



the federal **Ombudsman**

a bridge between citizens and the public services

**INTERMEDIATE REPORT
3TH QUARTER 2009**

Introduction

Since the end of April 2009, the Federal Agency for the Reception of Asylum Seekers (Fedasil) has systematically refused to receive needy minors who reside with their parents illegally on the national territory. Fedasil departs from this policy only in individual cases after a relevant court decision or the intervention of the Federal Ombudsman. As this situation is a serious violation of the fundamental rights of the child, the Federal Ombudsman made two recommendations: one to Fedasil on July 29, 2009 and the other to the Secretary of State for Social Integration and the Fight against Poverty on July 31, 2009. Fedasil has continued with its refusal of such minors even after the Federal Ombudsman's recommendations.

This attitude is tantamount to:

- Abuse of power, in deliberately refusing to apply the Act of January 12, 2007 concerning the reception of asylum seekers and certain other categories of foreign nationals (the Reception Act);
- Introducing direct discrimination between beneficiaries of the Reception Act: families in the asylum procedure on the one hand, and families residing illegally, who are not able to meet the needs of their children on the other;
- Creating, deliberately and with knowledge of the facts, an inhuman and degrading situation for the children concerned and their parents, which runs counter to article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and against the Convention on the Rights of the Child, by abandoning them to their fate.

Fedasil has invoked force majeure to justify its illegal practices before both the court and with the Federal Ombudsman. It does not contest that children, with their parents, are in principle entitled to material help and reception, but avers that it cannot grant such help and reception for reasons of force majeure, and more specifically because its reception facilities are completely overwhelmed.

The Brussels Industrial Tribunal has ruled in summary proceedings that: "*Fedasil has prima facie not shown force majeure in this case.*"

We would like to add here that it is shameful and unworthy of a democratic country that the authorities invoke force majeure by way of excuse for a violation of human rights and the rights of the child and for not applying the law.

Abuse of power

The Reception Act defines material help as: "*help provided by the Agency or a partner within the reception structure which consists in particular of housing, nutrition, clothing, medical, social and psychological aid and guidance and of a daily allowance. It also comprises access to legal aid, to services such as interpreting or courses, as well as access to a voluntary return programme.*"

It is expressly stipulated in the scope of the Act's application that the right to material help applies also to people referred to in article 60 of the Act.

That article runs as follows:

“The Agency shall be in charge of providing material help to minors who are residing illegally in the country, with their parents, and whose needy situation has been established by a public social welfare centre, if the parents are not capable of meeting their support obligation.

Such material help shall be provided in the reception facilities managed by the Agency (...).”

Furthermore, the organic law of July 8, 1976 on public social welfare centres provides that social welfare help for a foreign national under 18 residing with his or her parents illegally in the country shall be limited to the material help that is indispensable for the development of the child. Such help is provided exclusively in a federal accommodation centre and the presence in the centre of the parents or persons who actually exercise parental authority is guaranteed.

For such minors the legislation thus provides only for material help dispensed by Fedasil in its reception facilities but for no other form of help. To refuse to receive minors, aware that their needy situation has been established by a public social welfare centre and that they have no other alternative, cannot be seen as anything else but an abuse of power, even if the reception network is actually overwhelmed. A duly diligent and conscientious administrative authority faced with the same circumstances would not abandon these children to their fate, but would seek for other solutions to the saturation problem that were not detrimental to the children.

Direct discrimination

The other categories of beneficiaries (mostly asylum seekers) are also faced with the saturation of the network. To refuse to receive asylum seekers runs counter to the European reception directive and to international standards for the protection of candidate refugees; and yet, Fedasil refused to receive 97 of them in July 2009. Most of these were eventually received after collective legal action was taken. The other 20 were given a place the day after they applied. Since then, up to mid September, Fedasil has no longer refused any asylum seekers. When there was no place for them in the agency’s network, they were accommodated by Fedasil in hotels.

For exceptional circumstances, such as the saturation of the reception network, the Reception Act nonetheless provides for reception in an open centre as an alternative: not to attribute a required place of registration (code 207) to asylum seekers, so that financial assistance can be provided by a public social welfare centre. Fedasil applied this provision for a few days in April 2009 and then stopped doing so immediately at the request of the competent minister. The reason given was to avoid a suction effect brought about by granting financial aid to newly arrived asylum seekers.

To receive a category of beneficiaries of the Reception Act, i.e. families in the asylum procedure and to refuse to receive another category, i.e. families residing illegally who have needy children, is a textbook example of discrimination. This discrimination is all the more unfair and shocking as there is no legal alternative for the asylum seekers that does not violate their rights and the fundamental rights of children from families residing illegally are violated because there is no legal alternative.

The creation of an inhuman and degrading situation that runs counter to the European Convention for the Protection of Human Rights and the Convention on the Rights of the Child

Article 3 of the European Convention for the Protection of Human Rights prohibits any inhuman or degrading treatment.

Pursuant to article 3 of the Convention on the Rights of the Child, the best interests of the child are to be a primary consideration in all actions concerning children.

