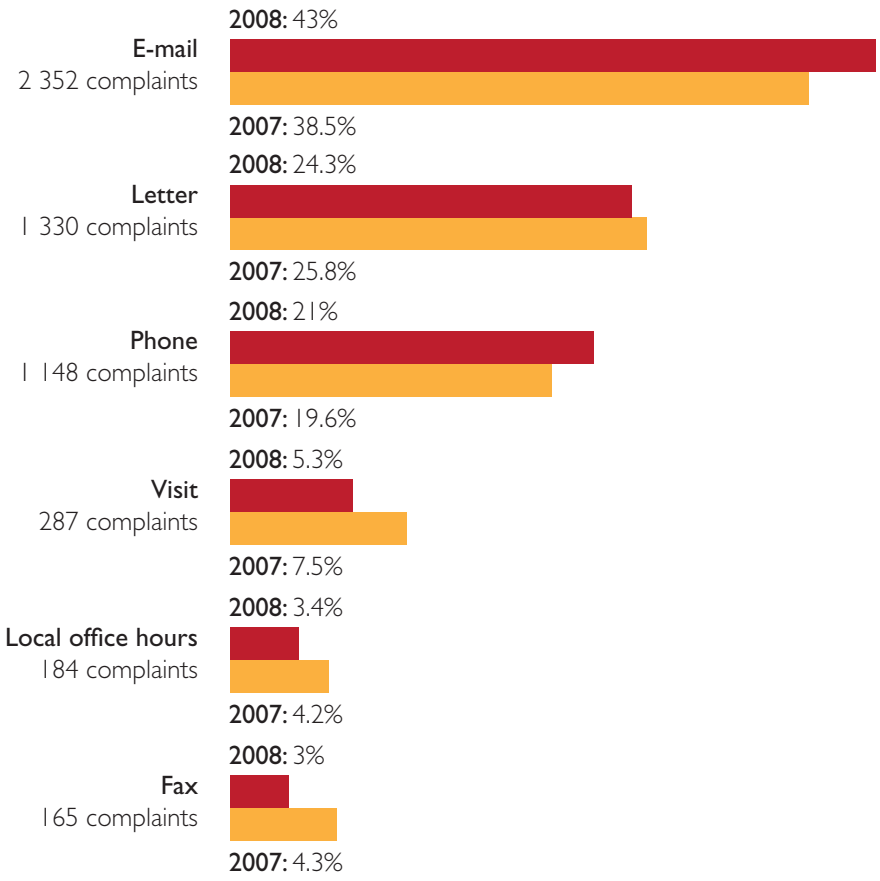
New case files by language



2.3. New case files by means of communication

The means of communication indicates the way in which a complaint was lodged or an information request submitted. Once again the predominance of case files submitted electronically (by e-mail or online via the website of the Federal Ombudsman) in 2008 was confirmed than by the latter. It is worth noting that since October 2008, the Federal Ombudsman can also be reached at a free phone number (0800 99 961).

New case files by means of communication

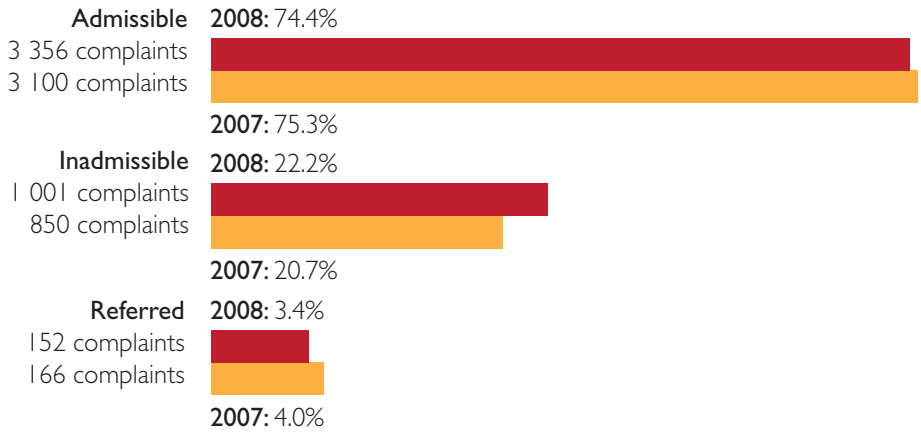


2.4. Admissibility of new complaints

The inadmissible or redirected case files represent a considerable part of the workload. A thorough investigation is often required before a case file is declared inadmissible or before it is referred to another mediation service.

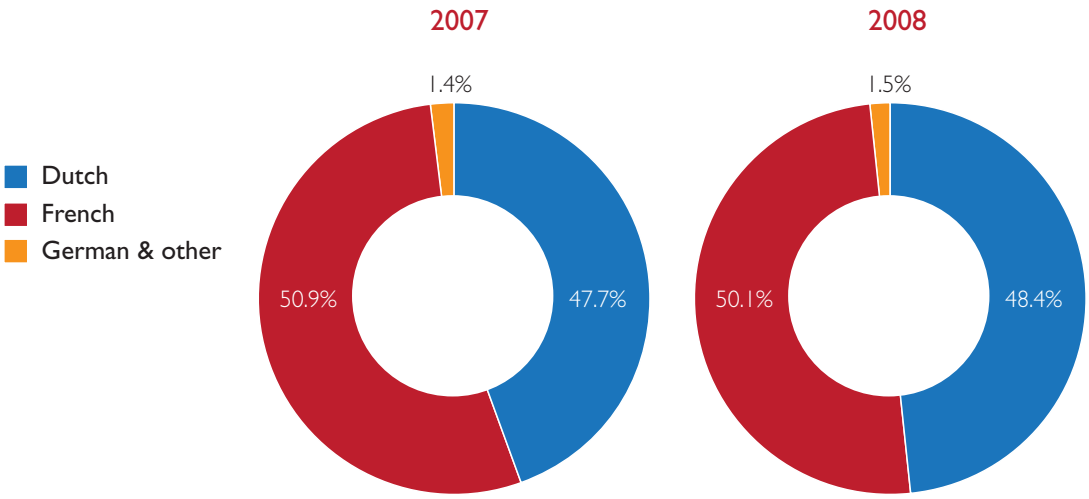
Of the 4,509 new complaints, 1,001 were inadmissible; 152 complaints were referred to another mediation service. The remaining 3,356 complaints were declared admissible.

Admissibility of new complaints



2.5. New admissible complaints by language

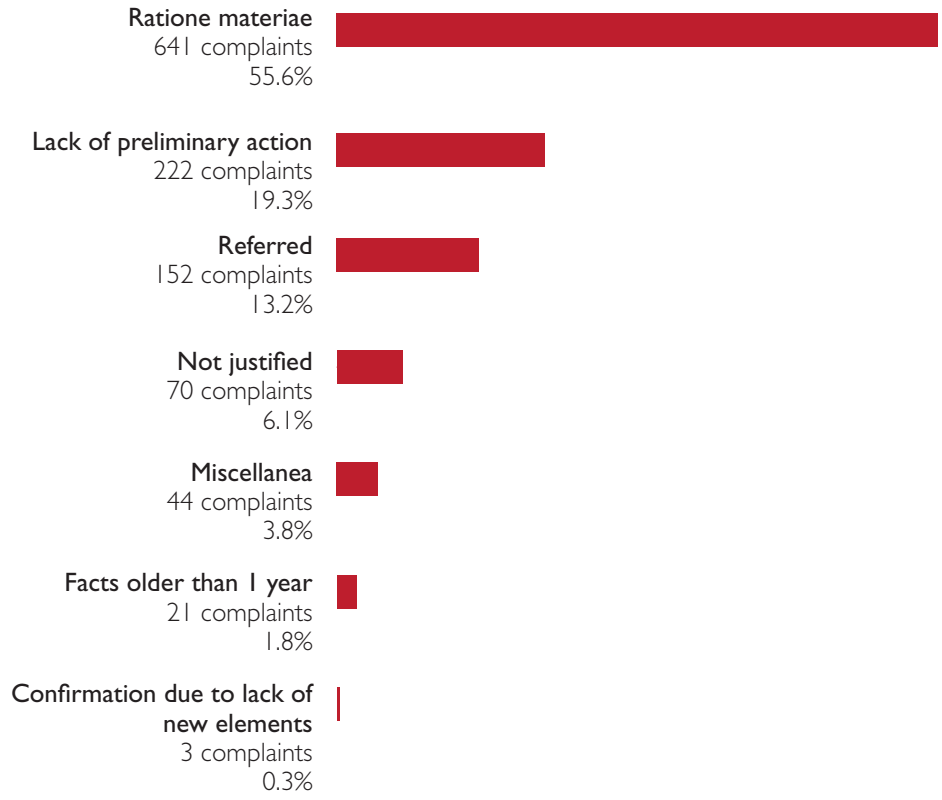
New admissible complaints by language



2.6. Breakdown of inadmissible complaints

This graph shows the number of complaints per reason for inadmissibility as set out in the organic law[7] and the rules of internal procedure of the Federal Ombudsman. Referrals are here considered as a category of inadmissible complaints.

Breakdown of inadmissible complaints



2.7. Complaints referred

When a complaint concerns a federal, regional, municipal or local administrative authority, which has its own ombudsman by virtue of a legal regulation, it is systematically and without formalities referred, and registered as such in the statistics. Complaints about other authorities are inadmissible (even if the case file is sent to a complaints or ombudsman department).

[7] pp. 153-157.

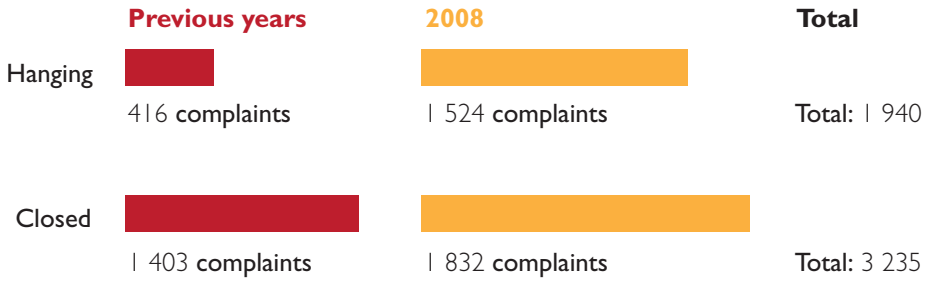
Destinations of complaints referred

	2008	%
Flemish Ombudsman	31	20,4%
Pensions Mediation Service	23	15,1%
Mediation body for the telecommunication sector	23	15,1%
Supervisory Standing Committee for the Federal Police ("P" Committee)	14	9,2%
Mediation body for the National railroad Company	13	8,6%
Mediation body for the Postal Office	12	7,9%
Supreme Council of Justice	11	7,2%
Ombudsman of the Walloon Region	9	5,9%
Local mediation bodies	6	3,9%
Ombudsman of the Franch-speaking Community	5	3,3%
Commission for the protection of privacy	3	2,0%
Flemish children's rights commissioner	2	1,3%
	152	

2.8. State of admissible complaints as at 31 December 2008.

On 31 December 2007, there were still 1,827 complaints in progress (lodged in 2007 and previous years). In 2008, 8 of these were declared inadmissible or referred to another service. Of the remaining 1,819 admissible complaints of the previous years, 1,403 were closed in 2008, so that there were still 416 complaints in progress as at 31 December 2008. Of the 3,356 admissible complaints that were lodged in 2008, there were still 1,524 in progress as at 31 December 2008. The total number of complaints to be processed thus rose from 1,1827 on 31 December 2007, to 1,940 (1,524+416) on 31 December 2008 (+ 113 case files).

State of inadmissible complaints as at 31 December 2008



An admissible complaint is closed when the complaint is closed for the complainant (3,169) or when the processing thereof has been suspended (appeal to the court or organised administrative appeal: 66).

2.9. New admissible complaints per administrative department: 2007-2008

The following tables show the distribution in the number of new admissible complaints in 2007 and 2008 among the different administrative departments. A distinction is drawn between complaints lodged by civil servants and other complaints.

Complaints by civil servants are lodged against their own (current, former or future) administrative department and concern a support staff or personnel service (support service) or an operational service (e.g. a complaint against an immediate superior), provided that the relationship between the civil servant and the administrative department does not fall under the core activity of that operational service (e.g. Selor). The data in Part IV per department[8], no longer contain complaints lodged by civil servants.

New admissible complaints per administrative department (with the exception of complaints lodged by civil servants)

	2008	2007
Chancellery of the Prime Minister	0	3
Personnel & Organisation	41	29
Information technology & Communication	1	0
Justice	77	87
Home Affairs	1,174	1,294
Foreign Affairs, Foreign Trade & Development Co-operation	91	82
Defence	4	5
Finance	948	731
Employment, Labour & Social Dialogue (not including semi-public bodies operating in the social field)	11	14
Social Security (not including semi-public bodies operating in the social field)	205	143
Health, Food Chain Security & Environment	20	40
Economy, SMEs, Self Employed & Energy	26	19
Mobility & Transport	102	116
Federal Public Planning Servics	2	1
Semi-public bodies operating in the social field	295	257
Semi-public bodies, public corporations and bodies not attached to a Federal administrative authority	21	12
Private organisations entrusted with a public service mission	349	204
Others	37	41
	3,404	**3,078**

The increase in the number of complaints lodged against private organisations in charge of a public service is explained by the difficulties encountered in 2008 by users of service vouchers.[9]

8 pp. 103 ff.
9 p. 84.

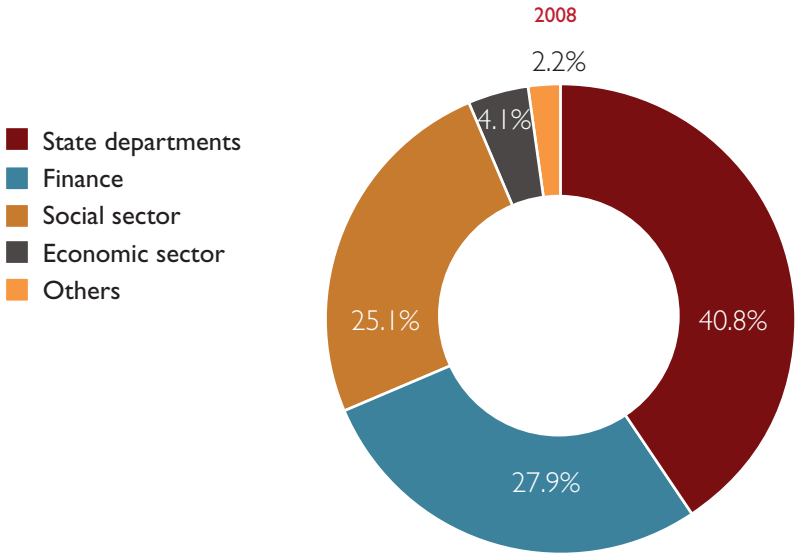
New admissible complaints lodged by civil servants per administrative department

	2008	2007
Personnel & Organisation	0	1
Justice	8	11
Home Affairs	4	7
Foreign Affairs, Foreign Trade & Development Co-operation	5	3
Defence	6	5
Finance	27	32
Social Security (not including semi-public bodies operating in the social field)	2	1
Health, Food Chain Security & Environment	2	2
Economy, SMEs, Self Employed & Energy	0	6
Mobility & Transport	1	1
Federal Public Planning Servics	1	3
Semi-public bodies operating in the social field	8	12
Semi-public bodies, public corporations and bodies not attached to a Federal administrative authority	4	11
	68	**95**

Since a complaint can pertain to different governmental authorities, the number of complaints per administrative department is always higher than the number of admissible case files (3,404 + 68 = 3,472 authorities concerned; for 3,356 new admissible complaints in 2008).

2.10. New admissible complaints per sector

New admissible complaints per sector (not including lodget by civil servants)



For the first time since 2002, the "*Authority Departments*" sector, in which the immigration authorities are chiefly concerned, fell practically to the 40% threshold. The social sector was up by 5%, while the Finances sector was up by 4% from 2007.

2.11. Evaluation of closed complaints

When a case file is closed, the Federal Ombudsman indicates whether the complaint is justified in the light of its grid of good administrative behaviour standards (ombuds criteria).

