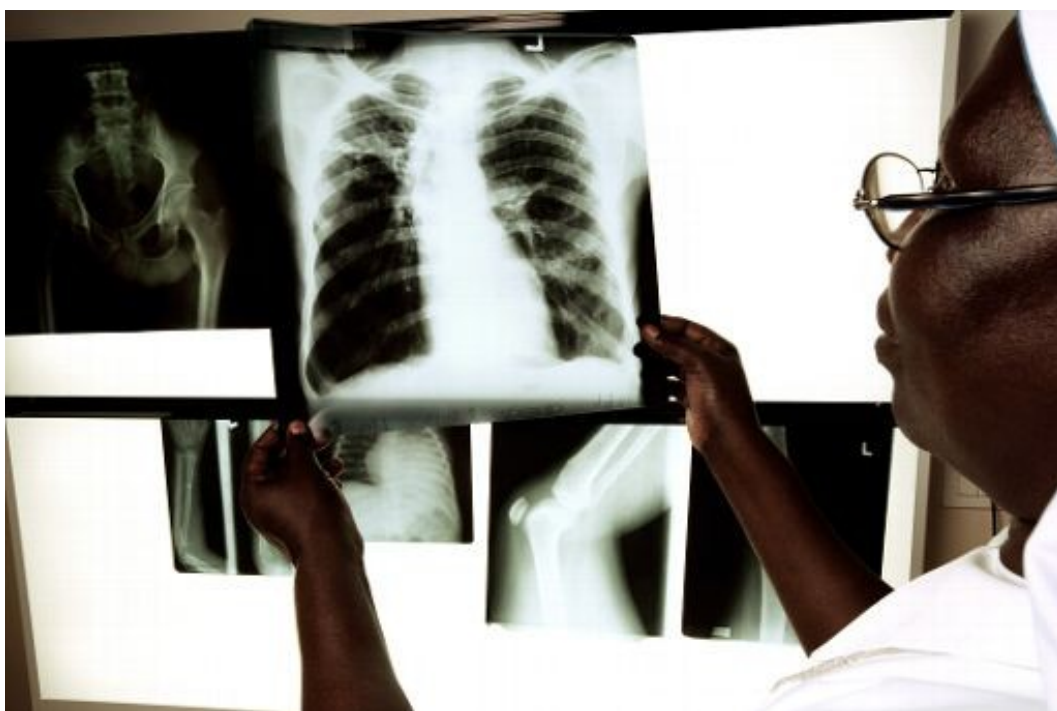


UNDOCUMENTED AND SERIOUSLY ILL: RESIDENCE PERMITS FOR MEDICAL REASONS IN EUROPE



PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS

PICUM

Platform for International Cooperation on
Undocumented Migrants

Gaucheretstraat 164
1030 Brussels – Belgium
Tel: +32 (2) 274.14.39
Fax: +32 (2) 274.14.48

info@picum.org

www.picum.org

Copyright © 2009 by PICUM

Lay Out: © 2009 by Achates

Cover photo: © Van Parys Media

This report was made possible with the generous
support of the NGO Medimmigrant.



www.medimmigrant.be

**UNDOCUMENTED AND SERIOUSLY ILL:
RESIDENCE PERMITS FOR MEDICAL REASONS
IN EUROPE**

PICUM, the **Platform for International Cooperation on Undocumented Migrants**, is a non-governmental organisation (NGO) that aims to promote respect for the human rights of undocumented migrants within Europe. PICUM also seeks dialogue with organisations and networks with similar concerns in other parts of the world.

PICUM promotes respect for the basic social rights of undocumented migrants, such as the right to health care, the right to shelter, the right to education and training, the right to a minimum subsistence, the right to family life, the right to moral and physical integrity, the right to legal aid, and the right to fair labour conditions.

PICUM's activities are focused in five main areas:

1. **Monitoring and reporting:** improving the understanding of issues related to the protection of the human rights of undocumented migrants through improved knowledge of problems, policies and practice.
2. **Capacity building:** developing the capacities of NGOs and all other actors involved in effectively preventing and addressing discrimination against undocumented migrants.
3. **Advocacy:** influencing policy makers to include undocumented migrants in social and integration policies on the national and European levels.
4. **Awareness raising:** promoting and disseminating the values and practices underlying the protection of the human rights of undocumented migrants among relevant partners and the wider public.
5. **Global actors on international migration:** developing and contributing to the international dialogue on international migration within the different UN agencies, international organizations, and civil society organizations.

PICUM has over 100 affiliated members and 107 ordinary members in 25 countries in Europe and beyond. PICUM's monthly newsletter on issues concerning the human rights of undocumented migrants is produced in seven languages and circulates to PICUM's network of more than 2,500 civil society organizations and individuals and beyond.

Table of Contents

Acknowledgements	6
Introduction	8
1. European Legal Standards	11
2. Austria	15
3. Belgium	17
4. France	19
5. Germany	21
6. Hungary	23
7. Italy	25
8. The Netherlands	27
9. Portugal	29
10. Spain	31
11. Sweden	33
12. United Kingdom	35
13. Database on Medical Treatment in Countries of Origin	38
Conclusion	42
Annex - Questionnaire	

Acknowledgements

PICUM expresses sincere thanks to all the individuals and organisations which participated in this study, providing invaluable comments on the legislation and practice in their respective countries. We would like to especially thank the following individuals for their assistance with the creation of this report: Sara Collantes, Ellen Druyts, Veerle Evenepoel, Katleen Goris, Whitney Johnson, Irene Kohlman, Smriti Mallapati, Baerbel Reissman, Pablo Sanchez and Willem Vervaeke.

Ama Sumani, a 39-year-old mother of two from Ghana, had been living in the United Kingdom for 5 years. She arrived in the United Kingdom in 2003 on a student visa. After her visa expired in January 2006, she was diagnosed with malignant myeloma, a cancer of the plasma cells. Complication from cancer caused her kidneys to fail, and by January 2008 she was receiving kidney dialysis treatment to prolong her life. Her solicitor made representations for her to stay in the UK on compassionate grounds, because she could not afford life-saving treatment in Ghana. Despite their efforts, the Home Office rejected her appeals, and she was removed from the UK on 9 January 2008 and flown back to Ghana.

Supporters rallied to raise funds to cover the cost of her treatment in Accra, Ghana, and €4,000 was collected to cover dialysis for the first three months. Yet Thalimodide, a vital drug to prolong her life, proved inaccessible in Ghana. Ama Sumani died on 19 March 2008 at Korle-Bu hospital in Accra, hours after being told that friends and family had found doctors in the UK and South Africa to treat her. By this time, they had raised more than €90,000 in donations to pay for the treatment, but the assistance came too late. Ms. Sumani's children, Mary, 16, and Samede, 7, are looked after by family.

Source: Migration Policy Group, *Migration News Sheet* (April 2008).

Availability versus accessibility of treatment in countries of origin

For many seriously ill individuals in Europe, expulsion to their country of origin as a result of their irregular migration status amounts to an extreme health risk and, for some, even death. In the above-mentioned case, the authorities' decision to deport Ms. Sumani from the UK hinged on the availability of treatment for her condition in Ghana. However, the adjudicators failed to consider the equally important issue of her ability to access this care. Though medical treatment was reportedly available at a hospital in Ghana's capital city of Accra, Ms. Sumani came from one of the least developed and most

impoverished regions in the North of Ghana, and had no resources or acquaintances in Accra to enable her to receive treatment there. Furthermore, Ghana's national health insurance covers neither the cost of dialysis treatment nor of transplants, both necessary for her survival.¹ Thus, while finding that treatment was theoretically *available* to Ms. Sumani, the authorities did not consider the critical issue of whether she had financial or other assistance that would enable her to *access* the treatment. Her case underlines how availability *and* accessibility of medical treatment must be equally considered to arrive at a just decision on granting permission to remain in Europe on medical grounds.

In recent years, the forced return of severely ill undocumented migrants to their countries of origin² where they were unable to access care has raised concern among many medical professionals and NGOs, both in Europe and beyond. An editorial in the leading medical journal *The Lancet* noted that 'Sumani is not the only migrant who has fallen seriously ill in the UK, begun treatment and then been removed or deported to a country where treatment is unaffordable or inaccessible... the UK has committed an atrocious barbarism'.³

Purpose of this report

Many members of PICUM's network have become concerned that authorities in their countries may rely on limited or even flawed sources of information regarding treatment in the migrant's country of origin. Through their extensive experience in assisting seriously ill migrants to apply for a stay permit for medical reasons, these PICUM members have witnessed cases in which seriously ill migrants have been forcefully returned to their countries of origin on the premise that they could access care. The forced return of these seriously ill individuals has often been made without considerations of other important issues such as whether treatment was free or affordable, possible disparities of services between rural and urban areas as well as tribal or ethnic based

¹ Grüb, A. (2007). *Ghana – Social security schemes for health*. Retrieved on 1 June 2008 from <http://www.ilo.org/gimi/RessShowRessource.do?ressourceId=4872&longTitle=Ghana+-+Social+Security+Schemes+for+Health&author=A.+Gr%3Fb&ressYear=2007>.

² For the purpose of this report, country of origin will be defined as country of nationality or former habitual residence.

³ 'Migrant Health: what are doctors' leaders doing?', *The Lancet*, Volume 371, Issue 9608, Page 178, 19 January 2008.

discrimination. Nevertheless, under international and European human rights law, EU member states are obliged to ensure that removal of seriously ill migrants to their countries of origin does not amount to a violation of their human rights.

In consultation with several of our members, including the Brussels based NGO Medimmigrant, PICUM decided to investigate the regulations and procedures in several EU member states concerning the granting of residence permits to undocumented migrants for medical reasons. This report aims to identify some of the main problems and obstacles in gathering information within several EU member states concerning residence permits for seriously ill undocumented migrants.

Methodology

The research for this report was largely carried out during the same time period as PICUM's previous EU project entitled "Access to health care for undocumented migrants in Europe." In order to build on the findings of that report as well as the contacts developed with NGOs, local authorities and health care professionals, we decided to focus on the same eleven EU member states.