To comply with the obligations these conventions impose on the Member States, the Belgian legislator has stipulated that underage foreign nationals residing with their family illegally in the national territory, whose needy situation has been established, are entitled to a place in an open centre.

To refuse them a place is tantamount to refusing any form of assistance to which they are entitled, including housing, nutrition, clothing and healthcare.

Such refusal evidently runs counter to the aforementioned international conventions and to Belgian law.

It is not enough to transpose into national law the international commitments Belgium has undertaken to respect human rights and the rights of a child. That legislation must actually be applied.

Figures on the refusal of needy minors residing with their parents illegally in the national territory

At the time that the recommendation was made on July 29, 2009 Fedasil's reception capacity was still insufficient, in spite of a series of measures taken to improve the situation. Since the end of April 2009, 269 children from 107 families had been refused reception to which they were entitled.

August 2009: the structural problems persist

In August 2009, Fedasil once again refused to receive 79 children belonging to 32 families. Thus, at the end of August, 341 children belonging to 139 families had been refused.

Fedasil replied to the Federal Ombudsman's official recommendation that it was aware that refusing to receive families residing illegally since the end of April 2009 had put these families, and in particular the children, in a very precarious situation; but that it was still not possible to receive them because Fedasil simply did not have any more space available.

In a letter of September 17, 2009 the Secretary of State noted, with the Federal Ombudsman, that the current situation was unacceptable in a country that had signed the Convention on the Rights of the Child. He therefore instructed Fedasil to draw up a specific reception scheme for these families. A number of operational measures have been taken to boost the reception capacity so as to be able to comply as rapidly as possible with the particular obligation to protect these minors and to be able to guarantee reception to all beneficiaries without distinction. The Secretary of State explained that evidently owing to a feared suction effect,

there is no governmental consensus at this time to provide financial aid to newly arrived asylum seekers.

When this report was being drawn up, the press disclosed the number of asylum seekers accommodated temporarily in hotels (more than one thousand). The measures taken to improve the situation have still not produced the desired effects.

The current 'response' to the saturation of the network is to try to find temporary accommodation for asylum seekers. Furthermore, there is a legal alternative to material reception for asylum seekers: they could be granted financial aid temporarily. No solution is currently proposed for families residing illegally in Belgium. The inability to receive these families, as currently alleged by Fedasil, is far from being the result of an unforeseeable and unavoidable situation, but rather of a decision by the authorities as to whether to use the legal and material means at its disposal to perform its mission. This decision currently concerns a category of vulnerable people, children of families residing illegally in this country, who are in an extremely precarious situation. The Federal Ombudsman has had to draw the attention of the House of Representatives to this situation which runs counter to the rights of children (and the rights of their families).

This refusal to receive underage foreign nationals residing illegally in the country, with their parents, and whose needy situation has been established, must cease immediately.

A sustainable solution must be found for all beneficiaries of reception – a solution in accordance with human dignity and the fundamental rights of those involved – to be able to deal with the saturation of the network as and when necessary.

November 20, 2009 will mark the twentieth anniversary of the Convention on the Rights of the child.

Official recommendation to the Federal Agency for the Reception of Asylum Seekers (Fedasil)

Brussels, July 29, 2009

OR 09/01: The Federal Ombudsman recommends that Fedasil put an end immediately to the practice of refusing to receive needy minors residing illegally in the country, with their parents.

The facts

In July 2009, a Bosnian family (parents with two children) asked the Federal Ombudsman to intervene. When their application for asylum had been definitively rejected, the Local Reception Initiative (LRI) where the family had been accommodated until then, could no longer receive them legally, and the Justice of the Peace had given them until August 1, 2009 to leave the accommodation in question. Fedasil refused to receive this family, citing force majeure. Nor did Fedasil put the family on a waiting list, but indicated that there was no point in going to the Dispatching Service to apply for a place in an open centre. This family was therefore at risk of winding up “in the street” without any assistance as of 1 August 2009.

The information gathered showed that Fedasil had since the end of April 2009 refused on several occasions to provide material reception in an open centre to families: *“with minors who were residing illegally in the country, together with their families, and whose needy situation had been established by a public social welfare centre, once the parents are no longer capable of meeting their support obligation.”*¹

The Reception Act stipulates that material help is to be granted to such families in federal accommodation centres. The reception network is (over)saturated, however, and there are (nearly) no reception places free. Fedasil claims that this is a case of force majeure that prevents it from receiving any more people who apply for material help in an open centre pursuant to the Royal Decree of June 24, 2004 *“establishing the conditions and procedures for granting material help to underage foreign nationals residing illegally in the country with their parents.”*

In July 2009, Fedasil’s reception capacity was still insufficient, in spite of a series of measures (the overcrowding of the federal centres, the launch of an emergency reception scheme, accommodation in hotels, the accelerated departure of certain categories of residents, the opening of 850 temporary places, the attribution of financial aid to people who filed their application for asylum under the old procedure, the end of reception for nationals from the new EU Member States, etc.).