The investigation of a complaint can lead to one of the following 4 evaluations:

1. Ill-founded: one or more good administrative behaviour standards are not met.

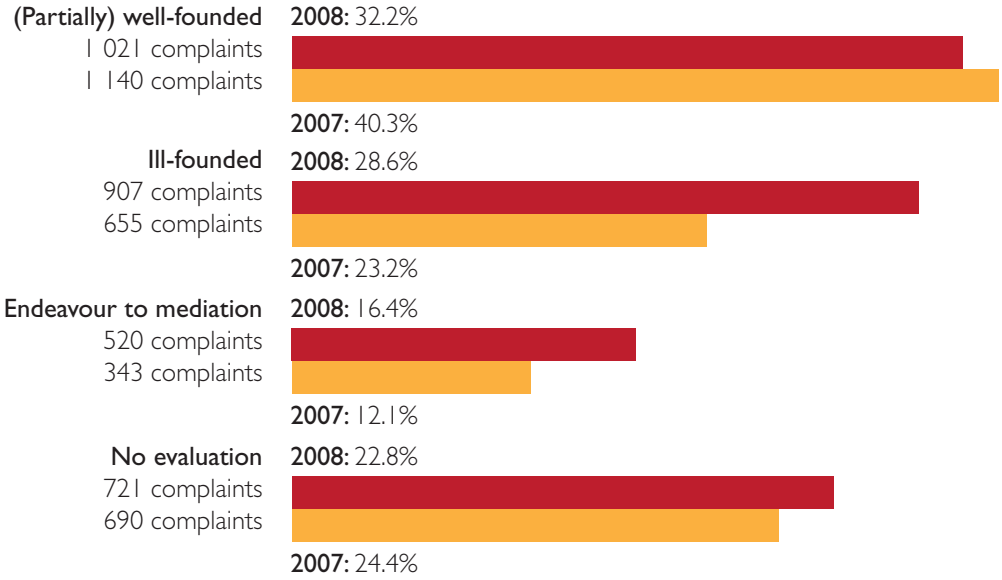
2. Well-founded: the good administrative behaviour standards were not violated.

3. Partially well-founded.
   3 situations are meant:
   - The complaint contains various, equally important grievances, not all of which are well- founded however. Nevertheless, if one and the same main concern appears from the complaint, then the evaluation of the complaint will be geared to this main concern;
   - Cases where there is shared responsibility between the petitioner and the administrative authority;
   - A complaint where material principles are met (e.g. the complainant is not entitled to a subsidy he claims), but which shows that the procedural principles were not respected (e.g. improper reception of the petitioner or the provision of wrong information).

4. No evaluation
   4 different suppositions are meant:
   - The attempt to mediate is used in complaints that cannot be immediately considered as well-founded or ill-founded (the administrative authority has a discretionary power) or where a solution can be found rapidly without requiring to investigate further into the responsibilities;
   - The impossibility to decide on whether the complaint is well-founded;
   - The petitioner's failure to answer a request for an explanation by the Federal Ombudsman;
   - A complaint that has become pointless; the petitioner informs the Federal Ombudsman that the latter's intervention is no longer justified or that the problem has been solved before it was referred to the Federal Ombudsman.

The graph below provides a general picture of the evaluation of the 3,169 complaints closed in 2008 (not including suspended cases), but including complaints lodged by civil servants.

Evaluation of closed complaints



2.12. Application of the ombudsman criteria

A summary of the ombudsman criteria applied to the 1,021 complaints closed in 2008 with the evaluation "*well-founded*" or "*partially well-founded*" is given below. Several criteria may be violated in the same case file, and the criterion "*efficient coordination*" in principle goes together with another ombudsman criterion. This explains why the number of violated criteria (1,313) is higher than the number of case files closed (1,021). Thus, in 85 complaints lodged by users of service vouchers that concerned the exchange thereof,[10] 2 to 3 criteria were applied each time (175 criteria for 85 case files).

Application of the evaluation criteria

Evaluation criteria	2008	%2008	2007	%2007
Reasonable time limit for complaint handling	541	41,2%	742	57,7%
Passive information	76	5,8%	106	8,2%
Active information	25	1,9%	31	2,4%
Conscientious handling	170	12,9%	129	10,0%
Proper application of the rules of law	136	10,4%	79	6,1%
Effective coordination	54	4,1%	43	3,3%
Reasonable and propotionality	64	4,9%	38	3,0%
Appropriate access	20	1,5%	32	2,5%
Legitimate confidence	98	7,5%	29	2,3%
Legal certainty	97	7,4%	24	1,9%
Justification of administrative acts	22	1,7%	22	1,7%
Courtesy	1	0,1%	6	0,5%
Equality	8	0,6%	5	0,4%
Right to be heard	1	0,1%	1	0,1%
	1,313		**1,287**	

[10] p. 84.

The extensive share of "*reasonable period*" in the ombudsman criteria is largely due to the long time it takes to process applications to regularise residence at the Department of Immigration and Naturalisation.

The increase in violation of the ombudsman criteria "*legitimate expectations*" and "*legal security*" is explained chiefly by the 85 complaints concerning the exchange of service vouchers.

2.13. Result of the intervention by the Federal Ombudsman

As soon as a complaint is found to be well founded, the Federal Ombudsman, relying on the new evaluation method introduced in 2007, proceeds to check the result of his intervention:

a) If the complaint is well-founded or partially well-founded:
   - Reparation
   - Partial reparation
   - Reparation refused
   - Reparation impossible (if it is materially not possible (any longer) to remedy the existing situation)

b) When the Federal Ombudsman made an attempt to mediate:
   - Successful
   - Unsuccessful

When the investigation into the justification of a complaint shows that it was well-founded or partly well-founded, then the complaint in question is closed as "*successful*" so that reparation or partial reparation can be awarded. The same applies when an attempt to mediate is brought to a successful conclusion, in the latter case the dispute was settled in a positive manner for the complainant.

On the other hand, the case file is closed "*Reparation impossible*" when the complaint is well- founded or partially well-founded, but the reparation is refused, or when an attempt at mediation failed.

'Reparation impossible' entails that the Federal Ombudsman's intervention could not lead to a solution that was satisfactory for the complainant. This evaluation is therefore not taken into consideration for assessing the result of the Federal Ombudsman's intervention.

Result of the intervention by the federal ombudsman

	Compliance	No compliance	Total
2007	1,073 **complaints** 75.2%	353 **complaints** 24.8%	**Total:** 1,426
2008	1,267 **complaints** 87.1%	188 **complaints** 12.9%	**Total:** 1,455

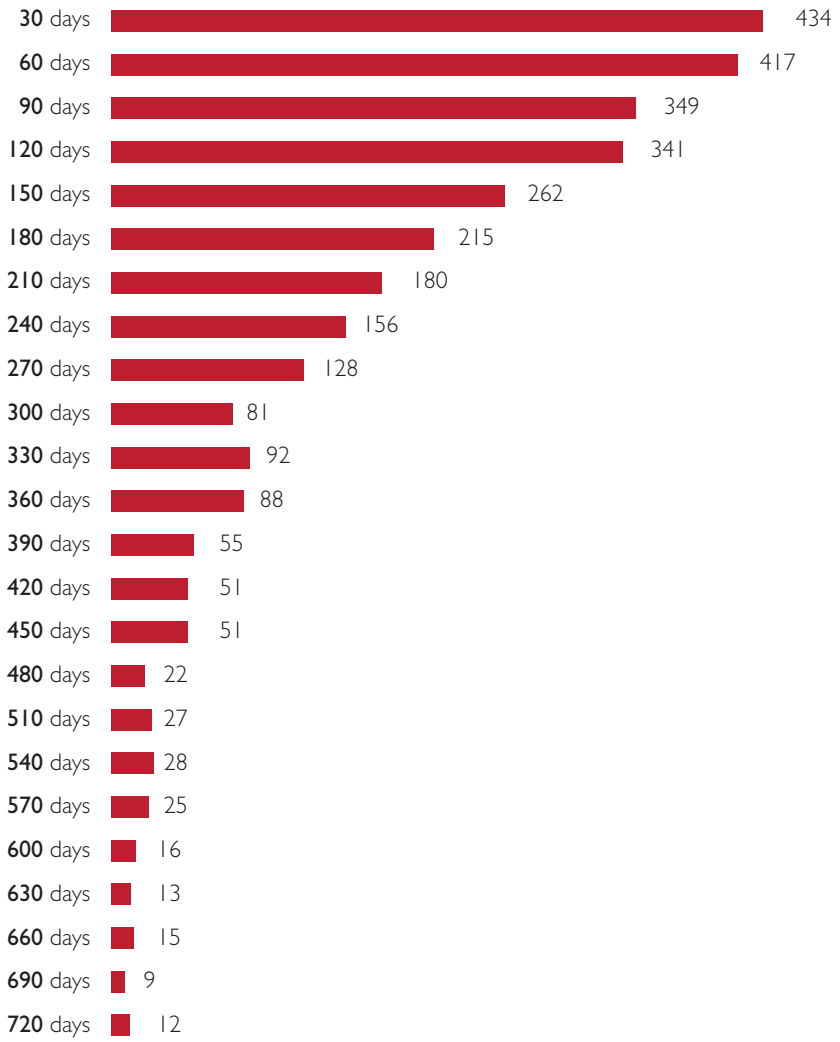
The part of case files closed without result is explained in large measure by the refusal of the Department of Immigration and Naturalisation to reply to requests for an explanation by the Federal Ombudsman in individual cases concerning the time it takes to process applications for a regularisation

of one's situation based on former article 9, paragraph 3. This phenomenon was gradually curbed in 2008, after the reduction of the number of old cases in the Humanitarian Regularisation Department.

2.14. Processing time of admissible complaints closed in 2008

A graph with the number of admissible complaints in 2008 per period of 30 calendar days is given below. It concerns both the new complaints as well as those of the previous year still in progress.

Processing time in calendar days of admissible complaints closed in 2008



A case file is considered "*closed*" when the result of the Federal Ombudsman's intervention has been communicated to the petitioner.

The data show that of these 3,169 complaints, 2,018 (63.7%) were closed within 6 months (compared with 1,644 complaints or 58.1% in 2007).

An additional 752 complaints (22.9%) were closed within a year (compared with 695 complaints or 24.6% in 2007), 234 other complaints (7.4%) within a year and a half (compared with 271 complaints or 9.6% in 2007), and finally 90 complaints (2.8%) within 2 years (compared with 112 complaints or 4% in 2007).

Finally, 102 complaints (3.2%) took more than 720 days to be processed (compared with 106 complaints or 3.7% in 2007).

The proportion of case files closed within the year rose (86.6%, compared with 85.7% in 2007). The top of the curve is henceforth 30 days, with 13.7% of the case files closed within this period, whereas in 2007, the top was 90 days.

The long processing time in these cases is attributable to:

- The complexity of the problem, which may pertain to various administrative departments, and even various levels of power;
- The slowness of people in a number of cases to react to the questions of the Federal Ombudsman, both complainants and authorities, during the examination of these complaints.

III. Analysis of complaints processed

Introduction

In this summarized part of the annual report, the complaints processed in 2008 ware, as in the previous year, compiled on the basis of the content thereof.

The following topics were broached:

1. Automation, technology and standardised procedures must improve the way the administration functions
2. The ombudsman and jurisprudence
3. Application of the regulations
4. The Ombudsman and the defence of human rights
5. What does *"in good time"* mean?
6. Legal security and conscientous management inspire confidence
7. Freedom of assessment by the administrative authorities

All these toics are illustrated with striking examples from the processing of complaints.

The names mentioned in the examples have been changed.

1. Automation, technology and standardised procedures must improve the way the administration functions…

The complaints show that the introduction of new technologies or the standardisation of administrative processes do not always make the citizen's life easier.

Electronic identity card

For instance, the electronic identity card has yet to convince all citizens of its value for them, especially when the electronic chip comes loose…

2 examples:

If the administrative authorities consider that the card was damaged because of negligent use, it must provide sufficient proof for its decision and inform the citizen accordingly.

If the chip came loose because of a card production error, then the problem lies with the identity card. If this defect causes damage, it is up to the administrative authorities to compensate the citizen.

The chip of Mr Pasmans's electronic identity card came loose. He has to pay for a new card. The Federal Public Service (FPS) Interior alleges that he was not careful in using his card. Mr Pasmans cannot understand this. He keeps his card in a plastic case in his wallet and uses it only exceptionally: once a year for a customs check, to give a copy to the bank and to borrow books from the library. According to the FPS Interior, his identity card showed a cut, indicating negligent use. According to the municipality, this would be due to the fact that Mr Pasmans always carries his wallet in the rear pocket of his trousers. Mr Pasmans wondered whether, as a man, he was now required to wear a jacket with a pocket sufficiently large to contain his wallet or to carry a handbag henceforth?

Because the chip on his identity card has come loose, Mr Lebon cannot accompany his family on a trip to Tunisia. He can leave only 2 days later, after getting a passport through the accelerated procedure. Thanks to the intervention of the Federal Ombudsman, the FPS Interior confirmed that Mr Lebon was entitled to reimbursement for the loss incurred because of a production error relating to his electronic identity card. He received the sum of €1,332.96, representing the cost of an international passport obtained through the accelerated procedure, an additional air ticket, a 2-day extension of the stay at the hotel owing to the delayed return flight, and an additional train ticket.

Immediate collection of traffic fines

There are proposals for the immediate collection for a series of traffic violations. These must be paid on a single account opened with the Postal Bank. Nearly 10,000 payments are made on this account every day. A certain automation in the processing of these payments is therefore inevitable.

This automated procedure nonetheless requires the efficacious cooperation of the person required to pay the fine. The violator is duly informed: if a payment is made without indication of a reference, it may not be linked to the fine concerned by the system devised by FINPOST, and the Crown Prosecution Service may initiate proceedings. The example cited on page 40 of the report illustrates that these are not empty words.

It is thus estimated that some 400 payments per day cannot be attributed to a specific fine. These payments represent a colossal sum. Inland revenue proceeds to reimbursements only by order of the Crown Prosecution Service.

2. The ombudsman and jurisprudence

Deportation of foreign nationals

3 issues on which the administrative authorities have hitherto refused to follow the recommendations of the Federal Ombudsmen were referred to the courts which upheld the latter's conclusions:

- By a ruling of January 2008, the European Court of Human Rights condemned the holding of foreign nationals in the transit area of Brussels Airport, referring in particular to criticisms made already in 2004 by the Federal Ombudsman against this practice. The Minister for Migration and Asylum Policy therefore decided to put an end to it.

- In 2 rulings of July 2008, the Council for Foreigners Disputes clearly indicated that the Department of Immigration and Naturalisation could not serve an order to leave the territory to a foreign national for whom an application for authorisation to stay is still being processed, a practice that the Federal Ombudsman had asked the Department of Immigration and Naturalisation to stop in a recommendation of 2006. The Department of Immigration and Naturalisation finally agreed to refrain from serving orders to leave the territory for as long as a previously filed application for authorisation to stay was still being processed.

Mr Mbombo, a Congolese national, is an asylum seeker in Belgium. In June 2006, he filed an application for authorisation to stay. In November 2006, Mr Mbombo became the father of a child with Belgian nationality. He informed the Department of Immigration and Naturalisation accordingly to complete his application for authorisation to stay. After his application for asylum had been turned down, in April 2007 Mr Mbombo received an order to leave the territory. He had not, however, received a reply yet to his application for authorisation to stay. He filed a complaint, and the Federal Ombudsman asked the Department of Immigration and Naturalisation to withdraw the order to leave the territory and to process Mr Mbombo's application for authorisation to stay.

- In January 2008, the Council for Foreigners Disputes also ruled in line with the recommendation we had made in 2006 concerning the situation of stateless persons, considering that the Department of Immigration and Naturalisation does not reason sufficiently its decision when it asks a stateless person to return to his or her country of origin (sic!) so as to apply for a visa through consular channels. In this case, however, the Department of Immigration and Naturalisation has not yet drawn the lessons of this case law.

3. Application of the regulations

A distinction must be drawn among complaints relating to the application of the regulations, between those arising from a wrong or contestable interpretation, and those arising out of a poor application of the regulations. Whereas practical solutions are generally rapidly found in the second category of complaints, the force of persuasion and perseverance are needed in the second case…

Thus, as regards registration fees:

Upon the simultaneous acquisition of adjoining dwellings each of which with a cadastral income not exceeding €745, the administrative authorities considered that neither of the 2 dwellings could benefit from a reduced tax rate on registration fees, if the sum of the 2 cadastral incomes exceeded €745 and the buyer intended to reunite the 2 dwellings.

According to the administrative authorities, the acquisition of a house excludes the benefit of a reduced rate for the other house and vice-versa, since the buyer already has a house at the time that the other is acquired, as the acquisition is simultaneous.

This was an unreasonable interpretation of the legal provision. We considered that at least one of the dwellings should benefit from the reduced rate in this situation and managed to convince the administrative authorities accordingly. The position that the service concerned adopted to date will be changed.

Mr Barbier acquired 2 adjoining small houses in Liège, the first of which with a cadastral income of €490 and the second with a cadastral income of €689. He paid €35,000 for the first house and €75,000 for the second. He bought the 2 houses simultaneously and intended to elect official address for service in the one with a cadastral income of €689. He therefore expected to benefit from the reduced rate for the latter, and to pay 6% in registration fees, i.e. €4,500. For the other house, he had to pay the full rate, i.e. 12.5%, or €4,375.

He got an unpleasant surprise when the Land Registry Office asked him to pay the full rate for the first house too, i.e. an additional €4,875. Mr Barbier did not agree and referred his case to the Federal Ombudsman. An examination showed that the administrative authorities had interpreted the relevant legislation wrongly. Mr Barbier does not have to pay the additional registration fees.