Through survey questionnaire research (see "Annex-Questionnaire"), this project has gathered the views and concerns of relevant authorities, NGOs and healthcare practitioners working on the issue of residence permits for medical reasons. For each country, the main areas of focus included an analysis of the legal framework for eligibility of such a residence permit, the availability of medical stay permits, the application procedure and the involvement of health care practitioners during the procedure. The questionnaire also addressed the opinions of NGOs, authorities and health care practitioners on the creation of a European medical database of information on the availability and accessibility of medical treatment around the world.

We received feedback for the questionnaire from 42 respondents⁴ throughout the European Union. We targeted NGOs working specifically on the issue of residence permits on medical grounds. Through these NGOs, we attempted to contact health care practitioners (or NGOs providing medical services) who assisted applicants during the procedure. Finally, relevant authorities in the eleven EU member states concerned were contacted but many preferred not to participate in the study. We often experienced a certain level of confusion between the government departments as to who was responsible or competent for residence permits on medical grounds. In addition to the administering of the questionnaire, we conducted follow-up interviews to gather information about details of the procedures and asked respondents to offer suggestions for improvement and standardisation to ensure equality, fairness and respect for human rights.

⁴ 32 NGOs, 6 healthcare practitioners and 4 authorities.

Structure of this report

Legal standards of protection for seriously ill undocumented migrants vary amongst the different countries examined even regarding the application of protection standards established by the case law of the European Court of Human Rights. The first chapter of this report seeks to provide an overview of legal standards set out by the Council of Europe as well as the European Union.

Chapters 2-12 provide information on legislation in eleven European countries concerning the possibility for seriously ill migrants to obtain residence permits⁵. In principle, the following groups may receive residence permits for medical reasons:

- Migrants admitted for brief periods according to regular procedures in order to undergo medical treatment in the host state;
- Asylum seekers;
- Undocumented Migrants;
- Migrants already present in the host state with a residence permit granted on other grounds who suffer from a severe medical condition.

This report focuses on undocumented migrants and migrants who may need to change residence status due to their medical condition. This report does not consider visa or residence permits for medical reasons granted to persons for first entry⁶ or as part of asylum claims⁷.

Some slight modifications to the legislative framework may have occurred since the research was completed in 2008, and PICUM has made efforts to include updates where possible. Although the project has now come to a close, readers may contact PICUM to include changes in the various EU member states' legislation examined in the study.

Finally, Chapter 13 provides feedback from NGOs and government agencies who responded to a questionnaire (available in the annex to this

report) on the creation of a European medical database containing information on availability and accessibility of medical treatment in countries of origin.

⁵ Residence permit is defined as any permit or authorisation issued by the authorities in the form required by that State's legislation allowing a third country national or stateless person to reside in its territory.

⁶ As evident in the Immigration Acts of the United Kingdom, Hungary, the Netherlands and others, this type of visa usually is granted for admission to the state's territory and is time limited to the duration of the treatment. It requires the applicant to pay the costs of maintenance and medical treatment.

⁷ For example, cases in which a foreigner is in possession of a student or work visa and the requirements for the prolongation of this type of visa are not satisfied at the time of expiration due to the illness. This report only includes reference to asylum claims in cases where information on medical conditions is necessary due to the special procedure of the particular country (e.g. Hungary and Sweden).

When discussing migrants' rights, the protection of human rights stands vis-à-vis the principle of state sovereignty. As a matter of fact and design, states are free to expel non-citizens from their territories. However, this right is subject to certain limitations. EU member states' legal obligations under international and European human rights law require these states to refrain *inter alia* from expulsion if it would violate the international legal principle of *non-refoulement*⁸ or another innate right found in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Non-refoulement prohibits the expulsion or return of a refugee, asylum seeker or undocumented migrant to a country in which they face a real risk of ill-treatment such as torture and inhuman and degrading treatment, or their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.⁹ *Non-refoulement* is a *jus cogens*, or fundamental principle, of international law and its definition may apply to a person who is refused access to vital medical treatment due to membership of a particular social or political group; the hindrance itself would amount to persecution.

Certainly, many are affected by poor health care in countries that do not provide the complex and high-cost medical care required for serious conditions such as cancer or HIV. The situation

at hand, though, is slightly different. For a person to be forcibly returned to a country where the lack of treatment could cause inhumane suffering or even death could amount to a violation of their rights under international and regional human rights law.

This chapter provides a brief overview of the protection standards in Europe as elaborated in the Council of Europe instruments and the legislation of the European Union.¹⁰

Council of Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹¹ is one of the core instruments of the Council of Europe. The convention and its subsequent protocols guarantee civil and political human rights to individuals within the jurisdiction of the signatory states.¹²

The convention is legally binding, and the European Court of Human Rights (ECtHR) monitors states' compliance. States, external parties and even individuals can bring applications before the court for human rights violations in other signatory states.

⁸ Article 33 (1) of the 1951 Geneva Convention Relating to the Status of Refugees provides that "no Contracting State shall expel or return ('refouler') a refugee against his or her will in any manner whatsoever, to a territory where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion".

⁹ Human Rights Watch emphasise that this principle includes those who have been unsuccessful in the asylum process but 'may not have had access to an appeal procedure with suspensive effect following a negative first instance decision on their asylum claim'. See HRW, 'Common principles on removal of irregular migrants and rejected asylum seekers', August 2005, available online at: <http://www.hrw.org/es/news/2005/08/31/common-principles-removal-irregular-migrants-and-rejected-asylum-seekers>.

¹⁰ The Council of Europe (CoE) was founded in 1949. It is an international organization with 47 member states, including 21 countries from Central and Eastern Europe. The European Union (EU) is a supranational and intergovernmental union of 27 independent member states, established in 1993 by the Maastricht Treaty. For more information on the Council of Europe and its conventions and instruments which apply to undocumented migrants, see PICUM's publication *Undocumented Migrants Have Rights: An Overview of the International Human Rights Framework*, (PICUM: Brussels, 2007), pp.22-25.

¹¹ The European Convention for the Protection of Human Rights and Fundamental Freedoms that entered into force in September 1953 was drawn up within the Council of Europe. All Council of Europe states, including all European Union member states, are party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹² Since the Convention's entry into force, thirteen protocols have been adopted. Some added further rights and liberties to those guaranteed by the Convention, while others dealt with procedural or organisational subjects.

Article 3 of the ECHR

Article 3 provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The European Court of Human Rights has determined in its case law that the removal of a foreigner might amount to a violation of Article 3 of the ECHR if the person suffered from a severe illness.

According to the ECtHR, Article 3 of the ECHR enshrines one of the cornerstone values of democratic societies; therefore, the ECtHR disallows derogation or limitation thereof. The Article applies *ratione personae* to every person physically present within the jurisdiction of one of the contracting state parties. The ECtHR determined in its case law that the removal of a foreigner might amount to a violation of Article 3 of the ECHR if the person suffered from a severe illness.

In a landmark ruling, *D v the United Kingdom*¹³, the Court prevented the expulsion of a St. Kitts national suffering from an advanced stage of HIV/AIDS on the grounds of Article 3 of the ECHR. Bearing in mind the critical stage the illness had reached, the court found that expulsion of the applicant would amount to inhuman and degrading treatment, since adequate medical treatment and assistance from family or social ties were unavailable in St. Kitts.¹⁴

In *Bensaid v the United Kingdom*¹⁵, the court extended the reach of Article 3 of the ECHR to cases of severe mental illnesses, recognising that the suffering associated with a relapse into hallucinations and psychotic delusions for the

schizophrenic applicant could, in principle, fall within the scope of Article 3 of the ECHR.

According to the court's jurisprudence, the following circumstances have been subject to particularly rigorous scrutiny:¹⁶

- The character and stage of illness;
- The availability and accessibility of medical treatment in the country of origin;
- The social and familial support in the country of origin.

This listing is, however, not exhaustive, and each individual case requires objective evaluation. A reliable, independent and comprehensive information source is crucial to guarantee a fair and adequate assessment whether involuntary return would amount to inhuman or degrading treatment.

On 27 May 2008 the Court issued a judgement on *N v the United Kingdom*.¹⁷ The case concerned an HIV-positive Ugandan national who arrived in the United Kingdom to claim political asylum. She was found to be very ill and was taken to a hospital where she was diagnosed as HIV positive with considerable immunosuppression (a CD4 count of ten)¹⁸ and disseminated tuberculosis. Over the course of the infection she had developed a second AIDS-defining illness, Kaposi's sarcoma, an aggressive form of cancer. However, due to the anti-retroviral treatment she was receiving, her condition stabilised. The uncontested medical certificates on which the Court's judgement was based stated that Ms. N. was "stable and free of any significant illness" and that she was likely to remain well for decades if able to remain in the United Kingdom. However, if returned to Uganda, "although anti-retrovirals are available

¹³ *D v the United Kingdom*, ECtHR judgement on 2 May 1997 (Case No: 146/1996/767/964).

¹⁴ See also *BB v France* (9 March 1998, RJD 1998-VI, p. 2596) where the Commission found that the deportation of a national from the Democratic Republic of Congo whose HIV/AIDS illness had stabilised due to the therapy he was receiving would amount to a violation of Article 3 ECHR, since adequate medical treatment and family support were unavailable in his country of origin.

¹⁵ *Bensaid v the United Kingdom*, ECtHR judgement on 6 February 2001 (Application No: 44599/98).

¹⁶ See also *Karara v Finland* (Application No. 40900/98, 29 May 1998), *SCC v Sweden* (Application No. 46553/99, 15 February 2000), *Henao v the Netherlands* (Application No. 13669/03, 24 June 2003), *Ndangoya v Sweden* (Application No. 17868/03, 22 June 2004), and *Amegnigan v the Netherlands* (Application No. 25629/04, 25 November 2004). In all cases, the applications were found to be inadmissible. In *SCC v Sweden*, the Court ruled that adequate treatment was available in Zambia, although at considerable cost. That the applicant's children and other family members lived in Zambia also was decisive in the case. In *Karara v Finland*, the decision was grounded on the early stage of the applicant's HIV infection, which had not yet developed to the AIDS stage. Despite the absolute character of Article 3 ECHR, the conduct of the applicant, who had a very serious criminal history, may have influenced the decision, as well. In the more recent cases of *Henao v the Netherlands*, *Ndangoya v Sweden* and *Amegnigan v the Netherlands*, the inadmissibility was based upon the early stage of the illness, the existing family ties, and the availability of medical treatment in the country of origin, notwithstanding the considerable financial and geographical barriers to access the treatment.