¹ Article 60 of the Act of January 12, 2007 on the reception of asylum seekers and certain other categories of foreign nationals, hereinafter referred to as the *“Reception Act”*.

Fedasil grants a place to such people only by (enforceable) court order². In the same vein, Fedasil has accepted to give a place to the family that went to the Federal Ombudsman.

Discussion

In a decision of July 22, 2003 the Court of Arbitration ruled that the legal provision which limited the social services granted by the public social welfare centres to emergency medical care³ constituted a violation of articles 10 and 11 of the Constitution in conjunction with articles 2, 3, 24.1, 26 and 27 of the Convention on the Rights of the Child. According to the Court, such violation occurs when social services are refused also to minors whose parents are residing illegally in the country, when the competent authorities have ascertained that the parents do not or cannot meet their support obligation; when it is established that the application concerns expenses that are indispensable for the development of the child for which it is filed; and that the public social welfare centre ensures that the aid is used exclusively to cover those expenses.

Article 2 of the Convention on the Rights of the Child stipulates that: *“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. 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.”*

According to article 3 of the Convention: *“the best interests of the child” shall be a primary consideration in all actions concerning children”*.

Article 24.1 of the same Treaty stipulates that: *“States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”*

Article 26.1 of the same Convention stipulates that: *“States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.”*

Finally, paragraphs 1 to 3 of article 27 of the same Convention stipulate:

“1. States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this

² Several decisions by the Brussels Industrial Tribunal given in urgent cases on ex-parte applications, ordering Fedasil to (continue) to receive refused people.

³ Article 57, §2 of the *organic law on the public social welfare centres of July 8, 1976*.

right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”.

The Belgian legislator reacted to the decision of the Court of Arbitration by enshrining the right to reception, first by Royal Decree of June 24, 2004 *“fixing the conditions and procedures for providing material help to the underage minors residing illegally in the country with their parents”*, and then with the organic law on the public social welfare centres⁴ and the Reception Act⁵. The families concerned are entitled to housing, nutrition, access to health care, etc. that meet the requirements of a decent minimum standard of living, just like the other categories of beneficiaries of the Reception Act.

Fedasil claims that it is absolutely not possible to find a reception place in a federal open centre.

Irrespective of whether the conditions of force majeure are met – a question currently debated before the courts and tribunals – it is unacceptable for a State to invoke this situation in order to justify its own inertia when it comes to protecting fundamental rights, in particular the rights of the child.

As the Court of Arbitration pointed out, the Convention on the Rights of the Child requires the Belgian State to provide particular protection for (underage) children, and therefore for the parents, who are initially responsible for ensuring the living conditions necessary for the development of the child.

Furthermore, article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that: *“Everyone has the right to respect for his private and family life.”*. Article 3 of the same Convention prohibits inhuman or degrading treatment.

Conclusions

The refusal to receive families residing illegally (and to *“leave them on the street”* without more ado) violates the Reception Act and international conventions. There is no justification for refusing to receive these people just like that. The fact of being temporarily unable to the required support to these children in the form chosen by the Belgian legislator (reception of the family in an open centre) does not justify that no form of assistance is offered, in particular as regards housing, nutrition, clothing and health care. In such a case Fedasil must offer aid in forms other than those provided under Belgian law which meet the requirements of particular protection for children laid down in international conventions.

In the current state of the legislation, it is neither up to Fedasil nor its competent minister to deprive a category of beneficiaries of their entitlement to reception in order to cope with the shortage of available places. In deciding not to receive any longer illegal families with underage children whose needy situation had been established by a public social welfare

⁴ Article 57, §2 was amended by the Act of December 27, 2005: *“The task of the public social welfare centre is limited to establishing a situation of need because the parents do not or cannot assume their support obligation, in the case of a foreign national under 18 residing illegally in Belgium with his or her parents. The social welfare aid is limited to material help indispensable for the development of the child, and is provided exclusively in a federal accommodation centre in accordance with the conditions defined by the King. The presence, in the accommodation centre, of parents or persons who actually exercise parental authority, is guaranteed”*.

⁵ Article 6, §2: *“The entitlement to material help applies also to the persons referred to in Article 60 of said Act.”*

centre, Fedasil committed abuse of power and introduced discrimination between the beneficiaries of the Reception Act.

Fedasil must cease immediately to refuse reception to needy minors residing illegally in the country with their parents.

The Federal Ombudsman

A handwritten signature in blue ink, appearing to read 'C. De Bruecker', with a large, sweeping underline.

Catherine De Bruecker

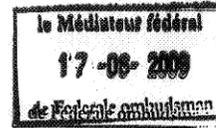
A handwritten signature in blue ink, appearing to read 'G. Schuermans', with a large, sweeping underline.

Guido Schuermans

Reply of the Director General of Fedasil dated August 14, 2009



14 AOUT 2009



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► **votre référence:** 09GN1980/DC

► **notre référence:**

► **annexe(s):**

► **Concerne :** Votre recommandation officielle du 29 juillet 2009

Madame la Médiatrice fédérale,
Monsieur le Médiateur fédéral,

Nous avons pris connaissance de votre recommandation officielle du 29 juillet dernier relative à l'accueil des mineurs en état de besoin séjournant illégalement avec leur famille sur le territoire.