4. The Ombudsman and the defence of human rights

Stay of parents of Belgian children

The fate reserved by the Department of Immigration and Naturalisation for single-parent families in which the foreign parent who alone provides for the upbringing of his or her Belgian child applies to regularise his or her residency situation, is alarming as regards basic rights.

The Department of Immigration and Naturalisation refuses to examine the application for authorisation to stay by such a parent when s/he cannot provide proof that the other parent actually takes care of the child. This refusal is a serious and disproportionate violation of the right to privacy and family of the parties concerned, and in particular to the rights of the children concerned.

The Department of Immigration and Naturalisation not only acknowledges that during the verification of the ties between the child and its Belgian parent, it relies solely on its "*inner conviction*" (sic!), with all the risks of error or irrational assessment this may entail, but above all this practice violates several fundamental rights guaranteed by the European Convention on Human Rights and the Convention on the Rights of the Child.

This situation actually entails that the foreign parent who looks after the child is not authorised to stay with the latter in Belgium, although the Belgian parent does not take care of the child…

Even if the Department of Immigration and Naturalisation claims that it is not deporting the Belgian child, its decision makes it impossible for the foreign parent (often the mother) to take a decision in accordance with the higher interest of the child:
- If s/he complies with the decision of the Department of Immigration and Naturalisation and has to take the child along because the other parent does not take care of it… which comes down to a *de facto* violation of the prohibition to deport one of its nationals and deprives the Belgian child of the economic and social rights that it enjoys in Belgium;
- Or s/he remains in the country illegally, but his or her administrative situation makes it impossible for him or her to meet the primary needs of the child.

We have sent a recommendation to the Department of Immigration and Naturalisation to review its practice and hope that no ruling by the European Court of Human Rights will be needed to achieve the goal…

5. What does "*in good time*" mean?

The time it takes to reimburse the medical expenses of war veterans is getting longer and longer.

The Institute of Veterans used to reimburse medical expenses within 4 to 6 weeks. Since the second quarter of 2007, this reimbursement period has become longer and longer. In the beginning of 2008 it amounted to 4 months. At the end of March, veterans had to wait for 7 months. In the acknowledgements of receipt, the probable date of reimbursement was regularly adapted according to the processing period. At the end of 2008, no processing period was indicated any longer… Measures have been taken to improve this service. It is still not yet possible to determine when the normal reimbursement period will be complied with again.

Curbing the backlog of the Humanitarian Regularisation Service

In our report of 2006, we had denounced the sizeable backlog of this service in processing applications based on the former article 9, paragraph 3 of the Act of 15 December 1980. In March 2006, the Service had a backlog of 25,448 applications still to process. On 30 October 2007, there were still 16,440 pending. In the beginning of November 2008, the backlog had been reduced to 6,417 cases.

The number of applications filed on the basis of new procedures based on articles 9*bis and* 9*ter* of the Act of 15 December 1980, as amended by the Act of 15 September 2006, seems to be up, on the other hand. As a result, the total number of case files to be processed in November 2008 is nearly the same as that of the previous year, i.e. nearly 15,500. Nevertheless, the new backlog (applications filed on the basis of articles 9*bis* and 9*ter*) concerns more recent cases. Compared with March 2006, the overall backlog has been reduced by 10,000 units nonetheless.

Backlog of certain Land Registry Offices…

Since 2005, the number of complaints filed with the Federal Ombudsman concerning the processing time of applications relating to the fixing of the cadastral income has gone up sharply.

We have noted that in certain Offices, taxpayers often have to wait for several years before a decision is taken. The initiatives taken to date, although based on a genuine will to improve the situation, are still not capable of reassuring the taxpayer that his or her grievances will be dealt with in a reasonable timeframe.

The delay in processing the case files and the fact that no reliable indication can be given to the taxpayer as to the probable processing time are not compatible with transparent and efficacious governance. They seriously erode the citizen's confidence in the administrative authorities.

In March 2006, Mr Quinet filed a complaint against the cadastral income attributed to his house. He also filed a complaint against the advance levy on income derived from real estate for tax year 2006, calculated on the amount of the contested cadastral income. When he received the notice of assessment for the advance levy on income derived from real estate for tax year 2007, he had still not heard anything about the processing of his complaint about his cadastral income, other than an acknowledgement of receipt. He therefore had to file another

complaint against the advance levy on income derived from real estate for 2007, so as to protect his rights. At the end of 2007, Monsieur Quinet learnt that the Land Registry Office concerned was still processing complaints from 2002 and 2003. Nevertheless, the official in charge of his case file promised that his complaint would be processed by 15 May 2008. Mr Quinet did not believe a word of it. And yet.. he finally received the decision at the end of May.

We therefore made 2 recommendations to the administrative authorities this year, one on shortening the periods for the future, and the other for adopting a plan to curb the backlog.

… and certain Regional Direct Taxation Offices

A similar situation holds sway in certain regional direct taxation offices concerning requests to reduce the advance levy on income derived from real estate.

In the standard acknowledgement of receipt, it is indicated that the administrative authority will do everything in its power to process the complaint as promptly as possible. It is also specified that if a decision has not been taken within 6 months, the taxpayer may refer the matter to the district court, although this is not an obligation. In fact, s/he may always choose to wait for the decision of the administrative authority.

Taxpayers actually have to wait for several months, even several years, before the administrative authorities take a decision about their complaint. In the absence of information, the taxpayer nonetheless has no idea whether the administrative authorities are close to taking a decision or whether s/he will still have to wait a long time. This long processing period obliges a good number of taxpayers to file a complaint again every year against the advance levy on income derived from real estate, based on the same grounds, as long as they have not obtained an administrative decision on the initial complaint.

We therefore made 2 recommendations to the administrative authorities this year, one on shortening the periods for the future, and the other for adopting a plan to curb the backlog.

The need for transparency on processing periods

Apart from the delay registered by the service, the total absence of information to the citizen as to when s/he can hope for a decision is what strikes the Federal Ombudsman. As we had denounced the situation in 2002 for the General Department for the Disabled or in 2006 for the Department of Immigration and Naturalisation, in 2008, whether it be regarding the Institute of Veterans, certain Land Registry Offices or certain Regional Offices for the Advance Levy on Income Derived from Real Estate, there comes a time when the backlog situation of the service is such that the officials can no longer tell the citizen when s/he can expect the decision s/he is waiting for.

Beyond the recommendations made to the services concerned to curb their backlog and return to a reasonable processing period, it is the lack of information that our general recommendation of 2006 (GR 06/01) aimed to remedy.

It is inadmissible that an administrative authority that advocates a culture of service and wishes to be transparent in regard to its users, can content itself with telling citizens it does not know when it will process their case files. Administrative transparency requires that action by the administrative authority be foreseeable and that the latter accepts to account for the way it operates.

This is the reason why we recommended in 2006 that a provision be included in the Act on Administrative Advertising requiring all administrative authorities to indicate a period within which they will take a decision. Alongside the name, title, address and telephone number of the person capable of providing more information on the case, the probable processing period is an essential indication required to provide the public with clear and objective information on the action of the federal administrative authorities. This recommendation remains a priority in our view.

6. Legal security and conscientious management inspire confidence

Legal security entails that the law must be foreseeable and accessible. The legal consequences must be estimable and the citizen must be able to rely on a certain constancy on the part of the administrative authorities. Legal security thus imposes certain limits to the freedom of the administrative authorities.

Guaranteeing legal security is also connected to meeting other ombudsman criteria. It is moreover ensured by communicating more information, providing a legal basis for certain administrative acts, and acting more meticulously…

Respect for legal security is moreover of capital importance for the citizen's confidence in the authorities.

The consequences of de facto separation on the tax assessment

De facto separation may have an influence on the way taxes are assessed. But as of when is one de facto separated? The beginning of de facto separation may be a little different for the party concerned, the judge, inland revenue, etc. It is above all a question of fact.

Inland revenue makes things easy for itself. In practice, it considers that the parties are de facto separated from the date of the new entry in the population register of the municipality in which they have elected their new, separate official address for service. This element is objectively verifiable. It is nowhere explicitly announced however that this is the element used to determine the beginning of de facto separation.

In order to enhance legal security for de facto separated spouses, we proposed to the tax authorities to clarify the matter in the explanatory brochure that accompanies the tax return form, by mentioning that the starting date of de facto separation is in principle the date of the new registration in the population register of the municipality of the new official address and that, if another date is indicated in the tax return, then proof must be provided of the actual de facto separation and the lasting and uninterrupted nature thereof.

Mrs Glineur has been de facto separated since 23 June 2004. Her husband moved but did not report immediately his change of address. In January 2005, the municipal authority automatically changed the latter's address.

For tax year 2006, Mrs Glineur filed a separate tax return, indicating the date of de facto separation. In May 2007, she was nonetheless very surprised to receive a tax assessment in the name of her spouse and herself.

She filed a complaint with the tax authority and phoned to find out whether she could get a separate tax assessment, as she had been de facto separated since June 2004. The administrative authorities replied in the negative, and her complaint was rejected. Mrs Glineur then consulted a tax expert, who told her she could contest the very fact of joint taxation, by providing proof of the date of the commencement of de facto separation. Having referred to the information of the administrative authorities, Mrs Glineur did not provide said proof, and now it is too late to submit it, as the complaint period has expired. Mrs Glineur must therefore agree with her spouse how they are going to share their tax payment.

The tax authorities refused to agree to this proposal. First, because they fear that the explanatory brochure would become too thick and incomprehensible if information is constantly added. But above all, which is far more basic, the tax authorities may not specify explicitly the condition of registration in the population register, for fear of abuse by the taxpayer.

The Federal Ombudsman obviously cannot concur. Legal security and transparency must take precedence over the risk of any bad faith on the part of the taxpayer. The lack of clarity by the tax authorities in regard to de facto separated taxpayers prejudices legal security.

Change of rules for the exchange of service vouchers

The system of service vouchers enables an authorised company to take on employees to perform household tasks at a user or outside.

Service vouchers are valid for 8 months. Up to 1 May 2008, if they had not been used within that period for one reason or another, they could still be exchanged up to 6 months after their expiry date for new vouchers. As of 1 May 2008 however, a new regulation entered into force.

From one day to the next, service vouchers whose validity period had expired could no longer be exchanged. No transitional measure had been provided. We received 85 complaints within a short period of time. Users of service vouchers contested the new regulations and the absence of appropriate information.

We considered that the absence of transitional provisions combined with a lack of active information have entailed a violation of the legal security and legitimate expectation standards. Following our intervention with the service vouchers firm, the National Employment Office and the Minister for Employment, the latter clarified the application of the new measure in time. The new provision must be interpreted in such a way that the measure that limits the exchange possibility is applied only to service vouchers which are issued after it entered into force.

This measure offers a practical solution for users, but should nonetheless be enshrined in the Royal Decree as a transitional provision.

Directives applied by the Department of Immigration and Naturalisation in the processing of applications for regularisation of residence

Legal security is not ensured in the current work method of the Department of Immigration and Naturalisation. This is the conclusion drawn in our evaluation report on complaints lodged by some hunger strikers in 2008 and included fully in our annual report.

The Federal Ombudsman recommended to the competent Minister and to the Department of Immigration and Naturalisation to reduce legal insecurity by specifying the directives for the processing of applications for the regularisation of residence on humanitarian grounds currently followed by the Department of Immigration and Naturalisation. This may be done preferably by means of a circular made public and updated regularly as soon as new applicable procedures are specified or the administrative practice has changed.

This recommendation is an extension of a general recommendation of 2001 (GR 01/01), which aimed at greater transparency and higher legal security in the application of the Act of 15 December 1980 by the Department of Immigration and Naturalisation.

7. Freedom of assessment by the administrative authorities

Contrary to the case where their powers are restricted, the administrative authorities may, under their "*discretionary powers*," take different decisions, as they deem fit, on condition that they remain within the limits of what is legal and reasonable. The complaints illustrate that the exercise of a discretionary power by the administrative authorities is at times perceived as being arbitrary by the citizen. In certain cases, we insist that the administrative authorities must clarify the elements they take into consideration for their assessment.

Furthermore, the freedom of assessment by the administrative authorities offers a certain margin of mediation for the Federal Ombudsman. The proportion of cases of successful mediation in the interventions by the Federal Ombudsman is by no means negligible.

Tax recovery measures

The collectors of direct taxes are in charge of recovering taxes. The State's accountants, they are personally responsible for their funds.

If the taxpayer does not pay the tax due within the stipulated period, owing to financial difficulties, for instance, the collector has different means for proceeding to recover the amount due. He may grant a payment plan or call on a bailiff to proceed to a forced recovery. He decides freely which means to use and when. Otherwise put, he has a discretionary power on the matter.

In exercising this power he, like all public services, is nonetheless required to meet certain good administrative behaviour standards. Proceedings initiated may not generate expenses out of proportion for the taxpayer when the elements of the dossier clearly show that s/he is complying voluntarily and that the debt will be recovered shortly.

At the end of November 2007, Mrs Charlier received her assessment for tax year 2007. She has to pay €6,624.70 to Inland Revenue by 28 January 2008. Now, that same year, in March 2007, to be more precise, she had already received her assessment for tax year 2006. She had to obtain a payment plan over 4 months for the €2,315.62 she owed for that year. Nevertheless, when she asked for another such plan to pay the €6,624.70, she was refused, because she had already obtained 2, one for tax year 2006 and the other for tax year 2004.

In recent years, Mrs Charlier has had to have 5 operations. She wears a prosthesis on her hip and shoulders and cannot do without a domestic helper. She receives a disablement allowance, with a supplement from her employer. She has already taken out various loans in order to deal with her financial difficulties. Getting 2 tax assessments in one year did not help matters in the least…

These arguments did not persuade the collector of direct taxes, nonetheless. Mrs Charlier contacted her credit institution. She can still borrow a maximum of €5,800. In the beginning of March 2008, she paid the €5,800 and asked for a 4-month plan within which to pay the balance, i.e. €824.70. This was also refused. She paid another €441.42 on 27 March 2008. Her tax debt is now just €400, and she plans to pay it as rapidly as possible.

In the beginning of April 2008, the collector decided nonetheless to call on a bailiff to recover the remaining amount. The costs and expenses, for a sum of €150, are charged to Mrs Charlier. Her debt now amounts to €550…

Whereas up to now, the tax administrative authorities supported the principle that the legal expenses could be waived only if the collector had made an error or fault, an in-depth discussion with the tax authorities let to the conviction that when there has been a clear violation of such standards as

conscientious management, or *reasonableness* or *proportionality*, the regional office may consider cancelling the legal costs in view of the concrete elements of the case.

Sanctions imposed on the unemployed

Unemployment benefits received unjustly must be reimbursed immediately, and the National Office of Employment may exclude the culprit from the entitlement to unemployment benefits for several weeks.

Are there any particular circumstances that authorise the intervention of the Federal Ombudsman, however? This may prove useful when the administrative authorities were unaware that the erroneous statements were made by a person with a mental disability…

Mr De Creemer worked for a certain number of days in 2005, but did not indicate them on his card, so that he received unemployment benefits for those days. The National Office of Employment found out and asked him to reimburse the benefits wrongly paid. Mr De Creemer was also excluded from the entitlement to unemployment benefits for 4 weeks.

Suffering from a mental disability, he lives in a special facility, which contacted the Federal Ombudsman. Mr De Creemer must of course reimburse the benefits received wrongly, but an exclusion for 4 weeks… the home considers that this is somewhat exaggerated.

Mr De Creemer did not conceal the days worked in any way from the National Office of Employment. When the Federal Ombudsman intervened, it seemed that the National Office of Employment was not aware of the state of Mr De Creemer's mental health. It is now prepared to limit the sanction to a warning and has cancelled the exclusion.

IV. Recommendations

1. Introduction

Recommendations based on observations made during the examination of complaints about the way the federal authorities function constitute one of the missions entrusted explicitly to the federal ombudsmen by Article 1, 3°, of the Federal Ombudsman Act[11] of 22 March 1995 (hereinafter referred to as "*the Act*").

There are 2 types of recommendations:

a) *"Official" Recommendations*: by virtue of Article 14, section 3 of the Act, the ombudsmen may, when processing complaints, make such recommendations as they deem useful to the administrative authority;

or

b) *"General" Recommendations:* Article 15, section 1, of the Act, stipulates that the annual report on activities and any interim reports that the ombudsmen submit to the House of Representatives shall contain such recommendations as they deem useful and shall expose any operating difficulties that they should encounter in the exercise of their office.[12]

2. General Recommendations

GR 08/01: Adopt a Royal Decree implementing Article 394, §4 of the Income Tax Code (ITC 92) so as, in the case of joint taxation, to define the way in which the part of the tax pertaining to the taxable income of each of the taxpayers is established.[13]

Article 934, §4, ITC 92, has since 2001[14] stipulated that the King defines how to fix the part of the tax to be paid or to be reimbursed by each of the spouses or parties living together legally.