¹⁷ See *N v the United Kingdom*, judgement on 27 May 2008 (Application No. 26565/05).

¹⁸ The CD4 count of a healthy person is 500.

in parts of the country, she would not have the full treatment required and would suffer ill health, pain, discomfort and an early death as a result". Her life expectancy upon return would be drastically reduced to one or, at most, two additional years. In addition, Ms. N. claimed to have no family members in Uganda who would be willing or able to support her.¹⁹

The Court held by a majority that the expulsion would not give rise to a violation of Article 3. It was argued that the high threshold was not met for a case such as this, in which the "alleged future harm would emanate not from intentional acts or omissions of public authorities or non-state bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country".²⁰

This judgment raises concerns *inter alia* for the following reasons:

- In accordance with the joint dissenting opinion of the Judges Tulkens, Bonello and Spielman, it is not apparent why the Court sets the threshold for violations of Article 3 ECHR much higher if the suffering results from a naturally occurring illness rather than from intentional acts or omissions. As long as the examination of the case reveals that the minimum level of severity required for determination as inhuman or degrading treatment is attained and a real risk of exposure of the person to ill treatment is shown on substantial grounds, the applied threshold should be equal.

- When assessing the principles to be drawn from the case law, the Court points out that "a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights" is inherent in the whole of the Convention. The Court therefore concludes that Article 3 ECHR "does not place an obligation on the Contracting State to alleviate such disparities (of different levels of treatment available) through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction" and that a "finding to the contrary would place too great a burden on the Contracting States". The dissenting judges controvert this reasoning, claiming it to be contrary to the absolute character of Article 3 ECHR.²¹ Where the Convention calls for a balancing of legally protected interests and rights, it specifically states so in the provision in question.²² The absolute nature of article 3 ECHR disputes and finds irrelevant the reasoning of the Court that a state's obligation to alleviate disparities in treatment by providing free and unlimited health care to all foreigners within its jurisdiction "would place too great a burden on the Contracting States".²³

¹⁹ Ms. N. claimed that five of her six siblings had died of HIV-related illnesses in Uganda.

²⁰ See *N v the United Kingdom*, judgement on 27 May 2008 (Application No. 26565/05), para. 43.

²¹ See *inter alia* Paragraph 138 of the judgement *Saadi v Italy* on 28 February 2008 (Application No. 37201/06), which states, "Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to . . . expel any person who, in the receiving country, would run the risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule".

²² See, for example, Article 8 ECHR.

²³ See *N v the United Kingdom*, judgement on 27 May 2008 (Application No. 26565/05), para. 44

This most recent ruling may now provide a precedent in the Council of Europe's case law by limiting the obligations of States to allow migrants with a severe illness to remain in their country and provide them with ongoing treatment. The ruling under *D v the United Kingdom* has now been distinguished as a 'high threshold' which should apply only in 'very exceptional circumstances'.²⁴

Article 8 of the ECHR

Severely ill migrants also may profit from Article 8 ECHR, which provides:

1. *Everyone has the right to respect for his or her private and family life, home, and correspondence*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and as 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.*

The right to respect for private life includes the right to physical and moral integrity and therefore can be invoked if removal from the country would cause acute physical and mental suffering. Unlike Article 3 of the ECHR, however, this right is not absolute nor is it subject to proportionality. The article allows the contracting states to interfere with the right if in accordance with the law and necessity of a democratic society. The threshold for an Article 8 of the ECHR claim on medical grounds is equally high as for an Article 3 of the ECHR claim. Normally the European Court of Human Rights does not raise separate issues under Article 8 of the ECHR when assessing applications against expulsion on medical grounds.

European Union

Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union synthesizes the common values of the EU member states, including civil and political rights as well as economic and social rights.²⁵ If adopted, the Lisbon Treaty²⁶ will make the charter legally binding to all EU institutions, bodies and member states applying Community law, with the exception of Poland and the UK, which were permitted to opt out.

Article 19 of the Charter of Fundamental Rights states in its second paragraph:

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Treaty of the European Union²⁷

Finally, Article 6 of the Treaty on European Union provides that:

Hence it is crucial for all member states of the

1. *The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.*
2. *The Unions shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community Law.*

European Union to carry out their immigration proceedings with respect for human rights and human dignity, safeguarding those in need of protection and ensuring that no one is subjected to inhuman or degrading treatment by being sent back to a country where health and life are at stake.

²⁴ See *N v the United Kingdom*, judgement on 27 May 2008 (Application No. 26565/05), para. 43

²⁵ For further information, see the PICUM publication *Undocumented Migrants Have Rights, An Overview of the International Human Rights Framework* (March 2007: Brussels).

²⁶ At the time of publication of this report, the Treaty of Lisbon had not been ratified by the European Union.

²⁷ Available online at: <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>

Legal Framework

Article 72 (1) Residence Act

“The authority may issue a residence permit to third country nationals residing in the federal territory *ex officio* ... in cases particularly deserving of consideration on humanitarian grounds.”

Article 72 of the Austrian Residence Act²⁸ provides the possibility of granting a residence permit on humanitarian grounds to persons already residing in Austria. The Article particularly concerns migrants facing a real risk of being subjected to inhuman or degrading treatment in their countries of origin,²⁹ which may include the removal of a severely ill migrant to a country where medical treatment is not available. However, the language of the Article is rather general, and residence permits may be granted on other grounds, for example to those unable to travel.³⁰

The residence permit for humanitarian reasons is issued *ex officio* (i.e. it is not possible to file an application). A migrant can only propose the initiation of a residence permit procedure and submit supporting documents. The issuing authority has an ample margin of discretion in granting the permit.

General Requirements and Duration

To qualify for a residence permit, the Residence Act presupposes that no final and legally binding residence ban has been imposed on the applicant and that his or her identity has been confirmed.³¹ If the applicant does not possess appropriate identity documents, identity must be satisfactorily established by other means. Compliant with Article 11 (2) No. 3 and 4 of the Residence Act, residence permits shall only be issued if the person concerned holds health insurance with respect to all risks normally covered in the federal territory and provided the residence does not lead to a financial burden on a territorial entity. Exemptions from these requirements are granted only if proven necessary to maintain the migrant’s private or family life within the meaning of Article 8 ECHR. However, one must bear in mind the high threshold of Article 8 ECHR in cases of severe illness.³²

Initial applications for residence permits should only be submitted by applicants currently outside of Austria, but residence permits on humanitarian grounds may be exempted from this condition and from the fulfilment of other procedural conditions.³³ The residence permit is usually granted for a one-year period.³⁴

²⁸ *Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich (Niederlassungs- und Aufenthaltsgesetz – NAG)*, BGBl. I Nr. 100/2005 idF BGBl. I Nr. 99/2006. Entered into force on 1 January 2006. Retrieved on 1 June 2008 from <http://www.bmi.gv.at/downloadarea/niederlassung/rechtsgrundlagen/NAG.pdf>.

²⁹ Article 72 Residence Act in conjunction with Article 50 of the Foreigners Police Act (*Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreiseteil (Fremdenpolizeigesetz 2005 – FPG)*). Entered into force on 1 January 2006.

³⁰ See the wording of Article 72 Residence Act: “in particular”.

³¹ See Article 19 (2) Residence Act. The explanation given by the Ministry of Interior for this requirement was that the Austrian residence permit qualifies as an identity document. As such, it can only be issued if the identity is definite. Otherwise, the authorities might unintentionally provide a non-verifiable and even false identity by issuing a residence permit.

³² See chapter 2 above, European Legal Standards, pages 6 et seqq.

³³ See Article 74 Residence Act.

³⁴ See Article 20 Residence Act. Under certain circumstances, a permanent residence permit may be granted from the start (Article 73 Residence Act).

Procedure

During the residence permit procedure, the stay of the undocumented migrant remains unauthorised. However, migrants *already* in possession of a residence permit that they want to change due to their illness will, after the expiry of their former residence permit, remain authorised residents until a final decision is made.³⁵

The provincial governors (*Landeshauptmänner*) have responsibility for granting residence permits.³⁶ They may authorise the local administrative authorities (*Magistrate or Bezirkshauptmannschaften*) to carry out the procedure. In cases concerning humanitarian residence permits, Article 75 of the Residence Act calls for the consent of the Federal Minister of the Interior before making a decision.

When investigating the availability and accessibility of medical treatment in the country of origin, the caseworkers consult various sources of information, such as the media and internet, local and international NGOs, international organisations, embassies, the Ministry of Foreign Affairs and public health officers. The Federal Asylum Authority (*Bundesasylamt*) also manages a database compiling information on country of origin information, which is run by its directorate on the issue. An Asylum Information System is also in existence in the form of a database run by the Federal Ministry of the Interior. This system comprises of data on asylum cases examined in Austria, thus comprising country of origin information linked to the respective cases.

If the authorities deem that the decision necessitates a medical assessment of the applicant's health, a public health officer is contacted. These officers are health care

practitioners who act upon a contract or as civil servants on behalf of the local administrative authorities.

Though the foreigner does not need to prove the medical condition or the absence of medical treatment in the country of origin, he or she may influence the decision by submitting medical certificates and diagnostic findings by independent healthcare practitioners. The practitioners who participated in this study generally do not search for patient-specific information on the availability and accessibility of medical treatment in the country of origin, although some do contact doctors in the country of origin to obtain information on the actual situation there.

Other Residence Permits and Expulsion

The expulsion of sick migrants must be suspended if the foreigner would, upon return, face a real risk of being subjected to inhuman or degrading treatment in the country of origin³⁷ or where *de facto* reasons render expulsion impossible. The latter may apply, for example, if the person concerned is unable to travel due to a medical condition.

³⁵ However, the law requires that the 'application' be filed within 6 months of the former residence permit's expiration.

³⁶ See Article 3 (1) Residence Act.