Conscients que le refus d'accueillir ces familles depuis la fin du mois d'avril place celles-ci, et en particulier les enfants, dans une situation de grande précarité, force est de constater que nous sommes toujours, à l'heure actuelle, dans l'impossibilité concrète de leur fournir un hébergement et ce, faute de places suffisantes disponibles.

En effet, outre notamment la sur-occupation des structures d'accueil, la création de places d'urgence supplémentaires et la récente décision du Conseil des ministres du 17/07/2009 de mettre à la disposition de Fedasil trois bâtiments susceptibles d'accueillir les deux demandeurs d'asile, plus de 900 demandeurs d'asile sont à ce jour hébergés à l'hôtel.

Afin de trouver une solution structurelle à la problématique de l'accueil des mineurs étrangers séjournant illégalement avec leur famille sur le territoire, notre Secrétaire d'Etat, Monsieur Philippe Courard, nous a chargé d'élaborer une proposition de modification de la loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers en vue de prévoir un trajet d'accueil spécifique pour ce groupe cible.

Nous ne manquerons pas de vous en tenir informés.

Il va de soi que si entre-temps la situation de crise actuelle prend fin, les familles seront à nouveau accueillies dans le réseau.

Nous vous prions de croire, Madame la Médiatrice fédérale, Monsieur le Médiateur fédéral, en l'assurance de nos sentiments distingués.

Isabelle Kuntziger
Directrice générale

Translation

Re: Your official recommendation of July 29, 2009

Dear Federal Ombudsman,

We have taken note of your official recommendation of July 29 instant relating to the reception of needy minors residing illegally in Belgium with their family.

Although we are aware that refusing to receive these families since the end of April puts them, and in particular the children, in a very precarious situation, we cannot but point out that we are still, at this time, absolutely unable to provide accommodation for them, because of lack of space.

More specifically, apart in particular from the overcrowding in the reception facilities, the creation of additional emergency reception places and the recent decision of the Council of Ministers of July 17, 2009 to put three buildings at the disposal of Fedasil in which to receive asylum seekers, more than 900 asylum seekers are at this time accommodated in hotels.

To find a structural solution to the problem of underage foreign nationals residing illegally in the country with their family, our Secretary of State, Mr Philippe Courard, has instructed us to draw up a draft amendment of the Act of January 12, 2007 concerning the reception of asylum seekers and certain other categories of foreign nationals so as to provide a specific reception procedure for this target group.

We shall keep you posted.

Needless to say, if the current crisis situation should end, the families will again be received in the network.

Yours faithfully,

Isabelle Kuntziger
Director General

Official Recommendation to the Secretary of State for Social Integration and the Fight against Poverty

Brussels, July 31, 2009

OR 09/02: The Belgium State must ensure reception for all beneficiaries of the Reception Act, without discrimination, in accordance with fundamental rights and human dignity at all times and under all circumstances. In view of the current saturation of the reception network, necessary measures must be taken immediately, either by making sufficient human and material resources available, or through an appropriate legal mechanism, to enable Fedasil to fulfil its mission of receiving all beneficiaries of the Reception Act correctly at all times. Whilst waiting for these measures to produce the expected effect, the State cannot hide behind the saturation of the reception network to refuse receiving certain beneficiaries. It must moreover ensure that the legal exemption mechanism for asylum seekers provided by the Reception Act is applied in full to guarantee that in exceptional circumstances, all beneficiaries receive the aid required to meet their basic needs.

The facts

The Federal Ombudsman had to conduct an investigation into Fedasil's refusal to receive certain people because the reception network for asylum seekers and other categories of beneficiaries was saturated. In July 2009, a Bosnian family (parents with two children) asked the Federal Ombudsman to intervene. When their application for asylum had been definitively rejected, the Local Reception Initiative (LRI) where the family had been accommodated until then, could no longer receive them legally, and the Justice of the Peace had given them until August 1, 2009 to leave the accommodation in question. Fedasil refused to receive this family, citing force majeure. Nor did Fedasil put the family on a waiting list, but indicated that there was no point in going to the Dispatching Service to apply for a place in an open centre. This family was therefore at risk of winding up "*in the street*" without any assistance as of August 1, 2009. As a result of the Federal Ombudsman's intervention, this family was finally accommodated in a Fedasil centre on July 28, 2009.

The information gathered showed that Fedasil had since the end of April 2009 refused on several occasions to provide material reception in an open centre to families "*with minors who were residing illegally in the country, together with their families, and whose needy situation had been established by a public social welfare centre, once the parents are no longer capable of meeting their support obligation.*"⁶ The Reception Act stipulates that material help is to be granted to such families in federal accommodation centres. The reception network is (over)saturated, however, and there are (nearly) no reception places free. Fedasil claims that this is a case of force majeure that prevents it from receiving any more people who apply for material help in an open centre pursuant to the Royal Decree of June 24, 2004 "*establishing the conditions and procedures for granting material help to underage foreign nationals residing illegally in the country with their parents.*"

⁶ Article 60 of the Act of January 12, 2007 on the reception of asylum seekers and certain other categories of foreign nationals, hereinafter referred to as the "Reception Act".