Taxpayers who have to be taxed jointly receive a single assessment comprising the calculation of the joint tax. They cannot identify their personal share in the tax or in the reimbursement of tax.

Now, the part of the tax to receive or to pay in the joint tax by each of the taxpayers must at times be established with precision, in particular in case of de facto separation or when one of the taxpayers has personal debts.

If the taxpayers cannot agree on the distribution of the tax, or if such distribution is refused by the administrative authorities,[15] in the absence of a Royal Decree, said authorities apply a distribution key developed years ago and described in an administrative circular from 1991. In most cases, the administrative authorities send a proposal for distribution to the taxpayers. If the latter agree with this proposal, there is obviously no difficulty. In the event of disagreement, on the other hand, the taxation and recovery services have to deal with many questions from the taxpayers as well as the contestation

11 pp. 153-157.
12 Only the general recommendations of 2008 are contained in this part IV, pp 145 ff. The summary table of all general recommendations (1997-2008) still being processed is given as Appendices, pp. 163-166.
13 pp. 85 ff. and 164.
14 Article 57 A, 3° of the Act of 10 August 2001 pertaining to the reform of taxation of natural persons.
15 For instance, due to one taxpayer's own debts.

of the distribution key and the amounts resulting from its application. In such a case, the Finance services would have to find a more precise distribution that takes account of the rights of each of the taxpayers under civil law and tax law.

The Federal Ombudsman receives complaints regularly from the time that the financial interests of the taxpayers are no longer common, but strictly separate.

For instance, the one who paid the most tax deducted at source, wishes to obtain the highest reimbursement. The one with dependent children does not want to transfer the tax benefit that ensues. A large number of points of friction can thus be listed, for which the administrative authorities have to provide a convincing explanation or a solution. As soon as the result of the distribution key seems to diverge from the matrimonial system adopted by the spouses, the choices made when filing the tax return, de facto questions, etc., each taxpayer can make an argument to contest the proposed distribution.

For as long as the distribution is defined in an administrative circular and in instructions, it is restrictive for the administrative authorities, but not for the taxpayer. In article 394, §4, ITC '92, the legislator has moreover expressed a preference for settling the matter by Royal Decree.

According to the Council of State, the Royal Decree intended to determine the share of the tax or of the tax reimbursement pertaining to the income of each of the taxpayers in the joint tax, must comply with the provisions of both the Income Tax Code of 1992, and of the Civil Code.[16]

A Royal Decree which meets these requirements is the most indicated means for defining a distribution key that takes into account the recent developments in tax legislation and civil law, the application of which produces a final result that can be relied upon by all the parties concerned.

The opposition of the authorities to change on the matter perpetuates legal insecurity and is consequently not justifiable.

GR 08/02: Take such measures as necessary to remove the contradiction arising out of the combined application of the Act of 15 December 1980 on access to the territory, the stay, establishment and deportation of foreign nationals and article 31 of the Private International Law Code.[17]

Several authorities may have to decide on the recognition of a single foreign official document in exercising their competencies.[18] Article 27 of the Act of 16 July 2004 on the International Private Law Code (hereinafter referred to as the IPL Code) actually authorises them to recognise or to refuse to recognise the document, independently from each other. Article 27, §1, of the IPL Code stipulates that a "*foreign official document shall be recognised in Belgium by any authority without having to engage in any procedure, if its validity is established in accordance with the applicable law by virtue of the present act, taking into account articles 18 and 21.*"

16 Opinion of the Council of State attached to the bill on tax and other provisions of 17 March 1999; Parl. Doc., House of Representatives, no. 2073/1, pp. 21-22, Session 49.

17 pp. 63 ff. and p. 165.

18 For example, the Department of Immigration and Naturalisation examines a foreign marriage certificate to grant a visa for family reunion; the tax authorities examine the foreign marriage certificate to determine the tax regime; the municipal authorities for the mention of the civil status on the identity card/residence permit. The National Pension Office with a view to granting a survivorship pension, etc.

The positive aspect of the system introduced by Article 297 of the IPL Code is that it entails that the recognition of foreign official documents is carried out, as of right, by any authority and without any procedure.[19] The system therefore appears simple for the applicant… at least for as long as no authority refuses to recognise the latter's foreign document. In certain cases, this system leads to the recognition of a foreign official document by certain Belgian authorities, while others will refuse to recognise it.[20]

This is the case for instance when the registrar of births, marriages and deaths enters in the relevant register the certificate of a marriage concluded abroad by a Belgian national and a foreign national residing abroad and the civil status of the Belgian national is amended accordingly in the population register. The couple therefore appears as being married in the eyes of most Belgian authorities which usually rely on the National Register: the tax authorities, the social security organisations etc.

The Department of Immigration and Naturalisation then refuses to grant a visa for family reunion to the spouse residing abroad because it considers that the deed cannot bring out its effects in the Belgian legal order.[21]

In view of the contradictory position of the different Belgian authorities, which is often very difficult for the persons concerned, it is up to the latter to initiate steps in order to sort out their situation. If one authority refuses to recognise a foreign official document, they can actually introduce legal proceedings before the district court, which is the only one that can decide once and for all whether a foreign official document is valid in regard to Belgian law.[22] [23] Nevertheless, this procedure, which will often be initiated after months of uncertainty, is at times long and costly. Furthermore, it would appear that some courts proceed to a different reading of article 27 of the IPL Code.[24]

The Federal Ombudsman has encountered even more worrisome situations concerning foreign nationals who had been issued a visa for family reunion in their capacity of spouse. When the person arrives with a family reunion visa, the Department of Immigration and Naturalisation has already verified that all the conditions have been met and has therefore recognised the marriage certificate.

19 Senate, Report in the name of the Justice Committee, 2003-2004, 3-27/7, p. 57.

20 In this sense: decision of the Council for Foreigner Disputes no. 2667 of 16 October 2007, which ruled, in regard to the refusal of the Department of Immigration and Naturalisation to grant a visit on the basis of a foreign marriage: "it ensues from this provision that each administrative authority (…) in exercising its competencies (…) may refuse to recognise a foreign document (…) In view of the fact that Article 27, §1, first indent, of the IPL Code, attributes to 'all authorities' this competence of recognition *de plano*, (…) the circumstance in which the competent registrar of births, marriages and deaths would have effectively recognised said foreign document, does not hamper the possibility that, in its field of competence, the other party refuses this recognition." (Free translation).

21 The Department of Immigration and Naturalisation refuses to recognise a marriage certificate in the following cases: either the marriage certificate is incompatible with the Belgian international public order, shows a violation of the law or does not respect the personal status of each spouse; or the Department of Immigration and Naturalisation, suspecting a phoney marriage, asks for the opinion of the Crown Prosecution Service, which, after an investigation, considers that this marriage cannot bring out its effects in Belgium because it was concluded for the sole purpose, not to create a sustainable community, but to obtain the benefit of residence from the status of spouse (cf. Article 146bis of the Civil Code).

22 This system of recognition by any authority is presented as an advancement because the (unilateral) petition proceedings before the district court have since been simplified: Senate, 2003-2004, 3-27/7, p. 60: "This insecurity has been dissipated to some extent through the introduction of an easier petition procedure;" p. 278.

23 Michael Traest, in *Het Wetboek Internationaal Privaatrecht, Becommentarieerd – Le Code de droit international privé commenté,* Intersential/Bruylant, 2006, pp. 154-155; Hakim Boularbah, in "Le nouveau droit international privé belge," J.T., 2005, p. 86.

24 Cf. Kristien Vanvoorden, « De erkenning door Belgische overheden van buitenlandse akten inzake de burgerlijke staat : tegenstrijdige beslissingen, » in Tijdschrift voor vreemdelingenrecht, DIP theme issue, 2008, pp. 11 ff. ; the Antwerp district court, which has ruled on several occasions (judgements of 19 June, 27 June and 18 December 2007) that the registration of a marriage certificate by the registrar of births, marriages and deaths stood in the way of its being recognised through judicial means: the court therefore declared the unilateral petition inadmissible for lack of interest. For its part, the Council for Foreigners Disputes (decision no. 1960 of 25 September 2007) ruled that it has no competence to verify, albeit incidentally, the legality of a refusal of the Department of Immigration and Naturalisation to recognise a foreign marriage certificate. Pursuant to the Antwerp district court, the spouses for whom the registrar of births, marriages and deaths entered the marriage certificate, would have no means to contest the decision of the Department of Immigration and Naturalisation to refuse to recognise said certificate.

Upon arriving in Belgium, the spouse must go to the municipal authorities to apply for a residence permit; once the residence has been verified, the municipal authorities in theory issue immediately the residence permit provided under the Act of 15 December 1980 on the accessing of the territory, residence, establishment and deportation of foreign nationals (hereinafter referred to as the Foreigners Residence Act).

Upon arriving in Belgium, some persons are nonetheless refused processing of their application for residence or even consideration of their application by the municipal authorities because there are doubts as to the validity of the marriage certificate. Whereas these persons have arrived with a valid family reunion visa, they find themselves either without any documents (when the municipal authorities refuse, verbally, to process their application), or with a refusal to take the matter into consideration, which entitles no right either to residence or any other benefit arising from said residence (employment, social rights, etc.). Now both of these attitudes are contrary to the Foreigners Residence Act. In fact, said act does under no circumstances authorise municipal authorities to refuse to process an application. The decision to refuse to take the matter into consideration[25] can only be taken if the person does not produce a legalised marriage certificate; in the case at hand, the person produces a legalised marriage certificate, but the municipal authorities have doubts as to the validity thereof, and are waiting, before making a final decision, for an opinion from the Crown Prosecution Service.

The municipal authorities justify their attitude as follows: on the one hand, article 27 of the IPL Code authorises them to reach their own conclusion on the validity of the marriage certificate produced, although this document has already been recognised by the Department of Immigration and Naturalisation. Secondly, article 31 of the IPL Code prohibits the municipal authorities from registering in the foreigners register the spouse who arrives with a valid visa for as long as it has not decided on the validity of the certificate, in regard to the conditions referred to in Article 27 of the IPL Code. Article 31 of the IPL Code actually stipulates:

"§1. A foreign official document concerning the civil status can have marginal notes in a civil status document or be entered in the register of births, marriages or deaths or serve as the basis for registration in a population register, an foreigners register or a waiting register only after the verifications of the conditions referred to in article 27, §ter.
[…]

§2 The verification is carried out by the custodian of the document or of the register.
The Minister for Justice may issue directives to ensure the uniform application referred to under §1.
The custodian of the document or of the register may, in case of serious doubt when assessing the conditions referred to in §1, refer the document or the decision for the opinion of the Crown Prosecution Service, which will proceed to carry out additional verifications as and where necessary.
§3 […]."

When the municipal authorities have doubts as to the validity of the official document presented to them, they refer it to the Crown Prosecution Service, which often takes several months (and even longer in certain districts) to give its opinion.

Whilst waiting for the opinion of the Crown Prosecution Service, the municipal authorities deem themselves to be incapable to apply the Foreigners Residence Act, which requires them in theory to register the foreign national in the foreigners register and to issue a residence permit once his or her residence has been verified – as article 31 of the IPL Code requires them to verify the marriage

[25] Or of inadmissibility when the spouse joined is authorised to stay temporarily or without limitation, without being Belgian or an EU national.

certificate and prohibits in the meantime the registration of the spouse in the foreigners register! Confronted with a seemingly insoluble dilemma, some municipal authorities therefore opt to place the person concerned in a situation without rights and to ignore purely and simply the obligations incumbent upon them by the Foreigners Residence Act. The foreign spouse has no residence permit in Belgium, although the Department of Immigration and Naturalisation has recognised the marriage!

This situation fails to recognise the fundamental rights of the spouses, and more precisely, their right to respect of family life arising out of article 8 of the European Convention on Human Rights, and generates legal insecurity and a breach in legitimate expectations.

In order to guarantee the effective exercise of the rights to family life as provided in article 8 of the European Convention on Human Rights, the Federal Ombudsman recommends that the necessary measures be taken to deal with the contradiction arising out of the combined application of the Act of 15 December 1980 on access to the territory, the stay, establishment and deportation of foreign nationals and article 31 of the Private International Law Code. The foreign partner who arrives in Belgium with a valid family reunion visa may not, when on Belgian territory, be in a situation without rights.

GR 08/03: Define directives to ensure the uniform application of article 31 of the International Private Law code, in accordance with the capacitation given by this provision to the Minister for Justice, in order to prevent contradictory decisions regarding the recognition of a civil status document and to ensure the formal reasoning of decisions to refuse a mention in the margin of a civil status document, a transcription in a register of births, marriages and deaths, or the registration, on the basis of said document, in the population, foreigners or waiting register.[26]

By extension to the previous recommendation, the Federal Ombudsman has also had to deal with situations where 2 registrars of births, marriages and deaths take 2 perfectly contradictory decisions concerning the same civil status document. Let us take the example of a Moroccan couple, separated, and residing in Belgium in 2 different municipalities, who go to Morocco to dissolve the marriage by repudiation. One of the registrars of births, marriages and deaths has accepted to consider that the woman is divorced (and can therefore get married again), while the municipal authorities of the man have refused to recognise the repudiation.[27] The interested party may not get married again in Belgium, and if he gets married again in Morocco his new wife will not get a family reunion visa.[28]

Under such circumstances, the authorities create total legal insecurity and are fully responsible for the situation. Furthermore, when the municipal authorities refuse to enter the document or to register the persons concerned in the population or foreigners registers, they do not serve official notice of the reasoned decision to the person concerned, who therefore does not know why his or her civil status document cannot be recognised. This absence of a formal reasoned decision runs contrary to the Act of 29 July 1991 on the formal motivation of administrative documents.

26 pp. 63 ff. and p. 165.

27 Cf. article 57, §1 of the IPL Code which imposes very strict conditions for the recognition of a repudiation.

28 In principle, the spouse in Belgium would have to re-divorce his first wife (who has in the meantime remarried) before getting married again to his second spouse.

3. Official Recommendations 2008

Minister responsible for access to the territory, residence, establishment and deportation of foreign nationals

At the end of the examination of 3 complaints that were attached, the evaluation report for which is set out fully below, the Federal Ombudsman made 3 official recommendations in November 2008 to the Minister responsible for access to the territory, residence, establishment and deportation of foreign nationals.

EVALUATION REPORT

1. Object of the complaints

The first complaint denounces the unequal treatment reserved for 2 groups of hunger strikers, on the Rue Royal and Forest, which, at the end of a hunger strike of 50 and 45 days respectively, had obtained a 3-month registration certificate, compared to the measure adopted subsequently for the hunger strikers in the Beguinage Church who, after a 56-day strike, obtained a certificate of registration in the foreigners register valid for 9 months.

The second complaint pertains to the unfair treatment of applications for the regularisation of residence caused by the absence of a circular.

The third complaint is also intended to claim the same treatment for the hunger strikers of the Latin America House in Ixelles as for the hunger strikers in the Beguinage Church.

The first 2 complaints were lodged on 8 July 2008. After an initial examination of the grievances of the complainants, on 31 July 2008 the Federal Ombudsman sent its provisional conclusions to the Minister for Migration and Asylum Policy. On 27 August 2008, a discussion was held between the Minister's strategic unit, the Directorate General of the Department of Immigration and Naturalisation and the Federal Ombudsman to hear the observations of the administrative authorities. On 24 September 2008, the Federal Ombudsman received the third complaint.

2. The relevant facts for the period concerned

Date (End of strike)	Place	Length of Strike	Size of the group at the end of the strike	Result and consequences in terms of entry into the labour market
19 February 2008	Rue Royal	50 days	162	Certificate of registration non-renewable Possibility to apply for for a work permit B
25 June 2008	Forest	45 days	39	Certificate of registration non-renewable Possibility to apply for for a work permit B
2 July 2008	Beguinage Church	56 days	161	Certificat of registration in the foreigners register for 9 months Possibility to apply for a work permit C
22 September 2008[29]	ULB	72 days	85	Filing of the application under article 9ter and delivery of certificate of registration Possibility to apply for a work permit B
3 October 2008	Latin America House	87 days	9	Filing of the application under article 9ter and delivery of certificate of registration Possibility to apply for a work permit B

3. Pertinent standards

The Federal Ombudsman examined the complaints lodged in regard to its usual grid of ombudsman criteria.[30] The analysis is based on the following standards:

- Application in accordance with the rules of law, in particular:
  - Article 2 and 3 of the European Convention on Human Rights;
  - Article 9bis, 9 *ter* and 13 of the Act of 15 December 1989 on access to the territory, residence, establishment and deportation of foreign nationals;
  - Articles 7 and 8 of the Royal Decree of 17 May 2007 fixing the implementing procedures of the Act of 15 December 2006, amending the Act of 15 December 1989 on access to the territory, residence, establishment and deportation of foreign nationals;
  - Circular of 21 June 2007 relating to the changes in the regulations on the residence of foreign nationals after the entry into force of the Act of 15 September 2006.
- Equal treatment
- Legal security
- Legitimate expectations

4. Analysis

The Federal Ombudsman first examined the action of the administrative authorities in regard to the applicable national legislation.