³⁷ Article 46 in conjunction with Article 50, Foreigners Police Law.

Legal Framework

Article 9 Foreigners Law

“The foreigner who suffers from an illness, which constitutes a real risk to his or her life or physical integrity or a real risk of inhuman or degrading treatment, should there not be an adequate treatment in his or her country of origin or country of residence, may apply for an authorisation of residence.”

In Belgium ill undocumented migrants may apply for residence permits on the grounds of Article 9ter Foreigners Law.³⁸

Pursuant to this article, a foreigner can request authorisation to stay in Belgium if suffering from an illness that presents a real risk to life or physical integrity or that entails a real risk of inhuman or degrading treatment if returned to the country of origin due to the lack of adequate medical treatment possibilities. The lack of adequate medical treatment relates both to availability and to accessibility.³⁹

The article does not clearly indicate whether the residence permit must be issued once the criteria are satisfied by the applicant. The law merely stipulates that the applicant ‘may apply’ for it, by which one may assume that the authority decides the case on a discretionary basis.

General Requirements and Duration

To comply with general requirements, the applicant must submit an identity document⁴⁰ and documents stating the medical condition and information about treatment possibilities in the country of origin. If the application is successful, a temporary residence permit⁴¹ will be issued for a minimum of one year and will be renewable on an annual basis⁴². If the condition has not changed after five years of temporary residence status, a permanent residence permit shall be delivered.

Procedure

The Immigration Department of the Ministry of Home Affairs (*Dienst Vreemdelingenzaken*) decides on all residence permits, including those delivered on medical grounds. If the Immigration Department deems the complete application admissible, it will order the municipal authorities to confirm the actual place of residence in Belgium and, if confirmed, will authorise the stay of the applicant. Until a definite decision is issued, the migrant receives an annexe 4 or the so-called ‘orange card’⁴³, valid for three months at a time and renewable for as long as the procedure lasts.

The applicant is required to substantiate the application by submitting relevant documents concerning the illness itself and the lack of medical treatment in the country of origin. If the applicant fails to provide full evidence of these criteria, however, it is considered good governance that the authorities themselves investigate the situation and justify their decision based on the findings.

³⁸ Article 9ter was introduced in the *Law of 15 December 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen* by the *Law of 15 September 2006*, amending the Foreigners Law (*Vreemdelingenwet*). The coming into force is stipulated by the Royal Decree of 27 April 2007, published on 21 May 2007.

³⁹ See Belgische Kamer van Volksvertegenwoordigers, *Preparatory Text of the Belgian Parliament: ‘Memorie van toelichting (‘Exposée de Motifs’) of the Vreemdelingenwet of 2007*, 10 May 2006.

⁴⁰ Both asylum seekers whose asylum claim has not been subject to a final decision and foreigners who can demonstrate in a valid manner their incapacity to obtain the necessary identity documents are exempt.

⁴¹ Certificate of Registration in the Aliens’ Register (*Bewijs van Inschrijving in het Vreemdelingenregister*).

⁴² See Royal Decree of 17 May 2007 on the Law of 15 September 2006.

⁴³ Annex 4 of the Royal Decree of 8 October 1981 “*betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*”.

Once the applicant has submitted all the relevant information concerning the illness, including information on medical treatment possibilities in the country of origin, a civil-servant doctor (*ambtenaar-geneesheer*) assesses the risk and the possibilities for treatment in the country of origin. If necessary, the doctor will examine the applicant and will obtain additional advice from other health practitioners before providing a recommendation. Upon this recommendation, the Immigration Department will provide a motivated decision on the applicant's case.

Since the Belgian authorities did not respond to our questionnaire, it was not possible to observe the actual approach of caseworkers or civil-servant doctors in the residence permit procedure on obtaining information on the country of origin. However, a Belgian NGO has stated that the caseworkers consult information from Belgian embassies, international organisations, NGOs and local doctors. It remains unclear if they use CEDOCA, a database run by the authorities to provide country of origin information, which is currently only linked to asylum claims. Further information on this subject was not available; the legislation which had just come into force, and reliable sources of information on the authorities' procedures were not yet available at the time of writing this report.

Other Residence Permits and Expulsion

Foreigners who are not able to leave Belgium due to a brief, temporary condition, such as short-term illness or pregnancy, may apply for an extension of their temporary stay permit or visa. The extension is granted for a maximum of three months, depending on the specific case. It is however an extraordinary authorisation of stay, which does not have a legal basis in the Belgian Foreigners Law and which requires that the foreigner possess a visa or residence permit⁴⁴

Chapter 6 of the Foreigners Law deals with expulsion. The chapter stipulates that expulsion should not take place if it is ruled out by international treaties or in certain cases explicitly stated in Article 21 of the law.⁴⁵ Therefore, for persons who do not fall under the scope of Article 21 Foreigners Law, the authorities must refrain from expulsion if it would amount to inhuman or degrading treatment and thereby a violation of Article 3 ECHR.⁴⁶

⁴⁴ See for further information in the circular of the Immigration Department, 26 January 2004. Retrieved on 1 June 2008 from <http://www.medimmigrant.be/OB%2026%2001%202004%20verlenging%20kort%20verblijf%20nl.pdf>.

⁴⁵ For example, if the person is a recognised refugee or a child who either was born in Belgium or arrived under the age of 12 years and has ever since regularly and primarily lived in Belgium.

⁴⁶ See above Chapter 1, European Legal Standards

Legal Framework

Article L 313 - 11 Loi N° 2007 - 1631

“Save for cases where his or her presence constitutes a threat to public order, the temporary residence permit with the mentioning ‘private and family life’ is delivered as a Legal obligation to foreigners who habitually reside in France and whose state of health requires medical care to avert health consequences of exceptional gravity, if he or she cannot effectively benefit from appropriate treatment in the country where he or she originates from.”

French legislation⁴⁷ provides a temporary residence permit (*carte de séjour temporaire*) for foreigners habitually residing in France whose state of health requires medical care to avert health consequences of exceptional gravity, only if medical treatment is unavailable in the country of origin.⁴⁸ The provision stipulates that medical treatment in the country of origin is defined as unavailable as long as the applicant is unable to benefit effectively from it, thus including cases of inaccessibility. The criterion of ‘habitual residence’ is met if the seniority of the stay in France exceeds one year.⁴⁹ In cases in which the applicant’s presence constitutes a threat to public order and security, the applicant is still entitled to obtain a temporary residence permit ‘as a legal obligation’.⁵⁰

General Requirements and Duration

The temporary residence permit requires the submission of an appropriate identity document, as well as evidence of the medical condition and the lack of adequate treatment in the country of origin. The duration of the residence permit depends on the advice of the medical advisor⁵¹ but may not be issued for a period exceeding one year.⁵² The permit is renewable as long as the medical condition requires essential treatment that cannot be obtained in the country of origin.

Procedure

Once the application is considered admissible, a *récépissé de demande de titre séjour* is issued which authorises the applicant to remain on French territory⁵³. However, one French NGO we contacted stated that despite their legal obligation, the authorities usually refrain from issuing such a temporary authorisation in practice.

The *Préfet*⁵⁴ (or *Préfet de Police in Paris*) issues the decision after consultation with a state-affiliated medical advisor of the respective public health department (*médecin inspecteur de santé publique de la direction départementale des affaires sanitaires et sociales compétente*).⁵⁵ If necessary, the medical advisor may convene a medical consultation before a regional medical commission.⁵⁶

The medical advisor will be required to give advice on the following questions:⁵⁷

- The state of health of the foreigner and the necessity of medical treatment;
- The risk of exceptionally grave consequences if adequate medical treatment should be withheld;
- The risk of the applicant not being able to benefit from appropriate treatment in their country of origin;
- The estimated duration of necessary medical treatment;
- The applicant’s ability to travel.

⁴⁷ *Loi N° 2007 – 1631 du Novembre 2007 relative à la maîtrise de l’immigration, à l’intégration et à l’asile*. Retrieved on 1 June 2008 from http://www.legifrance.gouv.fr/affichTexte.do?sessionId=EDF9D07B115806301EC702CC7A1D7B48.tpdjo14v_2?cidTexte=JORFTEXT000000524004&dateTexte=20080425#LEG.

⁴⁸ Article L 313 – 11 Loi N° 2007 – 1631.

⁴⁹ See *Circulaire of the Ministry of Interior No. NOR/INT/D/98/00108C of 12 May 1998 d’Application de la loi no. 98-349 du 11 mai 1998 relative à l’entrée et au séjour des étrangers en France et au droit d’asile*. Retrieved on 1 June 2008 from <http://www.france.qrd.org/texts/immigration/interieur19980512.txt>.

⁵⁰ “*La carte de séjour temporaire . . . est délivrée de plein droit*” (i.e. *ex debito justitiae*, meaning ‘as a legal obligation’).

⁵¹ See *Circulaire* of 12 May 1998, footnote 49.

⁵² Article L 313 - 1 Loi N° 2007 – 1631.

⁵³ See Article R 311 – 4 Loi N° 2007 – 1631.

⁵⁴ The prefect is the representative of the state at the departmental level.

⁵⁵ In Paris the prefect of police makes the decision after consultation with the medical advisor of the prefecture of police.

⁵⁶ The constitution of the commission is fixed by a Decree of the Conseil d’Etat.

⁵⁷ See *Circulaire* of 12 May 1998 (footnote 49).

The Ministry of Health and Ministry of Immigration share country files on their intranet network system, including country of origin information on medical treatment, and the network is accessible to the caseworkers and the medical advisor. However, NGOs contacted by our researchers claim that it has been established in a limited way, restricting itself to information on pathologies that can be treated in the country of origin. Therefore, the true focus is on expulsion procedures rather than residence permits.

Other Residence Permits and Expulsion

If the individual concerned does not fulfil the requirement of residing habitually in France, a provisional residence permit (*Autorisation provisoire de séjour*) may be granted for a period of up to six months.⁵⁸

This permit is renewable.⁵⁹

In addition, a foreigner who is habitually residing in France shall not be expelled if the state of health requires medical care in order to avoid exceptionally grave health consequences and if the person is unable to access appropriate treatment in the country of return.⁶⁰

⁵⁸ See Article R 313 – 22 (3) and the Circulaire of 12 May 1998 (footnote 49).