In July 2009, Fedasil's reception capacity was still insufficient, in spite of a series of measures (the overcrowding of the federal centres, the launch of an emergency reception scheme, accommodation in hotels, the accelerated departure of certain categories of residents, the opening of 850 temporary places, the attribution of financial aid to people who filed their application for asylum under the old procedure, the end of reception for nationals from the new EU Member States, etc.).

In the meantime, the other categories of beneficiaries (mainly asylum seekers) were also confronted with the saturation of the network. When the Dispatching Service could no longer find any room for these people, they too were left "*in the street.*" Fedasil went as far as to close its Dispatching Service between July 8 and 13, 2009.

This situation occurred four times in July, namely on July 8, 9, 10 and 22, 2009 and concerned 97 people in all.

In the first three cases, the persons involved were eventually given a place in the network, after collective court action. In the last case, the 20 persons involved were given a place the day after they had applied.

Discussion

A. Needy minors residing illegally in the country with their parents

A.1. In a decision of July 22, 2003 the Court of Arbitration ruled that the legal provision which limited the social services granted by the public social welfare centres to emergency medical care⁷ constitutes a violation of articles 10 and 11 of the Constitution in conjunction with articles 2, 3, 24.1, 26 and 27 of the Convention on the Rights of the Child. According to the Court, such violation occurs when social services are refused also to minors whose parents are residing illegally in the country, when the competent authorities have ascertained that the parents do not or cannot meet their support obligation; when it is established that the application concerns expenses that are indispensable for the development of the child for which it is filed; and that the public social welfare centre ensures that the aid is used exclusively to cover those expenses.

A.2. Article 2 of the Convention on the Rights of the Child stipulates that: "*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. 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.*"

According to article 3 of the Convention: "*the best interests of the child*" shall be a primary consideration in all actions concerning children.

⁷ Article 57, §2, of the *organic law on the public social welfare centres* of July 8, 1976.

Article 24.1 of the same Treaty stipulates that: *“States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”*

Article 26.1 of the same Convention stipulates that: *“States Parties shall recognise for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.”*

Finally, paragraphs 1 to 3 of article 27 of the same Convention stipulate:

“1. States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

A.3. The Belgian legislator reacted to the decision of the Court of Arbitration by enshrining the right to reception, first by Royal Decree of June 24, 2004 *“fixing the conditions and procedures for providing material help to the underage minors residing illegally in the country with their parents”* and then with the organic law on the public social welfare centres⁸ and the Reception Act.⁹ The families concerned are entitled to housing, nutrition, access to health care, etc. that meet the requirements of a decent minimum standard of living, just like the other categories of beneficiaries of the Reception Act.

A.4. Fedasil claims that it is absolutely not possible to find a reception place in a federal open centre.

Irrespective of whether the conditions of force majeure are met – a question currently debated before the courts and tribunals – it is unacceptable for a State to invoke this situation in order to justify its own inertia when it comes to protecting fundamental rights, in particular the rights of the child.

As the Court of Arbitration pointed out, the Convention on the Rights of the Child requires the Belgian State to provide particular protection for (underage) children, and therefore for the parents, who are initially responsible for ensuring the living conditions necessary for the development of the child.

⁸ Article 57, §2 was amended by the Act of December 27, 2005: *“The task of the public social welfare centre is limited to establishing a situation of need because the parents do not or cannot assume their support obligation, in the case of a foreign national under 18 residing illegally in Belgium with his or her parents. The social welfare aid is limited to material help indispensable for the development of the child, and is provided exclusively in a federal accommodation centre in accordance with the conditions defined by the King. The presence, in the accommodation centre, of parents or persons who actually exercise parental authority, is guaranteed.”*

⁹ Article 6, §2: *“The entitlement to material help applies also to the persons referred to in Article 60 of said Act.”*

Furthermore, article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that: “*Everyone has the right to respect for his private and family life.*”. Article 3 of the same Convention prohibits inhuman or degrading treatment.

A.5. The refusal to receive families residing illegally (and to “*leave them on the street*” without more ado) violates the Reception Act and international conventions. There is no justification for refusing to receive these people just like that. The fact of being temporarily unable to the required support to these children in the form chosen by the Belgian legislator (reception of the family in an open centre) does not justify that no form of assistance is offered, in particular as regards housing, nutrition, clothing and health care. In such a case, Fedasil must offer aid in forms other than those provided under Belgian law which meet the requirements of particular protection for children laid down in international conventions.