The Federal Ombudsman then focused on the search for a possible difference of unjustified treatment. This entails examining whether in exercising a competence under its discretionary power (i.e. the decision of whether to issue a residence permit), a public authority could apply different solutions to different groups of hunger strikers without failing to recognise the principle of equality.

29 This action is mentioned as a reminder but is not concerned by the complaints.
30 Annual Report 2006, p. 18.

Finally, the Federal Ombudsman examined the practice of the administrative authorities in regard to the principles of legal security and legitimate expectations.

a) Application in accordance with the rules of law

Information provided by the administrative authorities shows that the hunger strikers of the Rue Royale and Forest were issued a certificate of registration (AI), in principle non-renewable, valid for 3 months.[31] The legal basis put forward by the administrative authorities for granting this document is article 13 of the Act of 15 December 1980. In paragraph 1, section 1, this article provides that: "*Unless expressly stipulated to the contrary, the residence permit shall be issued for a limited period, either fixed by this act, or by reason of particular circumstances specific to the party concerned, or in relation with the nature or the duration of that person's activities in Belgium.*"[32]

In the case at hand, the Department of Immigration and Naturalisation relied on "*particular circumstances specific to the party concerned*" to justify the issuance of a registration certificate (A1) for a term limited to 3 months.

Now article 13 provides only the rules for the limitation of the term of the authorisation to stay, and therefore does not concern the conditions for granting the authorisation to stay. Furthermore, this article pertains to the determination of the term of an authorisation to stay for more than 3 months through the issuance of a certificate of registration in the foreigners register.[33]

If article 13 were the legal basis of the decision of the Department of Immigration and Naturalisation, the latter should have issued a certificate of registration in the foreigners register. Otherwise, another legal basis must be sought for the decision of said department. The only legal basis that can be found in the Act of 15 December 1980 for the issuance of an A1 certificate in the situation referred to by the complaints is article 9ter.

The registration certificates, as issued to the hunger strikers of the Rue Royale and Forest do not, strictly speaking, fall under article 9ter of the Act of 15 December 1980. More specifically, for one, the procedure for filing an application for authorisation to stay on medical grounds does not seem to have been respected.[34] On the other hand, the municipal authorities may not automatically extend the registration certificate of the hunger strikers after the 3-month period.

31 At the meeting of 27 August, the Department of Immigration and Naturalisation declared that only the registration certificates of the hunger strikers concerned who had moreover filed a request for authorisation to stay in accordance with the former article 9, section 3 of article 9bis or article 9ter of the Act of 15 December 1980, could be extended upon the production of a medical certificate.

32 The Dutch text of the provision is worded as follows : « *Behalve indien dit uitdrukkelijk anders wordt voorzien, wordt de machtiging tot verblijf verleend voor een beperkte tijd, ingevolge deze wet of ingevolge specific omstandigheden die betrekken hebben op de betrokkene of ingevolge de aard of de duur van zijn activiteiten in België;* the French text: "*Sauf prévision expresse inverse, l'autoristion de séjour est donnée pour une durée limitée, soit fixée par la presente loi, soit en raison de circonstances paticulières propres à l'intéressée, soit en rapport avec la nature ou la durée des prestations qu'il doit effectuer en Belgique.*" A reading of the 2 texts leaves no doubt as to the object of this provision.

33 This provision is contained in Chapter III of the Act ("Stay of more than 3 months"). Article 25 of the Royal Decree of 8 October 1981, which implements the provisions of the Act relating to a stay longer than 3 months, provides that the foreign national who comes to Belgium for a stay of longer than 3 months and who has a provisional authorisation to stay is to be issued a certificate of registration in the foreigners register.

34 This application must be made by registered letter to the Department of Immigration and Naturalisation, accompanied in particular by proof of identity and a medical certificate. The Department of Immigration and Naturalisation gives instructions to issue a registration certificate only if the application is declared admissible (article 7, §2, section, of the Royal Decree of 17 May 2007).

If the person concerned has no other procedure in progress and has not filed a new application under article 9ter after the strike, the Department of Immigration and Naturalisation refuses to extend the registration certificate that has expired, except if it appears that the hunger strikers have not yet recovered sufficiently from their action.[35]

Thus, at the meeting of the Interior Committee of 1 October 2008, in reply to a parliamentary question, the Minister for Migration and Asylum Policy declared: "*The best example is that of the Rue Royale. A temporary medical certificate was issued to the hunger strikers. When the certificate expires, if they have recovered, they find themselves back in the same situation which they faced initially.*" (Free translation).

The registration certificate is not a residence permit. It is a procedural document certifying that an application for authorisation to stay for medical reasons is admissible and is being processed.[36] For as long as there is no decision by the Department of Immigration and Naturalisation, this certificate must be extended by the municipal authorities. It is incorrect to consider, as the Minister states, that at the end of 3 months, the party concerned who has recovered, is back in the initial situation.

The fact that the Minister and the Department of Immigration and Naturalisation have apparently dispensed the hunger strikers of the Rue Royale and Forest from having to comply with a certain number of required formalities for the filing of the application under article 9ter of the Act of 15 December 1980 (no registered letter, no individual medical certificate, no passport requirement), apparently for reasons to do with the deterioration of their state of health, does not subsequently authorise the administrative of authorities to forego the legal procedure for processing applications for provisional authorisations to stay.

The Federal Ombudsman considers that inasmuch as the registration certificates were issued to the hunger strikers of Forest and the Rue Royale on a wrong legal basis, the complaint of the hunger strikers is founded in regard to the applicable standard in accordance with the rules of law. Any conclusion to the contrary would be tantamount to admitting that the administrative authorities followed a procedure sui generis for the needs of the case.

The fact that the hunger strikers agreed with the proposed solution does not however dispense the administrative authorities from giving concrete form to the outcome of the negotiations by a certificate in accordance with the form and substance of a sound legal basis. When the administrative authorities have a certain power of assessment regarding a provisional authorisation to stay, this power does not authorise said authorities from acting outside the legal framework.

The Federal Ombudsman considers that this violation of application in accordance with the rules of law may nonetheless be corrected. More specifically, in view of the circumstances, the registration certificates cannot reasonably rely on a legal basis other than article 9ter, (although no formal request has been made in this sense). Consequently, as the registration implements a decision regarding the admissibility of an application for authorisation to stay on medical grounds, an individual application does exist and the registration certificates of the persons concerned must be extended for as long as the Department of Immigration and Naturalisation has not ruled by a reasoned decision on the application for authorisation to stay on medical grounds, since it is necessary to ask the parties concerned to complete their file on the medical front.

35 The Department of Immigration and Naturalisation recently gave instructions to extend by 3 months the A1 certificate of the hunger strikers of Forest on the basis of a collective medical certificate indicating that the group had not recovered sufficiently yet.

36 Article 7, §2, section 2 of the Royal Decree of 17 May 2007, registration certificate model A, annex 4, of the Royal Decree of 8 October 1981.

The Federal Ombudsman has also wondered about the legality of the authorisation to stay issued to the hunger strikers of the Beguinage, who were given a certificate of registration in the foreigners register for 9 months. Unlike the other groups of hunger strikers (for whom the end of the strike was marked by a decision that could be qualified as "*admissibility*" of their application for authorisation to stay because of their state of health), the hunger strikers of the Beguinage received a temporary authorisation to stay, and therefore a decision on merit. The administrative authorities therefore considered that these people not only justified the exceptional circumstances, but had invoked sufficient arguments to justify the issuance of an authorisation to stay. The certificates of registration in the foreigners register for 9 months were issued by virtue of article 13 of the Act of 15 December 1980 only, without specifying whether the authorisation to stay had been granted on the basis of article 9bis or 9ter.

The Federal Ombudsman noted that only article 9bis actually authorised the issuance of a certificate of registration in the foreigners register for 9 months. The instructions of the Department of Immigration and Naturalisation mention that the authorisation to stay is issued "*on medical grounds*." Furthermore, no rules of procedure provided for the introduction of an application for authorisation to stay, whether those of article 9bis or article 9ter, were respected. If the legal basis of the certificate issued is not wrong, in this case, it is in any event incomplete and the procedure followed is not compliant with the regulations.

The most recent information received from the Directorate General of the Department of Immigration and Naturalisation shows that the administrative authorities henceforth require a formal individual application for authorisation to stay, even after a collective action.

b) Respect of the principle of equality

As the analysis of the previous point shows that, in the situations examined, the administrative authorities adopted different solutions outside the applicable regulations, there has consequently been an unequal treatment between:

- the different groups of hunger strikers among them, for whom different measures were taken in accordance with the specific circumstances of each action;

and

- the people who applied for a regularisation of residence, depending on whether they were hunger strikers or not.

Nevertheless, it appears official to apply the classic reasoning of whether the principle of equality was respected in this double difference of treatment.

The hunger strike actually places the 2 parties, i.e. the hunger strikers and the public authorities, in a relation of force intertwined round the conflict between the right to the physical integrity of the individual, guaranteed by article 3 of the European Convention on Human Rights, and the positive

requirement to protect the right to life of individuals that article 2 of the same convention brings to bear on the authorities of the States.[37]

Under these circumstances, the public authorities may have to give priority to their positive obligation to preserve the right to life of persons placed under their protection over strict compliance with the principle of equality in a search for a solution to the action in progress.

Furthermore, the Federal Ombudsman noted that if it had applied the classic reasoning of compliance with the principle of equality, the discussion would have pertained essentially on the suitability and proportionality of the measure in relation to the goal pursued. In the case at hand, the suitability of the measure for the goal is difficult to verify, as the Federal Ombudsman was not present during the negotiations and thus not in a position to decide about the circumstances that brought the administrative authorities to take one decision rather than another.

c) Legal security and legitimate expectations

As the Constitutional Court recently reiterated in regard to the possibility of being issued, under article 9 of the Foreigners Act, an authorisation to stay, "*the possibility of turning to the Minister is one measure with random effects (…)*."[38]

As much had been clearly stated by the Council of State in its opinion on the bill amending the Act of 15 December 1980, as regards the future article 9bis.[39]

The decision to maintain the power of assessment of the administrative authorities in processing applications for the regularisation of residence on humanitarian grounds and to perpetuate the legal insecurity that characterises this power of assessment is therefore the result of a deliberate choice made by the Legislator in 2006, on which it is not up to the Federal Ombudsman to take a stand.

This legal insecurity is however aggravated when foreign nationals and the people around them have no clear notion as to the circulars or Ministerial directives on the basis of which the Department of Immigration and Naturalisation will process their applications for authorisation to stay.

When the administrative authorities have powers of assessment, they can frame the exercise thereof by issuing directives to guide their services. In so doing, they must nonetheless apply, in individual decisions that they take, the rules of conduct that they have defined.[40] If they decide to depart from their own lines of conduct, whilst exercising a discretionary competence nonetheless, they must be able to provide reasonable justification, on pain of institutionalising administrative arbitratiness.[41]

37 Ruling of the European Court of Human Rights (5 April 2005, Case of Nevmerjitski vs. Ukraine): "*If (…) a person (…) is on a hunger strike, this may inevitably lead to a conflict that the Convention does not solve, between the right of the physical integrity of the individual and the positive obligation of article 2 that the Convention brings to bear on the contracting authorities*" (point 93). In this case, the (detained) person on a hunger strike had been force fed. And in circumstances of this kind, the Court ruled unanimously that article 3 of the Convention had been violated.

38 Const. Court, decision 95/2008 of 26 June 2008, point B.23.

39 Bill amending the Act of 15 December 1980. Opinion of the Council of State no. 39.718, AG, Parl. Doc., House of Representatives, ordinary session 2005-2006, doc. 51/2478/001, pp. 184-186, points 1.5.1 and 1.5.2.

40 This is an application of the adage: "potere legem quem ipse fecisti," which stems from the principles of equality and legal security.

41 A. Van Mensel, De rechtsbescherming tegen het overheidsoptreden, paper preseted at the University of Leiden, Faculty of Law, on 21 January 1999, published by Kluwer, 2000, p. 23. Cf. also, Council of State, decision no. 157.452 of 10 April 2006 conceming the obligation of the Department of Immigration and Naturalisation to apply the "long asylum procedure" criteria when they were specified in a simple "misterial declaration."

During the meeting held with the Minister's strategic unit and the Directorate General of the Department of Immigration and Naturalisation, the latter told the Federal Ombudsman that the rules currently applicable on regularisations are clear and that the Department of Immigration and Naturalisation applied them accordingly.

The Federal Ombudsman noted that up to March 2008, the Department of Immigration and Naturalisation processed applications for regularisation in accordance with the criteria specified by the Minister for the Interior during the preparatory works of the Act of 15 September 2006.[42] A note concerning the application of the former article 9, section 3 of the Act of 15 December 1980 that includes these criteria had been posted on the website of the Department of Immigration and Naturalisation since December 2006. This note was nonetheless removed from the website during the course of 2007. Furthermore, this explanatory note makes explicit reference to former article 9, section 3 of the Act of 15 December 1980, and could not therefore be applied in applications for authorisation to stay under the new legislation (applications filed after 1 June 2007 on the basis of articles 9bis or 9ter).

In March 2008, a governmental agreement widely covered in the media, announced the adoption of new regularisation criteria. The subsequent governmental statement received a vote of confidence in the House of Representatives. The governmental agreement of 18 March 2008 thus provided in the chapter on Migration:

"(…) The Government opts for a policy of regularisation on an individual basis.
The Government shall specify in a circular the regularisation criteria relative to exceptional circumstances (long procedure, illness and urgent humanitarian reason, which may be shown in particular by long-term local establishment). The criterion relating to the long procedure as applied until now took into account only an asylum procedure of 3 years (with children) or of 4 years (without children). We shall extend this period to 4 or 5 years for procedures including the intervention of the Council of State and/or article 9, 3 of the former act on the access to the territory, residence, establishment and deportation of foreign nationals under an asylum procedure.

During the assessment of the urgent humanitarian reason on the basis of long-term local establishment, due account can be taken of the opinions of the local authorities or an accredited service as regards the knowledge of one of the national languages, school attendance and the integration of the children, the occupational past and willingness to work, the possession of qualifications or skills adapted to the labour market, in particular as regards jobs that are in shortage, the prospect of being able to exercise an occupation and/or the possibility of providing for one's needs. In each of the cases mentioned, a verification will be conducted as to whether the person concerned constitutes a danger to security and the rule of law (…)."

The Minister for Migration and Asylum policy has on several occasions announced a deadline for the adoption of a circular to implement this agreement.[43] The circular has not been adopted to date, however.

At present, whereas it still says that it applies the criteria as specified by the Minister for the Interior in 2006, the Department of Immigration and Naturalisation adds that it adopts a prudent attitude concerning certain cases that could fall under the conditions of the governmental agreement (i.e.

42 Bill amending the Act of 15 December 1980, Report in the name of the Interior Committee, introductory statement of the Minister for the Interior. Parl. Doc., House of Representatives, ordinary session 2005-2006, doc. 51/2478/008, pp. 10-12.

43 During the presentation of her general policy note before the Interior Committee of the Senate, the Minister announced a circular for the 20th of May 2008. At the plenary session of the Senate of 22 May 2008, the Minister announced an agreement for the end of May – beginning of June 2008.

persons in an asylum procedure of more than 4 or 5 years, including the intervention of the Council of State, and/or the processing of an application on the basis of the former article 9, section 3 of the Act of 15 December 1980).

The Federal Ombudsman has noted that contrary to what the administrative authorities claim, the directives in force at this time are far from clear.

Expulsion measures are taken in regard to persons who are found to be residing illegally although the announcement, on 2 occasions, of a date for the adoption of a circular has given rise to legitimate expectations among foreign nationals who are residing illegally that their situation would be re-examined in accordance with the governmental promises. At the same time, measures sui generis and therefore arbitrary are taken in regard to those who, in the same administrative situation, opt voluntarily to put their health in danger.

Legal security on the contrary entails that the parties concerned must be able to anticipate and assess the legal consequences of the acts they are taking and the behaviour they adopt. They must be able to count on a certain stability in the legal order but also on administrative practices. Legal security offers guarantees of equal and impartial treatment, and thus restricts administrative freedom. It banishes arbitrariness.[44]

To preserve legal security, the administrative authorities are endeavouring in particular to reassure people who come under their jurisdiction that the rules will be applied within a reasonable period.[45] In this respect, there is no choice but to accept that communication from the authorities has not been adequate in recent months.

The failure to comply with the announced deadlines has reinforced the legal insecurity.