⁵⁹ According to the French organisation Comede (*Comité médical pour les exiles*), abusive use is made of the provisional residence permit. It is often issued instead of a temporary residence permit if the estimated duration of necessary medical treatment falls below one year. Moreover, it is frequently delivered in principle as a 'first one-year stage' even though the legal requirements for a temporary residence permit are fulfilled. See Guide Comede 2008, retrieved on 1 June 2008 from <http://www.comede.org/UserFiles/File/GuideComede2008.pdf>.

⁶⁰ Excluded are foreigners whose behaviour is likely to harm the fundamental interests of the state or cases linked to terrorist activities, acts of explicit and deliberated provocation or discrimination, and hate or violence against a person or a group.

Legal Framework

Article 25 Residence Permit

(3) "A foreigner should be granted a residence permit if the conditions for a prohibition of deportation are fulfilled in accordance with Section 60 (2) (3), (5) or (7)."

(4) "A foreigner, who is not subject to a final deportation order, may be granted a residence permit for a temporary stay if his or her continued presence in the Federal territory is necessary on urgent humanitarian or personal grounds or due to substantial public interests."

(5) "A foreigner who is subject to a final deportation order may be granted a residence permit if his or her departure is impossible in fact or in law and the obstacle to deportation is not likely to be removed in the foreseeable future."

The German Residence Act⁶¹ provides three main provisions that can be invoked by migrants with a severe illness in order to remain in Germany.

Pursuant to Article 25 (3) in conjunction with Article 60 (7) of the Residence Act, a residence permit shall be granted to a foreigner facing a serious and concrete risk against their life and physical integrity or freedom if returned to the country of origin. According to the prevailing case law of the Federal Administrative Court (Bundesverwaltungsgericht) these conditions are *inter alia* applicable should the person concerned face a grave and serious health impairment shortly after return because the illness cannot be adequately treated in the country of origin. Once these requirements are met, the applicant is entitled to obtain a residence permit; except in atypical and exceptional circumstances, the competent authority is obliged to come to a positive decision.

Article 25(4) of the Residence Act deals with temporary residence permits on urgent humanitarian or political grounds and can *inter alia* be applied to cases in which urgent personal grounds arise (e.g. necessary surgery, continuation of medical treatment which cannot be ensured in the country of origin, etc.)⁶². The granting of the temporary residence permit is discretionary (i.e. the applicant has no entitlement as conferred by Article 25 (3) Residence Act).

The granting of a residence permit where judicial or *de facto* reasons render the departure of the migrant impossible is allowed under Article 25 (5). The impossibility of departure due to judicial reasons includes legal impediments resulting from the internal situation in Germany (e.g. a severely ill migrant cannot be deported due to Article 1 in conjunction with Article 2 of the German Constitution⁶³). *De facto* reasons are *inter alia* at stake where the foreigner is unable to travel due to health reasons. The granting of the residence permit is discretionary but becomes mandatory if the deportation is suspended for more than 18 months and no exceptional circumstances warrant a contrary decision.

General Requirements and Duration

Article 5 of the Residence Act sets out the general requirements for residence permits, such as confirmed identity, sufficient means of subsistence and appropriate standard of accommodation. While the first residence permit mentioned above⁶⁴ is exempted from compliance with all requirements, the other two residence permits⁶⁵ may be exempted from all or some requirements only at the discretion of the issuing authority.⁶⁶

⁶¹ *Aufenthaltsgesetz vom 30. Juli 2004 (BGBl. I S. 1950) zuletzt geändert durch das Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union vom 19 August 2007 (BGBl. I S. 1970)*. Retrieved on 1 June 2008 from http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Nachrichten/Pressemitteilungen/2007/08/Neues_Aufenthaltsgesetz,templateId=raw,property=publicationFile.pdf/Neues_Aufenthaltsgesetz.pdf.

⁶² With the former Residence Act, it was contested whether foreigners who are obliged to leave fall under the scope of Article 25 (4). According to the preliminary instructions of the Federal Ministry of Interior, this group may only qualify for a residence permit pursuant to Article 25 (5) and Article 23 Residence Act on cases of hardship. (See the *Preliminary Instructions of the Federal Ministry of Interior regarding the Foreigners Act*, issued 22 December 2004, Paragraph 25.4.1.1. Retrieved on 1 June 2008 from http://www.fluechtlingsinfo-berlin.de/fr/gesetzgebung/BMI_Hinweise_AufenthG_221204.pdf). This dispute was settled by the new Residence Act that explicitly states that Article 25 (4) does only apply to foreigners who are not obliged to leave Germany, thus excluding undocumented migrants.

⁶³ Article 1 of the Constitution stipulates respect for human dignity, while Article 2 grants the right to free development of personality and the right to life and physical integrity. Retrieved on 1 June 2008 from <http://www.iuscomp.org/gla/statutes/GG.htm>.

⁶⁴ Residence Permit pursuant to Article 25 (3) in conjunction with Article 60 (7) Residence Act.

⁶⁵ Residence Permit pursuant to Article 25 (4) and (5) Residence Act.

⁶⁶ See Article 5 (3) Residence Act.

The residence permit pursuant to Article 25 (3) Residence Act may be issued for a duration of one to three years.⁶⁷ Residence permits pursuant to Article 25 (4) and (5) Residence Act will not exceed a duration of 6 months, as long as the foreigner has not been regularly staying in Germany for a period of more than 18 months.⁶⁸ After 7 years of continuous authorised residence, the individual concerned may apply for a permanent residence permit.⁶⁹

Procedure

If the applicant is not regularly staying in Germany at the time of the application and is obliged to leave the country, a stay of expulsion will be issued during the decision procedure. An applicant who wants to switch residence status due to the medical condition is considered authorised under the former residence purpose until a decision is taken.⁷⁰

The locally competent foreigners authority determine applications for residence permits autonomously, save for cases pursuant to article 25 (3) in conjunction with article 60 (7) Residence Act, in which the foreigners authority must cooperate with the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*).⁷¹ If asylum proceedings were conducted previously, the Federal Office for Migration and Refugees is competent to decide the case.

Caseworkers investigate the availability and accessibility of medical treatment in the country of origin primarily by consulting information collected by the Ministry of Foreign Affairs and the database run by the Federal Office for Migration and Refugees (MILO).

The applicant must credibly show the fulfilment of all criteria that favour his or her position by including medical certificates and information on the situation in the country of origin. The doctors who provide the medical certificates often search for patient-specific information on the availability and accessibility of medical healthcare in the country of origin. Since the database run by the Federal Ministry of Migration and Refugees is not publicly available,⁷² they must consult various other sources, such as international organisations, NGOs, healthcare practitioners in the country of origin and country reports of the Ministry of Foreign Affairs. In addition, the authority can contact a public health officer (*Amtsarzt*) if it considers the medical certificates submitted by the applicant to be insufficient.

Other Residence Permits and Expulsion

If the usual legal requirements are not met and the foreigner would be obliged to leave Germany, § 23 (a) Residence Act allows the German *Bundesländer*⁷³ to set up hardship commissions. These commissions may conduct hearings in special cases and recommend the granting of a residence permit on special and exceptional humanitarian grounds.⁷⁴ However, the procedure details are determined solely by the Bundesländer and therefore vary in their requirements.⁷⁵

If the authority refuses to grant a residence permit, a temporary suspension of deportation⁷⁶ must be issued in favour of an ill migrant if the deportation is ruled out for judicial or de facto reasons.⁷⁷

⁶⁷ See Article 26 (1) Residence Act.

⁶⁸ *Ibid.*

⁶⁹ Compared to the general provision, calling for 5 years of legal residence.

⁷⁰ See Article 81 (3) and (4) Residence Act.

⁷¹ See Article § 72 Abs. 2 Residence Act.

⁷² While there is a comprehensive database on jurisdiction available to everyone, the database concerning country of origin information is only available to authorities. Retrieved on 1 June 2008 from http://www.bamf.de/clin_006/nn_442166/DE/Asyl/Informationszentrum/Milo/milonode.html?__nnn=true.

⁷³ States of the Federal Republic of Germany.

⁷⁴ Hardship commissions have been set up in Berlin, Bavaria, Mecklenburg-Western Pomerania, etc.

⁷⁵ In Bavaria, for example, it is necessary to provide evidence of prospects of sufficient subsistence in order to qualify for the procedure. See Article 5 (5) Hardship-Commission-Regulation (*Verordnung über die Einrichtung einer Härtefallkommission nach § 23 a des Aufenthaltsgesetzes*). Retrieved on 1 June 2008 from http://www.stmi.bayern.de/imperia/md/content/stmi/buergerundstaat/auslaenderrecht/hfkomv_verl_011207.pdf.

⁷⁶ Article 60 a (2) Residence Act.

⁷⁷ Reference can be made to the comments on residence permits pursuant to Article 25 (5) Residence Act.

Legal Framework

Article 45 LXXX of 2007 on Asylum

(1) “The prohibition of *refoulement* (non-*refoulement*) prevails if the person seeking recognition were exposed to the risk of persecution due to reasons of race, religion, ethnicity, membership of a particular social Group or political opinion or to death penalty, torture, cruel, inhuman or degrading treatment or punishment in his or her country of origin, and there is no safe third country which would receive him or her.”

(4) “In the event of the existence of the prohibition under subsection (1) or (2), based on the proposal of the refugee authority, the alien police authority shall recognise the foreigner as a person authorised to stay.”

The new Hungarian Residence Act⁷⁸ includes a provision explicitly dealing with residence permits for the purpose of receiving medical treatment. However, the act applies only to foreigners seeking admission to Hungary’s territory.⁷⁹

According to Section 29 (1) Residence Act, certain groups are eligible to obtain humanitarian residence permits.⁸⁰ However, this does not include those with a severe illness and individuals may therefore only qualify if they can be subsumed under one of the listed groups.