A.6. Needless to say, the solution chosen should not lead to other beneficiaries being denied reception with human dignity. In the current state of the legislation, it is neither up to Fedasil nor its competent minister to deprive a category of beneficiaries of their entitlement to reception in order to cope with the shortage of available places. In deciding not to receive any longer illegal families with underage children whose needy situation had been established by a public social welfare centre, Fedasil committed abuse of power and introduced discrimination between the beneficiaries of the Reception Act.

On July 29, 2009 the Federal Ombudsman made an official recommendation asking Fedasil to put immediately an end to its current practice of refusing to receive needy minors residing in the country illegally with their parents.

B. Asylum seekers

B.1. The European Directive of January 27, 2003 laying down minimum standards for the reception of asylum seekers in the Member States is in line with the intent to establish a common European asylum system based on a full and non-restrictive application of the Geneva Convention relating to the status of refugees of July 28, 1951.¹⁰ The directive aims to establish minimum standards for the reception of asylum seekers that will suffice to ensure them a dignified standard of living and comparable living conditions.

The directive stipulates that when aid is provided in kind,¹¹ asylum seekers can be housed in accommodation centres that provide a sufficient level of accommodation and/or in private houses, apartments, hotels, or other appropriate premises for housing asylum seekers. The Belgian Reception Act has transposed this obligation into a 2-step reception, first in an open centre and then in a local reception initiative (LRI). The directive stipulates that asylum seekers must have access to material reception conditions from the moment they lodge their application. When the housing capacity available is temporarily exhausted, the Member States may exceptionally depart from the normal material reception conditions for a reasonable period which must be as

¹⁰ Supplemented by the New York Protocol of January 31, 1967.

¹¹ As opposed to a financial allocation.

short as possible.¹² Such exceptional modalities must in any event also cover the basic needs.

Failure to provide assistance is therefore contrary to the European Directive and international conventions for the protection of candidate refugees.

B.2. Fedasil has the task of providing material aid and to designate a required place of registration for asylum seekers to that end (code 207)¹³, in theory in an open centre. The Reception Act¹⁴ also authorises Fedasil not to designate a required place of registration in exceptional circumstances. The explanatory memorandum¹⁵ to the Act shows that the saturation of the reception network can in fact be considered as an exceptional circumstance authorising Fedasil not to designate a required place of registration. In such a case, the power to provide support is fixed by article 2, §5, of the public social welfare centre act of April 2, 1965 which stipulates that the competent public social welfare centre is that of the municipality in which the person in need of support is registered on the waiting list or in the aliens register. In the absence of an address and code 207, newly arrived asylum seekers are registered at the address of the Foreigners Office, 1000 Brussels. The Brussels public social welfare centre is therefore competent for these people.

B.3. Fedasil applied these provisions for a few days in April 2009, and then stopped doing so immediately at the request of the competent minister. The reason given was to avoid a suction effect brought about by granting financial aid to newly arrived asylum seekers.

Since then, Fedasil has no longer taken any formal non-designation decision. When the Agency was not able to find accommodation for asylum seekers who applied at its Dispatching service on four occasions in July 2009, it limited itself to a *de facto* non designation of a place of registration, without providing the slightest information to the persons concerned about the legal consequences thereof.

In such circumstances, asylum seekers who have not taken legal action are deprived of all adequate information that would enable them to go to a public social welfare centre to obtain aid.

This attitude is not only illegal but also contrary to the requirements of administrative transparency, and conducive to a breach in the trust that people should have in government.

Conclusion

In a State subject to the rule of law, the saturation of the reception network should not weigh on the beneficiaries of the reception, in particular the more vulnerable, nor on the authorities in charge of the reception. The actual exercise of the right to reception, in accordance with

¹² The legislator availed himself of this option to deal with emergency reception in article 18 of the Reception Act.

¹³ Articles 10 and 56, §2, 3° of the Reception Act.

¹⁴ Article 11, §3 *in fine* of the Reception Act.

¹⁵ *Parliamentary Document*, House of Representatives, 2005-2006, no. 51 2565/001, 23-24.

fundamental rights and human dignity, should not depend on court action or a policy decision by the Government, nor the time needed for the implementation of such a decision.

There is a legal mechanism which guarantees that asylum seekers can get the aid they need to lead a dignified life also under exceptional circumstances such as the saturation of the "*primary reception network*". This mechanism must be applied fully when Fedasil is not capable to attribute a reception place.

The beneficiaries of reception for whom there is no alternative to material reception in an open centre must be accommodated under all circumstances.

The Federal Ombudsman



Catherine De Bruecker

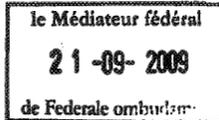


Guido Schuermans

Reply of the Secretary of State for Social Integration and the Fight against Poverty dated September 17, 2009



**LE SECRETAIRE D'ETAT A L'INTEGRATION SOCIALE ET A LA LUTTE CONTRE LA PAUVRETE
DE STAATSSECRETARIS VOOR MAATSCHAPPELIJKE INTEGRATIE EN ARMOEDEBESTRIJDING**



**Madame Catherine De Bruecker
Monsieur Guido Schuermans
Médiateurs fédéraux
Rue Ducale 43**

1000 BRUXELLES

Bruxelles, le 17 septembre 2009

N/Réf. : PhC/JMJ/MH/2009-2506

Concerne : Recommandation officielle du 31 juillet 2009

Madame, Monsieur, les Médiateurs fédéraux,

J'ai pris connaissance de la recommandation officielle qu'en tant que Médiateurs fédéraux, vous m'avez adressé le 31 juillet dernier. Je souhaite vous assurer de toute l'attention consacrée à la situation de crise que traversent Fedasil et l'ensemble du secteur de l'accueil.