The expectations created by the announcement of a circular can only goad the people who are likely to benefit from it to try and stay on the territory until the publication thereof, by using the widest means of action, some opting to go completely underground, while others going as far as to put their own life in danger, all the more so as the administrative authorities have not suspended deportation and expulsion actions. The legal insecurity that arises from the inaction of the authorities in no way helps defuse this type of actions but contributes, albeit indirectly, to maintaining the risk of a different treatment as noted in the cases of the complainants.

A hunger strike is an extreme resort through which hunger strikers hope to obtain a review of their particular situation. It is a means of action the dynamics of which rely on the compassion and support that the hunger strikers hope to elicit in public opinion and to bring them to bear on the decisions of the authorities. This means of action necessarily finds breeding ground during periods when the action of the authorities seems random or uncertain.

The Federal Ombudsman does not take a stand on the moral or ethical qualification of this means of action, which is seen differently depending on the points of view, the most extreme being blackmail for some, or the ultimate act of despair for others. As part of its mission, the Federal Ombudsman endeavours to strike a balance between the collective and individual interest, bearing in mind that these are necessary flanked by standards of good administrative behaviour, in particular equal treatment, legal security and legitimate expectations.

44 Cf. M. Van Damme and A. Wirtgen, "Het Rechtszekerheids- en Vertrouwensbeginsel," Beginselen van behoorlijk bestuur (I. Opdebeek and M. Van Damme, eds.), Bruges, the Charter, 2006, pp. 315 and 316.

45 Ibid., p. 324.

In light of the foregoing, the Federal Ombudsman has noted that the 3 complaints lodged with it are founded in regard to legal security and legitimate expectations.

5. Recommendations

The federal ombudsmen consider it useful to recommend to the Minister responsible for the access to the territory, residence, establishment and deportation of foreign nationals, and to his authorised representative to:

OR 08/01: Give instructions to the municipal authorities so that they can extend, automatically and in accordance with the circular of 21 June 2007[46], the registration certificates of the hunger strikers of the Rue Royale and of Forest while waiting for the reasoned decision of the Department of Immigration and Naturalisation on their applications for authorisation to stay on medical grounds.

OR 08/02: Make sure, in general and irrespective of the circumstances, to process applications for authorisation to stay filed by foreign nationals in compliance with the law.

OR 80/03: Reduce legal insecurity by defining directives for the processing of applications for the regularisation of residence on humanitarian grounds monitored by the Department of Immigration and Naturalisation, preferably by a circular made public and updated regularly as soon as the new applicable procedures are defined or the administrative practice has changed. This recommendation is in extension to the general recommendation GR 01/01[47], which was aimed at a greater transparency and greater legal security in the application of the Act of 15 December 1980 by the Department of Immigration and Naturalisation.

On the date of submission of this report, the Minister had not provided any official reply to the federal ombudsmen on how she planned to deal with these 3 recommendations.

FPS Finance

❖ Period for processing complaints about the fixing of the cadastral income

When the cadastral income is notified to the holder of rights in rem on a building, the latter may lodge a complaint with the local inspector of the Land Registry within 2 months (article 499 of the Income Tax Code). The Income Tax Code does not provide a period within which the Land Registry Inspector has to examine this complaint. It is therefore advisable to refer to the good administrative behaviour standards, and in particular to compliance with a reasonable reply period.

The Charter of Good Governance[48], approved in the Council of Ministers on 23 June 2006, provides: "*Every public service shall send an acknowledgement of receipt within fifteen days of receipt of a request from a citizen or a company, unless the request can be treated within 3 weeks.*

This request shall be treated within a reasonable period which in principle may not exceed 4 months.

46 Circular of 21 June 2007 relating to the amendments to the regulations governing the stay of foreign nationals after the entry into force of the Act of 15 September 2006, point D (Belgian Official Gazette of 4 July 2007).

47 Annual Report 2001, pp. 175-176.

48 pp.158-159.

For complex cases, the services shall make every effort to process the case within 8 months at most. In this case, a provisional reply, which moreover specifies the processing period, must be provided after 4 months" (Article 4).

The Federal Ombudsman has noted an alarming situation in certain regional offices (in particular the Regional Office of the Land Registry for Brussels – Brabant). It is not exceptional for taxpayers to have to wait several years for a decision on their complaints about the cadastral income.

The Regional Office of Brussels and the General Department of Asset Documentation have taken a certain number of measures to find a solution to this problem. A team of experts has been created in charge of fixing the cadastral income of industrial and exceptional buildings, whereas sustained attention is paid to examining complaints about the fixing of cadastral income. The administrative authority has set the objective to react within 3 months of the filing of a complaint and to process it within a reasonable period. Since 2002, it has monitored the processing of complaints. The situation is measured and managed by the means available. In this respect, the administrative authority points out that the replacement of 3 out of 5 officials and the increase of activity on the property market constitute obstacles to achieving this objective.

The initiatives taken to date, although they reflect a genuine determination for a diligent processing of complaints, are not capable to ensure that the grievances of a taxpayer will be examined within a reasonable period.

OR 08/04: The Federal Ombudsman recommends that complaints about the fixing of the cadastral income be processed within the reasonable period provided under article 4 of the Charter of Good Governance[49], i.e. within 4 to 8 months, extended, where necessary, by the time taken by the interested party to provide the information requested by the services of the Land Registry, which is needed to take a decision.

❖ Plan to curb the backlog in regional offices of the Land Registry in an alarming situation

Since 2005, the Federal Ombudsman has received a large number of complaints against the Land Registry Inspectorates that fall under certain regional offices concerning the time it takes to process complaints about the fixing of the cadastral income. In its annual report for 2006, the Federal Ombudsman reviewed this situation and the measures taken by the FPS Finance to try and find a solution.[50] It was a matter of priority to take on additional staff and to reorganise the services.

In connection with the examination of individual case files, the Federal Ombudsman keeps track of the processing of a complaint when the reasonable period for the examination thereof has been exceeded. The Charter of Good Governance[51] approved in the Council of Ministers on 23 June 2006, provides for a period of 4 to 8 months maximum in this respect. It specifies that a provisional reply fixing a processing period must be provided within 4 months.

Sometimes the complaint is processed when the Federal Ombudsman intervenes, at other times the Land Registry Inspectorates undertake to examine the complaint within a reasonable period. The Federal Ombudsman has nonetheless noted that the Land Registry Inspectorate is not always capable of honouring the commitment it has undertaken. Thus, when processing a complaint lodged in March

49 pp. 158-159.
50 Annual Report 2006, p. 47.
51 pp. 158-159.

2006, which the department head had undertaken to process by the end of 2007, the commitment has not been honoured. On the contrary, at the end of 2007, the Inspectorate was still processing complaints dating from 2002 and 2003. It hoped nonetheless to be able to process the complaint of the interested party in the course of the service year, i.e. by 15 May 2008. In view of the backlog in this department, it is difficult for the citizen to be able to rely on the announced time limit, even if in the case at hand, this time limit was met.

The situation is particularly worrisome in certain departments (in particular the Regional Office of the Land Registry for Brussels-Brabant). It concerns not only the processing period of complaints, but also the fixing of the cadastral income during the first occupation of the property. In these departments, the officials often do not manage to indicate a processing period for the citizen. The General Department of the Land Registry is fully aware of the situation. It explains it in large measure by a serious lack of staff and the growing complexity of the tasks assigned to them.

The delay in processing the case files and the fact that no reliable indication can be given to the taxpayer as to the probable processing time are not compatible with transparent and efficacious governance. They seriously erode the citizen's confidence in the administrative authorities.

OR 08/05: In order to be able to fulfil its duty to provide information and ensure equal treatment for taxpayers in all case files in progress, the Federal Ombudsman recommends to the FPS Finance to adopt a staggered plan to curb the backlog of complaints about the fixing of cadastral income in the Regional Offices of the Land Registry where the situation is alarming.[52]

❖ Period for processing petitions to reduce the advance levy on income derived from real estate

When a taxpayer files a complaint against the advance levy on income derived from real estate with the Regional Office of Direct Taxation, s/he does not know how long the latter will take to process the complaint. The Income Tax Code does not provide such a period. It is therefore advisable to refer to the good administrative behaviour standards, and in particular to compliance with a reasonable reply period.

The Charter of Good Governance, approved in the Council of Ministers on 23 June 2006,[53] provides: "*Every public service shall send an acknowledgement of receipt within fifteen days of receipt of a request from a citizen or a company, unless the request can be treated within 3 weeks.*

This request shall be treated within a reasonable period which in principle may not exceed 4 months.

For complex cases, the services shall make every effort to process the case within 8 months at most. In this case, a provisional reply, which moreover specifies the processing period, must be provided after 4 months" (Article 4).

In the standard acknowledgement of receipt that the Department sends within a month to taxpayers who have filed a petition to have the advance levy on income derived from real estate reduced, it is indicated that: "*the administrative authority will make every effort to process your complaint as promptly as possible. Nevertheless, if no decision has been taken within 6 months after the date of receipt of your petition, you can introduce proceedings before the district court (…), although this is not an obligation. You*

52 pp. 76 ff.
53 pp. 158-159.

can always choose to wait for the decision of the administrative authority."
A taxpayer who has confidence in the administrative authorities, expects that the decision about his case will come soon and therefore does not see the use of introducing proceedings before the district court, even if the 6-month time limit is exceeded. He prefers to turn to the Federal Ombudsman, who has noted that the reasonable period for processing the complaint is exceeded by a wide margin in several cases.

Taxpayers actually have to wait for several months, even several years, before the administrative authorities take a decision about their complaint. Worse still, this long processing period obliges a good number of taxpayers to file a complaint again every year, although the department has still not decided on the complaint that they filed for the same reason the previous year.

It is therefore up to the FPS Finance to take such measures necessary to ensure that the grievances of taxpayers will be processed within a reasonable period and to adapt the standard acknowledgement of receipt accordingly to the requirements of the Charter, by specifying a processing period when this exceeds 4 months.

OR 08/06: The Federal Ombudsman recommends that petitions to reduce the advance levy on income derived from real estate be examined within the reasonable period provided in article 4 of the Charter of Good Governance,[54] i.e. within 4 to 8 months, extended, where necessary, by the time taken by the interested party to provide the information requested by the services of the advance levy on income derived from real estate, which is needed to take a decision.[55]

❖ Plan to curb the backlog in regional offices of direct taxation in an alarming situation relating to the reduction of the advance levy on income derived from real estate

The Federal Ombudsman has registered another substantial number of complaints against regional offices of direct taxation concerning the time it takes to process petitions to reduce the advance levy on income derived from real estate (article 15 and 257 of the ITC 92).

The disputed cases in regional offices of direct taxation represent a sizeable workload. According to information gathered in the second half of 2008, most such departments are faced with a sizeable backlog, both as regards ordinary complaints (reduction of the advance levy on income derived from real estate for dependent children, recognition of a disability or modest dwelling) and more complex matters, chiefly due to a lack of staff and technical means and resources.

The time it takes to process complaints in regional offices forces a good number of taxpayers to lodge a complaint every year against the advance levy on income derived from real estate, as they still have not obtained an administrative decision on the complaint they lodged for the same reason the previous year. This situation also requires them to pay the full advance levy on income derived from real estate every year, although they considered it incorrect, and to obtain a reduction of tax in 2, 3 or even more years after lodging the first complaint. A taxpayer who makes a partial payment, taking into account the requested reduction, may be prosecuted for the payment of the balance. A tax credit may be imputed to the balance of the advance levy on income derived from real estate which, once the tax reduction is granted, will require an additional item of expenditure which could have been avoided, without taking into account any interest for late payment due by the Treasury.

54 pp. 158-159.
55 pp. 76 ff.

The Federal Ombudsman keeps track of the processing of the complaint when the reasonable period for the examination thereof has been exceeded. The Charter of Good Governance[56] approved in the Council of Ministers on 23 June 2006, provides for a period of 4 to 8 months maximum in this respect.

The complaint is processed when the Federal Ombudsman intervenes; otherwise, the regional officers inform the latter that given the large number of cases to be processed, the complaints shall be processed by order of seniority. Thus, some departments were still processing in 2008 complaints lodged in 2006 or even earlier.

The services for the advance levy on income derived for real estate of regional offices were reorganised in October 2008. They have assumed responsibility for matters relating to taxation and the reduction of tax per assessment of the advance levy on income derived from real estate. They are assisted in their tasks by officials from the different direct taxation collection departments. It is still too early at this stage to determine whether the transfer of competencies and the reinforcement of collectors will make it possible to curb the backlog rapidly.

The Federal Ombudsman has noted that the situation in the regional offices is very alarming. The delays in processing complaints against the advance levy on income derived from real estate, which leave taxpayers having to wait for several years for a decision and/or a reduction of tax, are not acceptable in regard to the requirements of transparent and efficacious governance. This situation seriously erodes the taxpayer's confidence in the administrative authorities.

OR 08/07: The Federal Ombudsman recommends to the FPS Finance to adopt a staggered plan to curb the backlog of complaints about the reduction of the advance levy on income derived from real estate in the Regional Offices of Direct Taxation where the situation is alarming.[57]

The recommendations were submitted to the tax authorities at the end of December 2008. Both the Department of Asset Documentation and the Department of Corporate and Income Tax recognised the pertinence of the recommendations. An initial concrete measure was announced: the services of the regional office of the Land Registry in Brussels are to be regrouped in the Finance Tower and be accompanied by a reorganisation of the tasks by topic. If this experience is conclusive, it will be extrapolated to the other regional offices of the Land Registry.

FPS Interior – Department of Immigration and Naturalisation

❖ Processing of applications for authorisation to stay filed by the foreign parent of a Belgian child

The Federal Ombudsman has received a series of complaints from foreign nationals who had filed an application for authorisation to stay based on article 9bis or former article 9, section 3, of the Act of 15 December 1980 in their capacity of a parent of a Belgian chid, whose application had been declared inadmissible on the grounds that they did not prove sufficiently if at all an emotional bonds and/or material/financial link between their child and the Belgian parent thereof.

Decisions notified to persons concerned show that the Department of Immigration and Naturalisation considers in particular that "*the fact of having a Belgian child does not automatically entitle one to the right to stay in Belgium,*" and that "*appeal to article 8 of the Convention on Human Rights and Fundamental*

56 pp. 158-159.
57 pp. 76 ff.

Freedoms would not constitute an exceptional circumstance that would prevent or make it difficult to return to the country of origin" when the Belgian child has little or no contact with its Belgian parent. Consequently, the Department of Immigration and Naturalisation *"does not deport the child, nor its mother, but invites the latter to go to a Belgian consulate or embassy (…) in order to obtain the necessary authorisations to stay in Belgium."*

The Federal Ombudsman considers that requiring the applicant to show *"emotional bonds and/or material or financial links"* between the Belgian child[58] and the Belgian parent of that child is unacceptable.

This requirement is actually contrary to the best interests of the child as defined in article 3 of the Convention on the Rights of the Child. Furthermore, it fails to recognise the fundamental rights of the applicant for regularisation, his Belgian child and the Belgian parent thereof. Finally, this requirement constitutes a flagrant discrimination between Belgian children one parent of whom is residing illegally, and Belgian children both of whose parents are Belgian or have a residence permit.

a) Best interests of the child

Article 3 of the Convention on the Rights of the Child stipulates that: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

The same agreement, under article 9, provides that: *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when the competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."*

In the letter sent to the Federal Ombudsman on 28 April 2008, the Department of Immigration and Naturalisation recognised that it is *"in the interest of the child for the foreign parent thereof to regularise his stay in order to preserve the existence of a real and effective family unit."* It added that it *"remained attentive nonetheless to prevent the Belgian nationality of the child being turned into an instrument by its foreign parent to obtain the authorisation to stay in Belgium."*

The Department of Immigration and Naturalisation therefore seems to consider that the fact that a Belgian child has no (longer any) emotional bonds and/or financial material link with its Belgian parent is reason enough to suppose that the recognition was carried out for the sole purpose of enabling the child (at times without any guarantee of biological filiation) to enjoy the benefits of Belgian nationality and as a result to authorise its foreign parent to stay in the country.

The Federal Ombudsman can in no way share this point of view.

First, it cannot be deduced from the mere absence of an emotional bonds and/or financial/material link that the Belgian parent had recognised the child for the sole purpose of enabling its foreign parent to obtain authorisation to stay in Belgium. The Federal Ombudsman considers that in doing so, the Department of Immigration and Naturalisation implies that the interested party had a fraudulent intent that no sufficient element in proof supports.

[58] The child is Belgian by virtue of article 8, §1, 1° of the Belgian Nationality Code, which stipulates that « *a child born in Belgium of a Belgian parent is Belgian.* » This rule allows for no exception and the Belgian nationality of these children is not questioned by the Department of Immigration and Naturalisation.