Section 30 (1)(c) of the Residence Act stipulates that a certificate of temporary residence shall be issued to persons who have remained in

Hungary beyond the duration of lawful residence *inter alia* due to humanitarian reasons or for personal or other unavoidable reasons beyond their control. The wording⁸¹ suggests that the section only applies to migrants who were authorised to enter and stay in Hungary beforehand.⁸² The duration of a certificate of temporary residence is three months and may be extended by three additional months at a time.⁸³ The certificate is issued *ex officio*, thus the foreigner may only suggest its issuance. The Hungarian Office for Immigration and Nationality does state that the certificate is only a temporary authorisation of stay that is granted whilst the foreigner is going through the procedure for a residence permit application and only lasts until a final decision is taken. The temporary authorisation has the sole purpose of authorising the migrant’s stay during the procedure and therefore cannot be invoked independently.⁸⁴

The only possibility for an ill migrant in Hungary who cannot be subsumed under one of the categories listed in the procedure for granting a residence permit on humanitarian grounds is to apply for asylum. Even if he or she cannot claim to be in fear of persecution⁸⁵, the petitioner may still be protected against deportation under Article 45 Asylum Act⁸⁶, which prohibits *refoulement* if the person would be exposed to the risk of inhuman or degrading treatment in the country of origin. Article 45 of the Asylum Act explicitly widens the scope of *non-refoulement* from the persecution-based

⁷⁸ Act II of 2007 on the Admission and Right of Residence of Third Country Nationals, entered into force on 1 July 2007. Unofficial English version retrieved on 1 June 2008 from <http://www.helsinki.hu/eng/indexm.html>.

⁷⁹ See Section 24 (1) Act II of 2007.

⁸⁰ For example recognised stateless persons, persons who have been granted refugee status, etc.

⁸¹ See Section 30 subsection (1c) Act II of 2007, which uses the language “who remained in the territory beyond the duration of lawful residence”.

⁸² This could include migrants with a residence permit pursuant to Section 24 (1) whose residence permit expired due to the maximum time limit of 4 years, but who, due to their state of health and the absence of treatment possibilities in the country of origin, still cannot be returned.

⁸³ See Section 30 (2) Act II of 2007.

⁸⁴ This is, however, not clearly apparent in the wording of the text, which only refers to an application procedure that has to be initiated beforehand in Article 30 (1a) and (1 b) Act II of 2007. Therefore, it could be argued that the legislator would have stipulated the linkage to a residence permit application procedure not only for paragraph 1a and b, but also for all grounds under which a certificate of temporary residence might be issued, should the legislator have intended its broad application.

⁸⁵ This might be invoked in cases in which, for example, the applicant is not allowed access to governmental hospitals to receive necessary medical treatment due to membership of a particular social group.

⁸⁶ Act LXXX of 2007 on Asylum (Asylum Act), entered into force on 1 January 2008. Unofficial English version retrieved on 1 June 2008 from <http://www.helsinki.hu/eng/indexm.html>.

approach of the Geneva Convention⁸⁷ to a broader coverage, including *inter alia* inhuman and degrading treatment. Once the refugee authority proposes the prohibition of *refoulement*, the immigration police authority shall recognise the foreigner as a person authorised to stay.⁸⁸ In practice, the immigration police authority then issues a residence permit on humanitarian grounds.

General Requirements and Duration

The authorities may refrain from requesting compliance with the general conditions for residence permits (e.g. valid travel document, visa or residence permit, sufficient means of subsistence) on humanitarian grounds.⁸⁹ The residence permit is granted for a maximum period of one year.⁹⁰

Procedure

During the procedure, the applicant is authorised to stay in Hungary. The applicant must submit evidence of his or her identity and must substantiate the claim to a real risk of being subjected to inhuman or degrading treatment upon return to the country of origin. Therefore, the applicant must submit a medical certificate providing information supporting the claim. The healthcare providers who examine the applicant's health do not search for information on medical treatment in the country of origin. The Office for Immigration and Nationality then assesses the situation by consulting the Country of Origin Information Centre (COI Centre), which operates a database on country of origin information, though the Centre does not specialise in medical treatment. If in a specific case special data on medical treatment is needed in order to make a decision, the COI Centre searches for this information

and communicates its findings to the Office of Immigration and Nationality. A medical advisor is not contacted by the authorities.

Other Residence Permits and Expulsion

The Residence Act does not clearly state whether migrants with a serious illness are protected against expulsion. Section 51 stipulates that foreigners shall not be expelled or returned to a country where there is substantial reason to believe that they are likely to be subjected to the death penalty, torture or any other form of cruel, inhuman or degrading treatment or punishment. The Section closes by parenthesising the word *non-refoulement* without clearly stating whether it refers to the general term in the Geneva Convention or extension to non-persecution based inhuman and degrading treatment as in the Asylum Act. However, the enumeration of grounds for protection against expulsion is not exhaustive.⁹¹ There is room for interpretation of Section 51 Act II of 2007, allowing for inclusion of cases of indirect inhuman and degrading treatment arising from the mere absence of adequate medical treatment possibilities in the country of origin.

Under the Asylum Act, expulsion of ill asylum applicants who do not fall under the scope of *non-refoulement* shall be suspended if have their state of health is in a very poor condition.⁹² The applicant will be obliged to leave Hungary as soon as the medical condition ceases to exist.⁹³

⁸⁷ Article 33 (1) of the 1951 Geneva Convention Relating to the Status of Refugees provides that “no Contracting State shall expel or return (‘refouler’) a refugee, against his or her will, in any manner whatsoever, to a territory where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion”.

⁸⁸ See Article 45 (4) Act LXXX of 2007 on Asylum.

⁸⁹ See Section 13 (2) Act II of 2007.

⁹⁰ See Section 14 (2) Act II of 2007.

⁹¹ See the wording of Section 51 Act II of 2007, “Third country nationals may not be turned back or expelled to a country... In particular, where the third country national is likely to be subjected to persecution”.

⁹² See Section 45 (8b) Act LXXX of 2007 on Asylum, which asserts that the state of health must be in such poor condition at the time of the adoption of the decision that the execution of the obligation to leave the country would result in a serious, irreversible or permanent deterioration of the state of health or would result in a life threatening condition. This state of health must be confirmed by a statement from an expert in forensic medicine.

⁹³ See Section 45 (9) Act LXXX of 2007 on Asylum, permitting return when the person's state of health allows for travelling again or adequate medical treatment can be received in the country of origin.

Article 5 (6) Single Text on Immigration

“Save for serious reasons, particularly of humanitarian character or arising from constitutional or international obligations of the Italian State, the refusal or revocation of residence permits may also be based upon conventions or international agreements, in force in Italy, when the alien does not satisfy the conditions of stay in one of the contracting States.”

Legal Framework

In Italy the law does not explicitly designate a residence permit for medical reasons. Article 5 (6) of the Single Text on Immigration⁹⁴ defines the scope under which a residence permit may be refused or revoked by the Italian state and stipulates that, as an additional ground, revocation or refusal may also be based on conventions or international agreements when the applicant does not satisfy the conditions of stay in one of the contracting states. However, cases in which serious matters of humanitarian character or individual rights arising from constitutional or international obligations are at stake will be exempted.

This text serves, though this is not clearly indicated, as a legal basis for residence permits on humanitarian or constitutional grounds. As regards the latter, the Constitutional Court has ruled that the expulsion of a severely ill migrant would be detrimental to the right of every person present in Italy to have access to essential and continuous health care pursuant to Article 2 and 32 of the Constitution.⁹⁵ The administrative courts picked up the interpretation of the Constitutional Court in their continuous jurisprudence, determining that irrespective of immigration status and whether the disease was first diagnosed in Italy, a person suffering from a severe illness who does not have the possibility to obtain adequate medical treatment in the country of origin should not be expelled.⁹⁶

Therefore, Article 5 (6) of the Single Text on Immigration provides the possibility of granting an atypical residence permit for humanitarian reasons to severely ill undocumented migrants already residing in Italy. However, the authorities have an ample margin of discretion in granting the residence permit, and many NGOs interviewed in the course of this research stated that the authorities often refrain from making a positive decision.

General Requirements and Duration

In Italy we found it quite difficult to obtain information on the legal framework and procedure. The legislation and most explanatory literature are only available in Italian. Moreover, we had problems making contact with NGOs who could provide us with the required information. Thus, we are unable to confirm whether the residence permit is usually granted for a distinct period and only upon compliance with certain general requirements. We are also uncertain as to the legal status of the applicant during the procedure, and the rules concerning the burden of proof remain unclear.

Procedure

The locally competent *Questure* deals with the applications for residence permits. The answers we received in response to our question as to whether the caseworkers themselves search for country of origin information on medical treatment possibilities showed a contradictory picture. While some NGOs stated that the authorities do investigate, this opinion was contradicted by others. Since the Italian authorities did not respond to our enquiry, the actual situation remains unclear. Healthcare providers in Italy responded that they are not contacted by the caseworkers.

⁹⁴ *Testo unico sull'immigrazione e recenti modifiche, pubblicato nella Gazzetta Ufficiale n. 191 del 18 agosto 1998 - S.O. n. 139*. Retrieved on 1 June 2008 from <http://www.meltingpot.org/articolo452.html>.

⁹⁵ See the judgment of the Constitutional Court of 17 July 2001, number 252, published in “*Gazzetta Ufficiale*” number 29, 25 July 2001.

⁹⁶ For example, see the judgment of “*Il Tribunale Amministrativo Regionale per la Liguria*” on 15 March 2006 (218 N. / REG. SEN. 2006, N. 00218/2006 REG. RIC).

Other Residence Permits and Expulsion

According to Italy's Single Text on Immigration, the expulsion of migrants must be suspended in cases where the person concerned is pregnant, is the mother of a child under 6 months old, or could be subjected to persecution if returned to the country of origin. As stated above, however, severely ill migrants are protected against expulsion pursuant to the Article 2 Single Text on Immigration⁹⁷ in conjunction with Articles 2 and 32 of the Italian Constitution.

⁹⁷ Article 2 Single Text on Immigration stipulates that the fundamental rights arising from the internal Italian law, from international conventions or from the generally recognized principles of international law are granted to every foreigner present at the frontier or in the territory of the Italian State.