Je constate avec vous la situation de crise dans laquelle se trouvent les dispositifs d'accueil découlant de la loi du 12 janvier 2007, compte-tenu de l'affluence importante des demandes d'asile constatées depuis le mois de mai 2008. En effet, pour le mois de mai 2009, on note une augmentation de 23% des demandes d'asile par rapport à mai 2008. Les sorties du réseau d'accueil n'arrivent pas à compenser les entrées puisqu'on observe, actuellement, un solde positif de l'ordre de 400 à 500 personnes par mois.

La problématique du manque de places pour l'accueil des mineurs en état de besoin séjournant illégalement avec leur famille sur le territoire s'inscrit également dans ce contexte de crise, que nous espérons transitoire et pour lequel des pistes de solutions (notamment l'augmentation de la capacité d'accueil d'urgence) sont mises en œuvre. Je réitère ma volonté de remédier à cette situation que j'estime inadmissible dans un Etat partie à la Convention relative aux droits de l'enfant. J'ai à ce titre chargé Fedasil d'élaborer des propositions de modifications de la loi accueil du 12 janvier 2007 en vue d'élaborer un trajet d'accueil spécifique pour ces mineurs et leurs parents, dans le stricte cadre du respect de leurs droits consacrés par les instruments internationaux.

Plus immédiatement, afin de pouvoir honorer dans les meilleurs délais ce devoir de protection particulier des enfants mineurs et d'assurer un accueil à tous les bénéficiaires de l'accueil tels que définis par la loi du 12 janvier 2007 sans distinction, plusieurs nouvelles mesures opérationnelles ont été prises et soutenues politiquement depuis le début du mois de juillet. En effet, les prévisions de Fedasil jusqu'à la fin 2009 démontrent la nécessité d'ouvrir de l'ordre de 1200 nouvelles places.

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Gouvernement fédéral
Federale regering

**LE SECRETAIRE D'ETAT A L'INTEGRATION SOCIALE ET A LA LUTTE CONTRE LA PAUVRETE
DE STAATSSECRETARIS VOOR MAATSCHAPPELIJKE INTEGRATIE EN ARMOEDEBESTRIJDING**

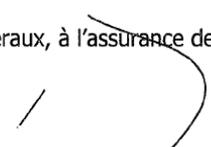
- Sur base d'une décision du Conseil des ministres, un groupe de travail rassemblant des représentants des différents Ministres compétents a été mis sur pied en vue d'identifier des bâtiments appartenant à l'Etat. De nouvelles places ont déjà pu s'ouvrir (par exemple à Florennes) et je souhaite que d'autres places puissent également être ouvertes sur de nouveaux sites.
- Une instruction en vue de l'identification d'éventuelles possibilités d'extension des structures d'accueil existantes, tant fédérales que chez les partenaires, a été envoyée à l'Agence ; l'identification de nouvelles places en ILA (Initiative locales d'accueil) et de sites appartenant à des propriétaires privés a été réalisée par l'Agence ainsi qu'une budgétisation des moyens nécessaires.
- J'ai rencontré tous les partenaires de l'accueil afin de les sensibiliser aux instructions de Fedasil en vue d'une augmentation des sorties des personnes du réseau d'accueil lorsqu'elles bénéficient de la mesure de modification du code 207 initiée par la Ministre Marie Arena.

Au niveau politique, je dois vous dire que je m'inscris pleinement dans l'initiative de coordination des matières Asile/Accueil menée par le Premier Ministre et souhaite débloquer les moyens humains et matériels suffisants afin de permettre à l'Agence d'exercer sa mission et ce, en accord avec l'ensemble du gouvernement puisque cette question s'inscrit dans un contexte budgétaire particulier qui doit être pris en considération. Dans ce contexte de bonne collaboration, j'ai rencontré le Secrétaire d'Etat à l'Asile et l'Immigration en vue de faciliter les mesures d'identification de dossiers susceptibles de s'inscrire positivement dans les instructions de régularisation du 18 juillet 2009. J'ai également demandé au Ministre en charge du Budget au Gouvernement une majoration du budget de Fedasil en vue de l'ouverture de plus de 5000 places d'accueil en 2010.