Secondly, the Civil Code itself allows for "*arranged*" recognition (i.e. by a person who is not the biological parent of the child), the Legislator having considered that it is in the best interests of the child for its filiation to be established. The Legislation considered that the stability of filiation had to be preserved to the maximum, a reason for which it reserved the contestation of paternity recognition[59] to a limited number of persons: the mother, the child, the father who claims paternity, as well as the father who has recognised the child.[60] Contrary to the provisions of the law on marriage, the Crown Prosecution Service is thus deprived of the right to act.[61] The Civil Code does not in fact have a provision analogous to article 146bis of the Civil Code that allows for the cancellation of a recognition in the event that it were aimed "*solely to obtain the benefit of the authorisation to stay.*"[62]

The Federal Ombudsman understands the concern of the public authorities to fight against paternal recognitions made for the sole purpose of enabling the foreign author to obtain authorisation to stay. It nonetheless considers that it is not up to the Department of Immigration and Naturalisation to make up for the absence of legal provisions that would make it possible to obtain the cancellation of such recognition, by adapting an administrative practice that fails to recognise the best interests of the child.

The Federal Ombudsman has moreover noted that articles 423 ff. of the Criminal Code make it possible at least to prosecute the Belgian parent who fails to provide support for his child, and that nothing prevents the Department of Immigration and Naturalisation from referring such contestations to the Crown Prosecution Service.

The Federal Ombudsman considers that the best interests of the child, arising out of the international obligations of Belgium, may under no circumstances be subordinated to the determination to fight against presumed fraudulent intent on the part of the parents to use it in order to obtain authorisation to stay for the foreign parent.

If, as the Department of Immigration and Naturalisation alleges, "*the best interests of the child constitute the guiding principle of the examination of every application for authorisation to stay filed by the foreign parent,*" it is necessary to take into account, first and foremost, the opinion of this foreign parent, who has thought that it is in the best interests of the child for him to remain in Belgium. Now, in asking the foreign parent to return to his country of origin in order to proceeded through diplomatic means, the Department of Immigration and Naturalisation makes it impossible for that parent, who in his own judgement is the only one to see to the upbringing and support of the child, to take a decision which is most in line with the best interests of the child.

For this invitation, the Department of Immigration and Naturalisation requires that the child must either be brought along, which comes down to interrupting, at least temporarily, all ties of this child with those around him in Belgium and depriving it of the economic and social rights it enjoys in

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59 For the contestation of maternity recognition, it is the father, the child, the woman who has recognised the child as well as the woman who claims maternity.

60 Cf. article 330 of the Civil Code. The author of the recognition may not apply for cancellation himself, except to be able to prove fraudulent consent on his part.

61 Subject to article 138bis, §1, of the Code of Judicial Procedure (formerly article 138, section 6), which stipulates: "In civil matters, the Crown Prosecution Service intervenes through action, requisition or opinion. The Crown Prosecution Service acts as of right in the cases specified by the law, and also each time that the rule of law requires its intervention." The Court of Cassation has ruled that: "In civil matters, the Crown Prosecution Service is, as in the cases specified by the law, entitled to act as of right, but its action must then be intended to bring to an end a situation that endangers the rule of law and it is therefore important to make it disappear." (Cass. 28 March 1974).

62 The Court of Cassation has ruled that: "The Crown Prosecution Service is not entitled to be, as of right, party to a case already pending, relating to the contestation of an untruthful recognition of a natural child by the author of said recognition, except if it should appear that the purpose of the intervention is to remedy a situation that endangers the rule of law which it is in charge of defending, in particular as regards the protection of youth." (Cass., 28 March 1974). It ensues that even in rare cases where the Crown Prosecution Service is entitled to become party in a case, this intervention must be guided by the interests of the child.

Belgium, or be left in Belgium, which comes down to breaking, at least temporarily, all ties with its parent, and requires entrusting the child to a guardian, since the Department of Immigration and Naturalisation has assumed that the other parent does not fulfil the obligation of upbringing and support.

Similarly, if the parent decides not to accept this invitation, it is certainly not in the best interests of the child for its foreign parent to be kept in a situation of illegality and precariousness, which makes it impossible for him to see to the primary needs of the child, and also much more difficult to defend the interests of the child in regard to the Belgian parent.

In requiring the foreign parent to prove the existence of an emotional bonds and/or financial/material link between the child and its Belgian parent, the Department of Immigration and Naturalisation de facto interferes in a discussion that is private and in so doing incites the foreign parent to create a dispute with regard to the Belgian parent, which risks comprising the future relationship of the child with the latter.

In light of the foregoing, the Federal Ombudsman considers that decisions of the Department of Immigration and Naturalisation declaring inadmissible applications for authorisation to stay filed by a foreign parent of a Belgian child on the grounds that he could not prove sufficiently if at all the existence of an emotional bonds and/or financial/material link between the child and its Belgian parent are incompatible with the best interests of the child.

b) Fundamental rights

The Federal Ombudsman has noted that the decisions declaring inadmissible applications for authorisation to stay filed by a foreign parent of a Belgian child violate the right to respect of their privacy and family life, as enshrined in Article 8 of the Convention on Human Rights and Fundamental Freedoms.

The effective respect of the right to privacy and family life may require the public authorities, depending on the circumstances, at times in a negative manner, to have to refrain from restricting the freedom considered, for instance by refraining to take deportation measures in regard to the foreign parent of the child; at other times, in a positive manner, to have to take certain measures, such as granting authorisation to stay to the foreign author of the Belgian child.

Interference in the exercise of the right to respect of privacy and family life of the foreign parent and his Belgian child is permitted only on the triple condition of being legal, of pursuing one of the goals listed in the second paragraph of article 8 of the Convention on Human Rights and Fundamental Freedoms,[63] and not to exceed what is necessary, in a democratic society, to achieving the goal pursued.

Several principles have been charted by the European Court of Human Rights to examine this need in an objective manner: interference must be justified by an overriding social need and be based on sufficient pertinent reasons. In this examination of proportionality by the court, it is advisable to assess whether there is a reasonable connection between the violation of the right on the one part, and the

63 « There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

legitimate goal pursued on the other. The Department of Immigration and Naturalisation must show that it took due care to strike the right balance between the goal pursued and the seriousness of the violation of the right to respect of family life.

The legitimate goal pursued seems to be to defend the rule of law: the person applying for authorisation to stay for a period of more than 3 months must, apart from exceptional circumstances, file such a request with a Belgian diplomatic or consular post. The concern to ensure compliance with the law is certainly a legitimate goal in a country with the rule of law.

The examination of proportionality requires us to balance the interests of persons whose rights are threatened and the interest legitimately defended by the public authority. The interest of the foreign parent and his Belgian child is as shown above, that of respect of their privacy and family life and that of being able to remain on Belgian territory during the processing of the application for authorisation to stay filed by the foreign parent. The interest defended by the public authority is that to ensure compliance with the principle set out in article 9, section 2 of the Act of 15 December 1980, which is that of filing an application for authorisation to stay for more than 3 months from a diplomatic or consular post.

The Department of Immigration and Naturalisation does not seem to contest the right of the foreign parent to live with his Belgian child,[64] nor the right of the latter to live in Belgium. Aware that it cannot deport either the Belgian child,[65] nor its foreign parent,[66] the Department of Immigration and Naturalisation declared that it would limit itself to "*inviting*" the foreign parent "*to proceed (…) via a Belgian diplomatic post (…) to obtain the authorisations necessary for his stay in Belgium.*"

The requirement to file an application for authorisation to stay from a competent Belgian diplomatic post therefore appears, in the case of a foreign parent of a Belgian child, as a purely formal requirement. Even in the absence of forced deportation, we have shown above that compliance with this requirement would cause a breach in the privacy and family life of the foreign parent and his Belgian child if the parent decided to leave the child in Belgium. This requirement therefore appears clearly disproportionate in view of the right of the foreign parent and the Belgian child to respect of their family life, in particular given the tender age of the children concerned,[67] their possible schooling and the duration of the processing of the applications.[68]

64 This right arises also out of article 10.1 and 10.2 of the Convention on the Rights of the Child: "*10.1 In accordance with the obligations of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, human and expeditious manner. State Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.*

64 10.2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention. (Emphasis added).

65 Article 3 of Protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates: "*1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.*
2. No one shall be deprived of the right to enter the territory of the state of which he is a national."

66 It is worth underscoring that the labour courts, on the whole, consider that article 57, §2 of the Act of 8 July 1976, is not applicable to the parent of a Belgian child, which "*cannot be deported in view of the requirements of article 8 of the European Convention on Human Rights.*" (Cf. e.g. Brussels Labour Court, 9 January 2008).

67 Of all the complaints currently open with the Federal Ombudsman, the oldest of the Belgian children of foreign parents is only 7 years old.

68 Cf. "*Aperçu des données statistiques disponibles sur la délivrance et le refus de visas,*" RDE 2007, no. 143, p. 138.

If the foreign parent on the other hand returns to file his application for authorisation to stay in the country of his nationality with his Belgian child, there is a violation of the right of the Belgian child not to be expelled from the territory of its country, Belgium: in fact, even if the Department of Immigration and Naturalisation takes no formal measure to expel the Belgian child, said department leaves no other choice to the Belgian child and its foreign parent, who wish to preserve their right to privacy and family life, than to leave Belgium together, which de facto comes down to violating the prohibition of expelling one's own nationals.[69] Furthermore, if there were a bond with the Belgian parent (the latter being present in many cases but deemed insufficiently proven by the Department of Immigration and Naturalisation), the "*invitation*" given to the foreign parent to leave the territory with his child also violates the right to respect of the privacy and family life of the child and its Belgian parent.

c) Prohibition of discrimination of any kind.

In addition to articles 10 and 11 of the Constitution, which provides for equality and the prohibition of discrimination of any kind between Belgians, article 2 of the Convention on the Rights of the Child stipulates: "*1. States Parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members."[70]

The practice which consists of requiring from the applicant to show the existence of "*emotional bonds and/or material/financial links*" between the child and the latter's Belgian parent constitutes discrimination between this Belgian child and a Belgian child whose parents are both Belgian or authorised to stay: contrary to the latter, the Belgian child living with the parent who is not Belgian or authorised to stay, must either live in an administratively precarious situation in Belgium, or follow its parent in the country of the latter's nationality, and thus lose the benefits of the economic and social rights which that child would enjoy in Belgium.

OR 08/08: The Federal Ombudsman recommends to the Department of Immigration and Naturalisation, in processing an application for authorisation to stay based on article 9bis or on former article 9, section 3, of the Act of 15 December 1980, filed by the foreign parent of a Belgian child, to limit the examination to the exceptional circumstances required by these articles to the existence of a link between the foreign parent and his Belgian child, and to cease to require proof of emotional bonds and/or material/financial links between the Belgian child and the applicant for regularisation and the Belgian parent of this child.[71]

69 In this sense, cf. CAD, decision 128.427 of 10 February 2004: "*If the other party may, by virtue of article 9, section 3 of the Act of 15 December 1980, oblige a foreign national, who does not invoke any exceptional circumstance justifying that his application for authorisation to stay should be filed in Belgium, to return to his country of origin to obtain said authorisation, this obligation would nonetheless be contrary to the aforementioned article 8 if it were to result, without justification compatible with the Convention, in the separation of the underage child from its mother, in the case at hand, the second petitioner, aged 22 months, depends on the care of the first petitioner, so that the latter's departure would entail, apart from the violation of article 8 of the Convention, likewise its departure; the measure contested would thus, indirectly. lead to requiring a Belgian national to leave the national territory in violation of article 3 of protocol no. 4 to the Convention for the Protection of Human Rights, likewise cited by the petitioners."(RDE, 2004, no. 127, p. 34, emphasis added).*

70 Emphasis added.

71 pp. 61 ff.

The Department of Immigration and Naturalisation submitted this recommendation to the Minister responsible for Migration and Asylum Policy by proposing to maintain the current practice while waiting for the decision of the Constitutional Court which has been asked to rule on 2 prejudicial questions posed by the Council of State and relating to article 40, §6, of the Act of 15 December 1980, prior to its amendment by article 19, of the Act of 25 April 2007.

It is specified that in the meantime, "*instructions have nonetheless been given to the competent service (HR) to be more attentive to the reasons for refusing to grant authorisation to stay to the foreign parent of a Belgian child when it does not have the inner conviction that there are emotional bonds and material/financial links between the Belgian child of the applicant for regularisation of residence and the Belgian parent of this child.*"

Appendixes

Appendix I - The Federal Ombudsmen Act, Kingdom of Belgium, March 22, 1995.[72]

CHAPTER I. The federal ombudsmen

Article 1. There are two federal ombudsmen, one French-speaking, the other Dutch- speaking, whose mission it is :

1°) to examine the claims relating to the operation of the federal administrative authorities;
2°) at the request of the House of Representatives, to lead any investigation on the functioning of the federal administrative services that it designates;
3°) to make recommendations and submit a report on the operation of the administrative authorities, in compliance with Article 14, paragraph 3, and Article 15, paragraph 1, based on the observations made while implementing the duties referred to in 1 and 2, above.

The ombudsmen carry out their duties with regard to the federal administrative authorities referred to in Article 14 of the coordinated laws on the Council of State, except for those administrative authorities endowed with their own ombudsman by a specific legal provision.

When the ombudsman's office is assumed by a woman, she is designated by the French term "médiatrice" or the Dutch term "ombudsvrouw" (in English : ombudswoman).

The ombudsmen act collectively.

Article 2. The ombudsmen and the staff who assist them are subject to the provisions of the laws on the language used in administrative matters, coordinated on July 18, 1966. They are regarded as services which are extended to the entire country.

Article 3. The ombudsmen are appointed by the House of Representatives (lower house of parliament) for a term of six years, after an open invitation to candidates to apply. At the end of each term of office, there is an open invitation to submit applications to renew the board of federal ombudsmen. An ombudsman's term of office can be renewed only once for the same candidate. If his term of office is not renewed, the ombudsman continues to perform his duties until a successor is appointed.

To be appointed ombudsman, it is necessary :

1°) to be Belgian;
2°) to be of irreproachable conduct and to enjoy the civil and political rights;
3°) to hold a degree, giving access to the functions of level 1 of the Civil Service departments of the State;
4°) to demonstrate sufficient knowledge of the other national languages, according to the standards laid down by the House of Representatives;
5°) to have had relevant professional experience of at least five years, either in the legal, administrative or social spheres, or in another field relevant to carrying out this function.

The same person may not serve as ombudsman for more than two terms of office, whether successive or otherwise.

[72] As modified by Act of February 11, 2004 and by Act of May 23, 2007.

Article 4. Before taking up duty, the ombudsmen take the following oath before the Speaker of the House of Representatives : "I swear fidelity to the King, obedience to the constitution and to the laws of the Belgian people".

Article 5. During their period in office, the ombudsmen may not carry out the following duties or hold any of the following positions or offices :
1°) magistrate, notary public or bailiff;
2°) lawyer;
3°) minister of a recognised religion or delegate of an organisation recognised by the law which gives moral assistance according to a non-religious philosophy;
4°) a public office conferred by election;
5°) employment remunerated in the public services referred to in Article 1, paragraph 2.

The ombudsmen cannot hold an office, public or otherwise, which could compromise the dignity or the performance of their duties.

For the application of this article, the following are treated as a public office conferred by election : a position as mayor appointed separately from the communal council; director of a public interest organisation and a position as a Government commissioner, including that of Governor of province, Deputy Governor or Vice-Governor.

The holder of a public office conferred by election who accepts a nomination for the office of ombudsman is legally excluded from his elective mandate.

Articles 1, 6, 7, 10, 11 and 12 of the Act of 18 September 1986 instituting political leave for the members of staff of the public service are applicable to the ombudsmen, if they are entitled to such leave, and the necessary adaptations are made.

Article 6. The House of Representatives can terminate the ombudsmen's functions :
1°) at their request;
2°) when they reach the age of 65;
3°) when their health seriously compromises the exercise of their duties.

The House of Representatives can remove the ombudsmen from office :
1°) if they carry out the duties or hold one of the positions or offices referred to in Article 5, paragraph 1 and paragraph 3;
2°) for serious reasons.

Article 7. Within the limits of their mission, the ombudsmen do not receive instructions from any authority.

They cannot be relieved of their duties due to activities conducted within the framework of their functions.

CHAPTER II. Complaints

Article 8. Any interested person can lodge a complaint with the ombudsmen, in writing or verbally, regarding the activities or functioning of the administrative authorities.

As a preliminary matter, the interested party must contact these authorities in order to obtain satisfaction.

Article 9. The ombudsmen can refuse to investigate a complaint when :
1°) the complainant's identity is unknown;
2°) the complaint refers to facts which occurred more than one year before the lodgement of the complaint.

The ombudsmen will refuse to investigate a complaint when :
1°) the complaint is obviously unfounded;
2°) the complainant obviously took no steps to approach the administrative authority concerned to obtain satisfaction;
3°) the complaint is primarily the same as a complaint dismissed by the ombudsmen, if it contains no new facts.