Legal Framework

Article 14 Aliens Act

“Our Minister is competent:

- (a) To approve, reject or not handle applications for granting a temporary residence permit
- (b) To modify a temporary residence permit, either on request of the holder of the permit or because of changed circumstances”

3.4 (3) Aliens Decree

“Unless the aim for which the alien wants to stay in the Netherlands is to such an extent related to the situation in the country of origin that for the appraisal of it, according to the judgment of Our Minister, a submission of an application as meant in Article 28 of the law is necessary, Our Minister can grant, under another restriction than named in the First Paragraph, a temporary residence permit, meant in Article 14 of the Law.”

According to Article 14 of the Aliens Act⁹⁸ in conjunction with Article 3.4 (1r) and 3.46 of the Aliens Decree⁹⁹ a temporary residence permit may be granted if medical treatment is needed in the Netherlands as the only country in which the special treatment can take place. Moreover, since the financing of the treatment costs must be secured, most undocumented migrants will fall outside the scope of this provision as they are systematically denied access to the labour market and cannot avail of social assistance.

Article 28 in conjunction with Article 29 (1b) of the Aliens Act provides the possibility of applying for an asylum-related residence permit once the high threshold is met (i.e. when it is shown that the deportation of the migrant would amount to inhuman or degrading treatment). This provision also includes unintended inhuman or degrading treatment arising from the lack of medical care in the country of origin.

Aside from asylum residence permits, severely ill undocumented migrants may qualify for a residence permit in cases in which the termination of medical treatment in the Netherlands would result in a medical emergency situation,¹⁰⁰ the treatment for which cannot be adequately provided in the country of return.¹⁰¹ The medical treatment preventing the emergency situation must be expected to last longer than one year. If the expected period falls below one year, a stay of expulsion will be issued instead. The authorities retain all discretion as to whether or not the residence permit is granted.

General Requirements and Duration

As a general rule, applications for residence permits in the Netherlands may be rejected if the applicant does not possess a valid authorisation for temporary stay, a valid travel document and sufficient means of subsistence.¹⁰² However, the possession of a valid authorisation of stay is not required for the application procedure if the state of health of the applicant makes it inadvisable for them to travel.¹⁰³ Moreover, an exemption of the requirement to hold a valid travel document can be made if the applicant can prove that this non-possession is based on reasons that rest upon their government.¹⁰⁴

Since September 2007, foreigners without an identity document who are awaiting a decision on an residence permit application as mentioned above or whose expulsion has been suspended on medical grounds have the right to obtain a W2-permit which serves as an identity document throughout the application procedure or postponement of expulsion.¹⁰⁵ The W2-permit, however, requires the possession of a valid visa, issued by the competent embassy of the country of origin of the applicant. Exemptions from this requirement are only made if the applicant can

⁹⁸ *Wet van 23 November 2000 tot algehele herziening van de Vreemdelingenwet (Vreemdelingenwet 2000)*. Retrieved on 1 June 2008 from www.wetten.nl.

⁹⁹ *Besluit van 23 November 2000 tot uitvoering van de Vreemdelingenwet 2000 (Vreemdelingenbesluit 2000)*. Retrieved on 1 June 2008 from www.wetten.nl.

¹⁰⁰ A medical emergency situation is one in which the person concerned suffers from an impairment that will lead to death, infirmity or another form of serious mental or physical damage in the short-term, should the necessary treatment be withheld. The phrase "in the short term" is understood to describe a period of three months.

¹⁰¹ Pursuant to Article 14 Aliens Act in conjunction with Article 3.4 (3) Aliens Decree, which serves as a “catchall element”.

¹⁰² See Section 16 Aliens Act.

¹⁰³ Section 17 (1)(c) Aliens Act.

¹⁰⁴ See Section 3.72 Aliens Decree.

¹⁰⁵ For further information on the W2-permit, see the official site of the Immigration and Naturalisation Service, retrieved on 1 June 2008 from http://www.ind.nl/nl/inbedrijf/actueel/wat_is_eeen_W2-document.asp.

establish that it would be impossible for them to return to their country of origin to obtain such a visa (e.g. that they are too sick to travel).

The residence permit is granted for one year and may be extended by consecutive periods of one year. Only in cases where it is almost certain that medical treatment has been bound permanently to the Netherlands may the residence permit for medical emergency situations be granted for the duration of five years.¹⁰⁶ Neither holders of residence permits to allow medical treatment nor those who have permits to stay due to a medical emergency situation may subsequently qualify for a permanent residence permit.¹⁰⁷

Procedure

During the application procedure, the stay of the migrant is authorised until a final decision is taken, provided the applicant is in possession of a W2-permit.¹⁰⁸ The Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) is the competent authority.

In medical emergency cases, the applicant must submit medical certificates confirming their illness and listing the doctor(s) they are seeing. The Medical Advisory Board (*Bureau Medische Advisering*), a department of the Ministry of Justice composed of health care practitioners, will then evaluate the case. The applicant must sign a release from medical confidentiality so the authorities may contact the listed doctors. They then question the applicant's doctor about the medical condition in order to assess the necessity of the medical treatment, the availability of treatment in the country of origin, and the ability of the applicant to travel.

The authorities investigate the situation in the home country of the applicant to gain information about the availability and accessibility of care. If they conclude that adequate medical treatment is available, the applicant must prove the contrary.¹⁰⁹ The country of origin information is primarily received from International SOS and from specially appointed doctors who are working in the countries of origin.¹¹⁰ The doctors (*Vertrouwensartsen*) are appointed by the Ministry of Foreign Affairs and the embassies.

Other Residence Permits and Expulsion

Pursuant to Article 64 of the Aliens Act, the expulsion of a foreigner may be prohibited on medical grounds if their health would make it inadvisable to travel.

¹⁰⁶ See Article 3.60 Aliens Decree.

¹⁰⁷ See *Vreemdelingencirculaire* 2000 (B) 8/3.

¹⁰⁸ See explanation of the W2-permit above.

¹⁰⁹ Accessibility is not required.

¹¹⁰ International SOS is a worldwide medical assistance company providing medical care and emergency medical assistance. The organisation deals mainly with foreigners from Western countries with medical conditions (i.e. in many cases the data provided by International SOS does not match the actual cause of consultation).

Legal Framework

Article 122 Act 23/2007

(1) “Nationals from third countries do not need a visa for the granting of a temporary residence permit, such as:

(g) Persons who suffer from a disease that requires prolonged medical assistance preventing him or her to return to the country of origin in order to avoid a health hazard to the concerned person.”

Portugal’s new Residence Act (Act 23/2007) provides, unlike its former version, the possibility for ill undocumented migrants to obtain residence permits.¹¹¹ According to Article 122 (1g) of Act 23/2007, a third country national may apply for an authorisation to stay if suffering from a disease that requires prolonged medical assistance preventing return to the country of origin to avoid a health hazard.¹¹² The entity making the decision analyses each individual case in relation both to the exceptional circumstances and to the general requirements, and the entity decides on a discretionary basis.

General Requirements and Duration

Article 122 of Act 23/2007 explicitly exempts applicants from the requirement of holding a valid visa.¹¹³ However, they are obliged to fulfil the other general requirements for residence permits including *inter alia* proof of means of sufficient subsistence and the guarantee of accommodation.¹¹⁴

A temporary residence permit is usually valid for a period of one year and is renewable for successive periods of two years.¹¹⁵ After five

years, the person concerned may apply for a permanent residence permit.¹¹⁶

Procedure

A migrant who applies for a residence permit receives a document proving that they have filed an application for a residence permit and is authorised to stay during the course of the application procedure. The permit is valid until a final decision is taken but must be renewed every 60 days.

Applications for temporary residence permits must be submitted to the Directorate General of the Immigration and Borders Office (*Servico de Estrangeiros e Fronteiras*). According to the Portuguese NGOs that participated in this study, when assessing an application for medical reasons caseworkers consult international NGOs, medical services and the Portuguese embassies for information on the country of origin. There is no authority-run database in Portugal comprising of information on medical treatment and medication in countries of origin. While no state-affiliated or independent healthcare practitioner is contacted by the authorities, the applicant must provide a medical certificate issued by the official health authority or another officially recognised health authority.

The applicant has the burden of proving the severity of their medical condition and the existing lack of adequate treatment in their country of origin. To substantiate the application, they must provide a medical certificate stating the need for prolonged medical treatment due to an illness which prevents return.

¹¹¹ Act 23/2007 of 4 July 2007, which approves the legal framework of entry, permanence, exit and removal of foreigners into and out of national territory. Retrieved on 1 June 2008 from <http://www.sef.pt/portal/V10/EN/asp/page.aspx>.

¹¹² Although the wording of Article 122 Act 23/2007 does not clearly indicate that it serves as a legal basis for granting a residence permit (it only states that “nationals from third countries do not need a visa for the granting of a temporary residence permit, such as . . . a person who suffers from a disease that requires prolonged medical assistance preventing him or her to return to the country of origin in order to avoid a health hazard to the concerned person”), the National Immigrant Support Centre (CNAI Lisboa) confirmed its nature as a legal basis.

¹¹³ Pursuant to Article 77 Act 23/2007, a person applying for a residence permit must, in principle, hold a valid residence visa, but medical-based applicants are exempted.

¹¹⁴ See Article 77 Act 23/2007.

¹¹⁵ See Article 75 (1) Act 23/2007.

¹¹⁶ See Article 80 Act 23/2007.

Other Residence Permits and Expulsion

Individuals who fail to satisfy the legal requirements but who nonetheless cannot be sent back to their countries of origin may benefit from article 123 of Act 23/2007 which rules that a temporary residence permit for humanitarian reasons may be granted to foreign citizens who do not fulfil the requirements of the present law.¹¹⁷ This provision serves as a catchall element and allows the authorities to grant residence permits in exceptional cases which are not foreseen by the law. Though the general requirements for granting residence permits still apply, the authorities may refrain from demanding their fulfilment and may grant a residence permit in spite of certain non-compliance.¹¹⁸

As for expulsion, Article 143 of the new Residence Act prohibits expulsion if there is a real risk that the foreigner may suffer torture, inhuman or degrading treatment upon return to the country of origin according to the meaning of article 3 of the European Convention of Human Rights (ECHR). Paragraph 2 of the Portuguese Residence Act postulates, however, that the person concerned has to call upon the “fear of being pursued” (i.e. the explicit protection against expulsion is constricted to cases where the person is seeking international protection from the deliberate infliction of ill treatment). Article 143 of the Residence Act cannot, therefore, be invoked if the inhuman and degrading treatment arises from the mere lack of medical treatment in the country of origin.