S'agissant de l'activation du mécanisme automatique prévu à l'article 11 de la loi accueil, mécanisme qui, comme vous l'indiquez dans votre recommandation, vise à garantir les droits des bénéficiaires en cas de circonstances particulières telles la saturation du « réseau d'accueil primaire », je tiens à souligner qu'en raison sans doute d'une crainte d'appel d'air, il n'y a à ce stade aucun consensus gouvernemental qui permettrait l'ouverture de l'aide financière aux demandeurs d'asile primo-arrivants. Afin de stimuler l'autonomie des demandeurs d'asile et leur sortie de l'aide matérielle, j'inviterai les partenaires du gouvernement à reprendre les travaux de préparation de l'arrêté royal « Cumul revenus professionnel et aide matérielle ». Cette nouvelle disposition légale permettra de transposer la directive européenne qui prévoit l'accès aux demandeurs d'asile au marché de l'emploi. Avec la modification du dispositif d'accueil pour les demandeurs d'asile multiples, ces mesures libèreront, je le souhaite, de nouvelles places à mettre à disposition de tous les bénéficiaires de l'accueil.

Pour conclure, je souhaite vous assurer de la mise en œuvre de toutes mesures possibles afin de remédier à la problématique de l'accueil de bénéficiaires de la loi sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers. Je tiens à vous remercier de votre collaboration constructive dans le cadre de cette investigation et me tiens à votre disposition pour toute éventuelle question ultérieure liée à la crise de l'accueil.

Veillez croire, Madame, Monsieur, les Médiateurs fédéraux, à l'assurance de ma considération distinguée.


Philippe COURARD

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Translation

Re: Official recommendation of July 31, 2009

Dear Federal Ombudsman,

I have taken note of the official recommendation which you sent to me on July 31 instant in your capacity of Federal Ombudsman. I would like to reassure you that the crisis situation of Fedasil and the entire reception sector will receive our undivided attention.

I have noted together with you that the reception facilities arising out of the Act of January 12, 2007 are in crisis, due to the sizeable number of applications for asylum since May 2008. More specifically, in May 2009, asylum applications were up by 23% from May 2008. The departures from the reception network do not offset the arrivals, since there is currently a positive balance of 400 to 500 people per month.

The problem of the lack of places to accommodate needy minors residing illegally in the country with their parents must also be put in the context of this crisis, which we hope will be temporary, and for which potential solutions (in particular an increase in the emergency accommodation capacity) have been deployed. I should like to reiterate that I am determined to remedy this situation which I consider unacceptable in a signatory state of the Convention on the Rights of the Child. I have therefore instructed Fedasil to draw up proposals to amend the Reception Act of January 12, 2007 so as to introduce a specific procedure for the reception of these minors and their parents in strict compliance with their rights enshrined in international conventions.

In the shorter term, several new operational measures have been taken with political support since the beginning of July to meet as promptly as possible the duty to provide particular protection for minors and accommodation for all beneficiaries of material reception as defined in the Act of January 12, 2007 without distinction. According to Fedasil projections, some 1200 new places will be needed by the end of 2009.

- By decision of the Council of Ministers, a work group composed of representatives of the different competent ministries was set up to identify buildings that belong to the state. New places have already been opened (e.g. in Florennes) and I would like to see other places to be opened on new sites.
- The Agency has been instructed to identify possible extensions to the new reception facilities, both at federal level and among the partners; the Agency has identified new places under the local reception initiative (LRI) and sites of private owners, and has moreover budgeted the necessary resources.
- I have met all the reception partners to make them aware of the Fedasil instructions to increase the number of people to leave the network when they fall under the measure to amend code 207 initiated by Minister Marie Arena.

On the policy front, I must say that I subscribe fully to the prime minister's initiative to coordinate asylum/reception matters and wish to see sufficient human and material resources

made available to enable the Agency to perform its mission in agreement with the entire government, as this issue falls under a particular budgetary context that has to be taken into consideration. In line with this good cooperation, I have met the Secretary of State for Asylum and Immigration to make it easier to identify cases that fall under the regularisation instructions of July 18, 2009. I have also asked the minister in charge of the budget to increase the budget of Fedasil so that more than 5000 reception places can be opened in 2010.

As to the activation of the automatic mechanism provided under article 11 of the Reception Act, which, as pointed out in your recommendation, aims to guarantee the rights of beneficiaries in exceptional circumstances such as the saturation of the "*primary reception network*," I would like to underscore that, undoubtedly because of a feared suction effect, there is no governmental consensus at this time on making financial aid available to newly arrived asylum seekers. To promote the autonomy of asylum seekers and to get them out of dependence on material help, I shall ask the government partners to resume the preparatory work on a royal decree concerning the combination of income from gainful employment and material help. This new legal provision will make it possible to transpose the European directive on making the labour market accessible to asylum seekers. I hope that these measures, together with the adaptation of the reception system for multiple asylum seekers, will make new places available for all beneficiaries of material reception.

Finally, I should like to reassure you that all possible measures will be taken to remedy this problem of reception of beneficiaries under the act on the reception of asylum seekers and certain other categories of foreign nationals. I would also like to thank you for the constructive cooperation under this investigation and I am at your entire disposal for any more questions about the current crisis you may have.

Yours faithfully,

Philippe COURARD



the federal **Ombudsman**

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