When the complaint refers to a federal, regional, community and other administrative authority which has its own ombudsman by virtue of legal regulation, the ombudsmen will pass it on to the latter without delay.

Article 10. The ombudsmen will inform the complainant without delay of their decision of whether or not the complaint will be handled, or whether it will be passed on to another ombudsman. Any refusal to handle a complaint will be substantiated.
The ombudsmen will inform the administrative authority of their intention to investigate a complaint.

Article 11. The ombudsmen can impose binding deadlines for response on the agents or services to which they address questions in the course of their duties.

They can similarly make any observation, acquire all the documents and information that they consider necessary and hear all persons concerned on the spot.

Persons who are entrusted with privileged information by virtue of their status or profession, are relieved of their obligation to maintain confidentiality within the framework of the enquiry carried out by the ombudsmen.

The ombudsmen may seek assistance by experts.

Article 12. If, in the performance of their duties, the ombudsmen note a fact which could constitute a crime or an offence, they must inform the Public Prosecutor in compliance with Article 29 of the Code of Criminal Procedure.

If, in the performance of their duties, they note a fact which could constitute a disciplinary offence, they must inform the competent administrative authority.

Article 13. The examination of a complaint is suspended when the facts are subject of judicial appeal or of organised administrative appeal. The administrative authority will inform the ombudsmen of legal proceedings.

In this event, the ombudsmen will report to the complainant of the suspension of the examination of his or her complaint without delay.

The lodgement and the examination of a complaint neither suspend nor stop time limits for judicial or organised administrative appeal.

Article 14. The complainant is kept periodically informed of the progress of his or her complaint.

The ombudsmen will endeavour to reconcile the complainant's point of view and those of the services concerned.

They can send any recommendation to the administrative authority that they consider useful. In this case, they will inform the minister responsible.

CHAPTER III. Reports by the ombudsmen

Article 15. Every year, by March 31st at the latest, the ombudsmen send a report on their activities to the House of Representatives. They can, in addition, submit intermediate quarterly reports if they consider it useful. These reports contain the recommendations that the ombudsmen consider useful and expose possible difficulties that they encounter in the performance of their duties.

The identity of the complainants and of members of staff in the administrative authorities may not be divulged in these reports.

The reports are made public by the House of Representatives.

The ombudsmen may be heard by the House at any time, either at their request, or at the request of the House.

CHAPTER IV. Various provisions

Article 16. Article 458 of the Penal Code applies to the ombudsmen and their staff (professional secrecy).

Article 17. The ombudsmen adopt house rules.

The house rules are approved by the House of Representatives.

After seeking the advice of the ombudsmen, the House of Representatives can modify the house rules. In case the advice has not been given within the 60 days following the request, it is considered favourably.

Article 18. Without prejudice to the competence of the House of Representatives – assisted by the Auditor's Office – to examine the federal ombudsmen's detailed budget propositions and to approve their budget as well as to verify its implementation and to audit the books, a part of the Kingdom's general expenditure budget is allocated for the state grant covering this budget.

For their budget and accounts, the federal ombudsmen follow a scheme comparable to the one that the House of Representatives uses for its budget and accounts.

Correspondence sent as part of the ombudsmen's office is sent free of postage.

Article 19. Without prejudice to the assignments agreed upon by collegial decision, the ombudsmen appoint, dismiss and direct the members of staff who will assist them in the performance of their duties.

The staffing and the members status are decided by the House of Representatives at the suggestion of the ombudsmen.

After seeking the advice of the federal ombudsmen, it can modify this status and staffing. In case the advice has not been given within the 60 days following the request, it is considered favourably.

Article 20. The ombudsmen enjoy a status identical to that of the counsellors of the Court of Auditors. The rules governing the financial status of the counsellors of the Court of Auditors, in the Act of 21 March 1964 on the salaries of the members of the Court of Auditors, as amended by the acts of 14 March 1975 and 5 August 1992, are applicable to the ombudsmen.

The ombudsmen's pension on retirement is calculated on the basis of the average salary for the last five years, determined in accordance with the applicable arrangement for retirement pensions to be paid by the State, at a rate of one thirtieth per year of service as an ombudsman, providing he or she has carried out his or her functions in the aforementioned capacity for twelve years.

Services by the ombudsmen which are not governed by the previous paragraph and which are acceptable for the calculation of a pension on retirement to be paid by the State, are calculated according to the laws fixing retirement pensions pertaining to these services.

If an ombudsman is not considered fit to carry out his or her functions due to illness or infirmity, but has not reached the age of 65, he or she may draw a pension irrespective of age.

The ombudsmen's pension on retirement shall not be higher than nine tenths of the average salary for the last five years.

Except in the cases referred to in Article 6, Paragraph 1, 1° and 2°, and Paragraph 2, and in the case referred to in Paragraph 4 of this article, an ombudsman whose term of office expires shall receive a severance allowance calculated on the basis of a monthly salary per year of service.

Appendix 2 - Memorandum of Understanding on the relations between the Federal Ombudsman and the federal public services for the processing of complaints

Article 1: For the purposes of this Memorandum of Understanding, the following terms shall mean:

- The Act:
  The Act of 22 March 1995 establishing the federal ombudsmen (as amended by the Acts of 11 February 2004 and 23 May 2007);

- The Rules of Procedure:
  The rules of procedure of the Federal Ombudsman, approved by the House of Representatives on 19 November 1998 (Belgian Official Gazette of 27 January 1999);

- The Federal Ombudsman:
  The federal ombudsmen appointed by the House of Representatives and their staff;

- Federal Public Service:
  The federal public services, the Ministry of Defence, the public services of planning, the public institutions of social security, and other federal institutions that fall under the FPS and PPS, general interest organisations and federal cultural and scientific establishments.

- The Managing Official
  The civil servant with the highest grade in a federal public service.

- The Director General
  Holder of the management position N 1 or, by extension, the person responsible for a service that does not fall under a directorate general.

Article 2. The procedure relating to contacts between the Federal Ombudsman and the federal public services for the processing of complaints is in principle in writing. In connection with its intervention, the Federal Ombudsman may, except in the case of personal data, nonetheless contact the competent official or service verbally as and when it should deem it necessary, without prejudice to article 11 of the Act.

At the request of the Federal Ombudsman, bilateral meetings may be organised to simplify the processing of similar or repeat complaints. The same applies when the processing of a complaint requires a direct exchange of points of view.

Article 3. In connection with the information phase of a complaint (article 12.2° of the rules of procedure), the Federal Ombudsman shall contact the competent service directly. The latter shall provide the information requested. If there is a problem, the Federal Mediator will contact the director general or the managing official.

As regards the examination of a complaint (article 12, 3° of the rules of procedure), or when a proposal is being drawn up (article 12, 4° and 7° of the rules of procedure), the Federal Ombudsman

shall transmit the useful elements of the complaint to the director general with a copy to the managing official who so requests. The director general shall take such measures as necessary to answer the questions or proposals of the Federal Ombudsman. If there is a problem, the Federal Ombudsman will contact the managing official.

Article 4. Without prejudice to article 11, section 1 of the Act, the questions of the Federal Ombudsman shall be answered by the competent service within 15 working days from the receipt of the question.

If there is a problem, the Federal Ombudsman will contact the director general or the managing official.

The service concerned may depart from the time limit indicated in the first paragraph for due reason and after consultation with the Federal Ombudsman.

Article 5. The federal ombudsmen shall provide the director general or the managing official with a list and the particulars of managing agents that can act in their name and capacity and represent them.

Article 6. If the Federal Ombudsman should notice any malfunctioning in a federal public service, it shall inform the director general and/or the managing official.

If the Federal Ombudsman plans to make an official recommendation (article 12, 8° of the rules of procedure), it shall inform the managing official and enable the latter to comment on the draft recommendation.

When the Federal Ombudsman makes an official recommendation, it shall also inform the competent Minister, in accordance with article 14, section 3 of the Act.

Article 7. Each complaint deemed admissible shall, upon closure, be assessed. If the complaint is declared founded, albeit partially, the Federal Ombudsman will indicate the good administrative behaviour standards concerned.

Statistics containing the number and an outline of the assessments of closed complaints shall be sent to the managing official at the end of each quarter. At the latter's request, they shall also be sent to the director general.

Article 8. When a complaint is declared inadmissible on the grounds that the complainant has evidently made no effort to try to obtain satisfaction from the administrative authority concerned (article 9, section 2, 2° of the Act), and if the nature of the case file so permits, the Federal Ombudsman shall transmit the complaint to the competent service or to the complaints department of the federal public service concerned. The administrative authority shall keep the Federal Ombudsman informed of the decision taken on the complaint.

Article 9. The Federal Ombudsman may, if it should deem it useful, be heard by the forum of the presidents of the federal public services and by the board of public social security institutions.

At least once a year, a meeting of the forum of the presidents of federal public services and one meeting of the Board of public social security institutions shall be devoted to relations between the Federal Ombudsman and the federal public services, to which the Federal Ombudsman shall be invited.

Memorandum of Understanding on the relations between the Federal Ombudsman and the federal public services for the processing of complaints

Each managing official shall encourage his services to cooperate with the Federal Ombudsman, and make sure to provide clear information about the role of the Federal Ombudsman, its missions, means of action and rules of procedure, and to publicise this memorandum of understanding accordingly.

Article 10. The Federal Ombudsman and the service concerned may complete this memorandum of understanding in accordance with the specific features of a federal public service.

Brussels, 29 January 2008

The Presidents of the federal Public Services

The federal ombudsmen

Appendix 3 – Outline of General Recommendations

GR	Title	Object	Status	Comment	Petitions Committee
Cross-thematic general recommendations					
97/11	Dispute between two administrative authorities as to which of the two must disburse expenses incontestably payable	Cross-thematic	Pending	Recommendation that is still topical, pertaining to a more rapid processing of claims for compensation of expenses when several administrative authorities can be involved but are trying to pass the responsibility for paying to each other so that a settlement is delayed or remains outstanding.	
99/05	The adoption of measures to familiarise the general public with the existence and tasks of information officers	Cross-thematic	Without object	The position is being extinguished.	
06/01	Require of every federal administrative authority to indicate the period within which it will take a decision, by inserting a new provision in the Act of 11 April 1994 on the transparency of governance	Cross-thematic	Priority	The complaints received in 2008 confirm again the need of this measure.	26.04.2007
07/01	Develop a central information point that provides basic information as well as efficient orientation and referral to the competent services. This information point can assume the form of a (free) information line of the federal government.	Cross-thematic	Pending	Proposal for a resolution of 30 April 2008 to create a central information point as well as a corresponding information line.[73]	24.11.2008
General recommendations relative to the FPS Finance					
99/08	Difficulties between taxpayers and the tax authorities when the latter assess a property	FPS Finance	Closed in 2008	The tax authorities have on the whole complied with this recommendation by improving considerably the information for the taxpayer during the assessment of a property.	
02/03	The tax trap of unemployment	FPS Finance	Pending	The bill of 18 January 2008 to amend the Income Tax Code 1992 regarding the tax inducement for life-long learning and in all areas[74]	
06/07	Exoneration of road tax on vehicles that are rented with driver: deletion of the wording: "on the occasion of ceremonies " in article 15, §2, 2°, of the Royal Decree of 8 July 1970	FPS Finance	Pending	No action has been taken on this recommendation.	26.04.2007

73 Parl. Doc., House of Representatives, DOC 52 1129/001.

74 Parl. Doc., House of Representatives, DOC 52 0709/001.

GR	Title	Object	Status	Comment	Petitions Committee
07/02	Amend article 366 of the Income Tax Code 1992 (ITC 92) so that a notice of objection lodged with a service involved in the establishment or levy of the tax that contests the taxpayer's notice of objection, can also be considered as lodged and officially sent to the competent director of taxes	FPS Finance	Priority	The Petitions Committee forwarded this recommendation on 24 November 2008 to the Finance and Budget Committee[75], and instructed the Ombudspromotor[76] of said committee to see to the monitoring thereof. Bill of 22 April 2008 amending the Income Tax Code 1992 as regards the introduction of a written complaint.[77] Bill of 3 September 2008 amending the Income Tax Code 1992 as regards the introduction of a written complaint[78] Bill of 3 November 2008 amending article 366 of the Income Tax Code 1992.[79]	24.11.2008
07/03	Amend Article 371 of the Income Tax Code 1992 (ITC 92) so that the sending date of the notice of objection is valid as the lodging date.	FPS Finance	Priority	The Petitions Committee forwarded this recommendation on 24 November 2008 to the Finance and Budget Committee, and instructed the Ombudspromotor of said committee to see to the monitoring thereof. Bill of 3 November 2008 amending article 366 of the Income Tax Code 1992.[80]	24.11.2008
07/04	Amend Article 375 of the Income Tax Code 1992 (ITC 92) so that the director of taxes is unequivocally empowered to cancel a decision on a notice of objection.	FPS Finance	Priority	The Petitions Committee forwarded this recommendation on 24 November 2008 to the Finance and Budget Committee, and instructed the Ombudspromotor of said committee to see to the monitoring thereof.	24.11.2008
08/01	Adopt a Royal Decree implementing Article 394, §4 of the Income Tax Code (ITC 92) so as, in the case of joint taxation, to define the way in which the part of the tax pertaining to the taxable income of each of the taxpayers is established.	FPS Finance	New	Cf. pp. 85-86 and pp. 127-128	
General recommendations relative to FPSs Justice, Home Affairs and Foreign Affairs					
01/01	Greater transparency and greater legal security in the application of the Act of 15 December 1980 and its implementing decree thereof	FPS Home Affairs	Priority	This recommendation is still topical. In this regard, Cf. Official Recommendation 08/03, pp. 132- 140.	
03/01	The time limit for processing case files submitted on Belgian territory and referred to the Department of Immigration and Naturalisation	FPS Home Affairs	Pending	This recommendation is monitored with the Department of Immigration and Naturalisation	

75 Article 144, b, of the Regulations of the House of Representatives: " *The Petitions Committee is also in charge, as regards the Board of Federal Ombudsmen b) to report on the annual report and interim reports drawn up by the Board of Federal Ombudsmen and to send said reports or parts thereof to the standing committees, which report to the House of Representatives, after having heard the Federal Ombudsmen where necessary.*"

76 p. 177.

77 Parl. Doc., House of Representatives DOC 52 1090/001.

78 Parl. Doc., House of Representatives DOC 52 1423/001.

79 Parl. Doc., House of Representatives DOC 52 1531/001.

80 Parl. Doc., House of Representatives DOC 52 0676/001.

GR	Title	Object	Status	Comment	Petitions Committee
06/08	Take the necessary measures to guarantee that detainees are actually given an opportunity to prepare for their reintegration into society. This entails that the Federal State must conclude efficient and effective cooperation agreements with the Communities and/or Regions.	FPS Justice	Pending	No action has been taken on this recommendation.	26.04.2007
08/02	Take such measures as necessary to remove the contradiction arising out of the combined application of the Act of 15 December 1980 on access to the territory, the stay, establishment and deportation of foreign nationals and article 31 of the Private International Law Code.	FPS Interior FPS Justice	New	Cf. pp. 63-66 and pp. 128-131.	
08/03	Define directives to ensure the uniform application of article 31 of the International Private Law code, in accordance with the capacitation given by this provision to the Minister for Justice, in order to prevent contradictory decisions regarding the recognition of a civil status document and to ensure the formal reasoning of decisions to refuse a mention in the margin of a civil status document, a transcription in a register of births, marriages and deaths, or the registration, on the basis of said document, in the population, foreign or waiting register	FPS Justice	New	Cf. pp. 66 and 131.	
General recommendations relative to other federal administrative authorities					
99/13	The lack of transparency of the Order of Physicians	Order of Physicians	Abandoned	After ten years and in the absence of new complaints about this subject, the recommendation has lost its topical interest.	
06/02	Adapt article 24, §2, of the Royal Decree of 22 May 2003 on the procedure concerning the processing of applications for disablement benefit; - which stipulates that the social insured must give his consent in order to proceed to the recovery, via his banking institution -- - to the Act of 27 February 1987 on disablement benefit, article 16, §2 of which lays down the terms and conditions that must be met by decisions to recover sums paid unduly.	FPS Social Security	Pending	No action has been taken on this recommendation.	26.04.2007
06/03	Provide a legal basis for the administrative practice that allows self- employed workers to pay social security contributions after the expiry period and determine the procedure to be followed	FPS Social security	Pending	On 9 May 2007 the Directorate General for the Self-Employed submitted two draft Royal Decrees.	26.04.2007
06/04	Provide, in the Act of 3 July 2005 on the rights of volunteers, the possibility for disabled civil servants and self-employed workers to do volunteer work	FPS Social security	Pending	The Royal Decree of 29 June 2007, amending, as regards the notion of work disablement, the Royal Decree of 20 July 1971, establishing an indemnity insurance and a maternity insurance for self-employed workers and helping spouses, enables disabled self-employed workers to do volunteer work. There are still no regulations for disabled civil servants.	26.04.2007

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