¹¹⁷ A residence permit may then be granted through a proposition by the Director General of the Immigration and Border's Office or by initiative of the Ministry of Internal Affairs.

¹¹⁸ See Article 77 Act 23/2007.

Legal Framework

Article 45 Royal Decree 2393/2004

(4) “An authorisation for humanitarian reasons may be granted in the following cases (presumptions):

(b) To foreigners who attest to suffer from a supervening disease of serious character requiring specialised medical assistance, which is inaccessible in their country of origin and would constitute a serious risk for the health or life if the medical treatment was interrupted or terminated. To credit the necessity, a medical certificate issued by the corresponding health authority is required.”

The Spanish immigration law deals with temporary residence permits for exceptional reasons under title 4, chapter 1, section 3(a). Article 45 (4b) of the Royal Decree 2393/2004 explicitly states that a migrant who, due to a serious illness, needs special medical treatment which is not accessible in the country of origin and, in case of interruption or termination of that treatment, would face a real risk to life or physical integrity may qualify for a temporary residence permit.¹¹⁹ The provision applies to all migrants irrespective of their legal residence status. The permit is provided on a discretionary basis.

General Requirements and Duration

The applicant does not require a valid visa to obtain an authorisation for humanitarian reasons but must submit a passport or another recognised travel document verifying their identity¹²⁰ and must provide documentary evidence in the form of a medical certificate from the local health care authorities circumstantiating the necessity of prolonged treatment and the lack of treatment in the country of origin.¹²¹

The residence permit is granted for a period of one year and has the possibility of extension.¹²² After five years of authorised and continuous residence in Spain, a permanent residence permit may be granted.

Procedure

During the residence procedure, the stay of the applicant continues under the same conditions as the former residence status. If the applicant had no authorisation to stay in Spain beforehand, he or she will still be considered undocumented, but in practice the authorities will refrain from ordering or enforcing an expulsion order as long as the decision on the application is pending. If the applicant wishes to change residence status, the former residence title is prolonged automatically until a decision is made on the new residence permit application.

The competent authority dealing with the application is the Secretariat of State for Immigration and Emigration (*Secretaría de Estado de Inmigración y Emigración*). The NGOs and authorities that participated in our research gave contradictory answers as to whether or not the Spanish caseworkers search independently for information on the country of origin. While a local immigration authority in Andalusia stated that caseworkers investigate each case by consulting information about medical services in the country of origin, this was only confirmed by one NGO and negated by the others. There are several reasons for this discrepancy in opinions. Some NGOs have the impression that if a search was conducted, it was done insufficiently. One NGO suggested that language barriers may be an issue as country of origin information is often only published in English and many caseworkers do not have proficient knowledge of the language. Furthermore, it was pointed out that there is a lack of training among officials about how to search for country of origin

¹¹⁹ *Real Decreto 2393/2004 por el que se aprueba el reglamento de la Ley Orgánica 4/2000*. Retrieved on 1 June 2008 from http://extranjeros.mtas.es/en/normativa_jurisprudencia/Nacional/RD2393-04.pdf.

¹²⁰ According to Article 46 (1a) Royal Decree 2393/2004, this requirement may be dispensed with under certain circumstances in asylum and refugee related cases.

¹²¹ See Article 45 (4b) in conjunction with Article 46 (2) Royal Decree 2393/2004.

¹²² See Article 45 (6) and Article 47 (1) Royal Decree 2393/2004.

information. Sometimes there may also be reluctance to conduct a thorough assessment of the situation in the country of origin. As most caseworkers do not state their sources in written decisions, it is difficult to verify the information on which the decisions are based.

Spanish authorities do not operate a database containing information on the availability and accessibility of medical treatment in countries of origin that the caseworkers could consult when assessing the claim.

According to all of the Spanish participants in this research, neither a state-affiliated medical advisor nor an independent doctor is contacted by the authorities when reaching their decision. It is the applicant who has to prove the existence of their medical condition and the absence of adequate treatment possibilities in their country of origin. As happens in Portugal, the medical condition is assessed by the authorities; a prerequisite of applying for the residence permit on medical grounds is that the applicant must submit a medical certificate from the local healthcare authorities.

Other Residence Permits and Expulsion

A delay of expulsion in cases relating to severely ill migrants is not explicitly dealt with by the law. Pursuant to Article 141 (9) of the Royal Decree 2393/2004, the enforcement of an expulsion order shall be suspended if the person concerned has filed an asylum claim or is pregnant and the expulsion would thus constitute a risk for the pregnancy or the life or physical integrity of the mother.

Legal Framework

Chapter 5 Section 6 of the Aliens Act

“If a residence permit cannot be awarded on other grounds, a permit may be granted to an alien if on an overall assessment of the alien’s situation there are found to be such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden. In making his assessment, particular attention shall be paid to the alien’s state of health, his or her adaptation to Sweden and his or her situation in the country of origin.”

“Children may be granted residence permits under this Section even if the circumstances that come to light do not have the same seriousness and weight that is required for a permit to be granted to adults.”

In Sweden applications for residence permits on humanitarian grounds are generally examined within asylum procedures. A migrant suffering from a severe illness without adequate medical treatment possibilities in the country of origin therefore must apply for asylum in Sweden. The authorities will then assess whether the migrant qualifies for asylum, subsidiary protection or a residence permit for humanitarian reasons.

According to chapter 5, section 6 of Sweden’s Aliens Act,¹²³ a residence permit may be granted on a discretionary basis if an overall assessment of the foreigner’s situation shows exceptionally distressing circumstances.¹²⁴ The provision expressly states that particular attention must be paid to the person’s state of health and the situation in their country of origin. The residence permit is granted on a discretionary basis.

General Requirements and Duration

In general a foreigner who wants to obtain a residence permit must have applied for and have been granted such a permit before entering the country, while foreigners already present in the country may not have a permit approved. This requirement does not apply however, if the foreigner qualifies for a residence permit in

exceptionally distressing circumstances.¹²⁵ To be eligible for this process, the applicant must submit a passport or establish his or her identity by other means.

If the migrant’s illness or need for care in Sweden is of temporary nature, the residence permit is only issued for a limited time.¹²⁶ However, according to the Swedish Migration Board a residence permit in humanitarian cases is often granted on a permanent basis.

Procedure

Due to the unique nature of the Swedish legislation, which links the residence permit on humanitarian grounds to asylum procedures, during the procedure the applicant has the same status as an asylum-seeker and thus is authorised to stay until the claim is decided.

The Swedish Migration Board, as the competent authority, issues decisions on residence permits.¹²⁷ When investigating the availability and accessibility of medical treatment in the country of origin, the caseworkers consult the database of the Swedish Migration Board (LIFOS), an intranet network of information on countries of origin. If needed, the Swedish Embassy in the respective country and the Swedish Ministry of Foreign Affairs may also be contacted. The authorities have knowledge about the standard situation in the country of origin, but specific information substantiating the claim must be credibly shown by the applicant.

Regarding the consultation of state-affiliated medical advisors, the answers given by the respondents to our questionnaire were contradictory. While the Swedish Migration Board and most of the NGOs stated that neither a state-affiliated nor independent medical advisor is contacted during the procedure by the authorities, one NGO specified that several medical experts are appointed each year for consultation by the Swedish Migration Board if necessary.

¹²³ Aliens Act (2005:716), issued 29 September 2005, entered into force on 31 March 2006.

¹²⁴ The Swedish Migration Board explains, “Despite the fact that their personal circumstances are not in accordance with the conditions for being granted the status of refugee or person in need of protection against persecution, certain persons could still be granted a residence permit as a result of particularly distressing circumstances linked directly to the individual’s health, adaptation to Sweden and the situation in their native country. A collective assessment of such circumstances could lead to the granting of a residence permit” (Asylum Rules, September 2007). Retrieved 1 June 2008 from http://www.migrationsverket.se/infomaterial/asyl/allmant/asylregler_en.pdf.

¹²⁵ See Section 6 Aliens Act (Section 18).

¹²⁶ See Section 9 of Chapter 5 Aliens Act.

¹²⁷ See Section 20 Aliens Act in compliance with Section 20 Aliens Ordinance (2006:97), issued on 23 February 2006.

Other Residence Permits and Expulsion

Additionally, section 11, chapter 5 of the Swedish Aliens Act determines that a temporary residence permit may be granted if there is a temporary impediment to the enforcement of a refusal-of-entry or expulsion order. This provision might inter alia be the case if the foreigner is not able to travel due to a medical condition which is not of lasting nature. The provision is subject to the discretionary decision of the immigration authority and is usually granted for the estimated duration of the impediment.

According to chapter 12, section 18 of Sweden's Aliens Act, in cases of final and non-appealable expulsion orders, a residence permit may be granted if new circumstances come to light which constitute an impediment to the enforcement of expulsion. This provision may apply inter alia if expulsion to a certain country is prohibited because the poor standard of medical treatment facilities available for the migrant's medical condition would mean that their return would amount to inhuman and degrading treatment and thus a violation of article 3 of the ECHR¹²⁸ or if there are other medical grounds explaining why the expulsion order should not be enforced.¹²⁹ The authority can choose whether to grant a residence permit or to issue a stay of enforcement instead. Moreover, it is dependent on the nature of the impediment as to whether a permanent or a temporary residence permit will be granted.

Chapter 8 of the Aliens Act deals with expulsion of foreigners. In its 7th section, it rules that a foreigner who lacks a passport or a permit required to stay in the country may be expelled from Sweden. The expulsion order might not be enforced, however, where there is a fair reason to assume that the foreigner would be in danger of being subjected to inhuman or degrading treatment in the country to which they are deported.¹³⁰

¹²⁸ See Chapter 12 Section 18 (1) in conjunction with Section 1 Aliens Act.

¹²⁹ See Chapter 12 Section 18 (3) Aliens Act.

¹³⁰ See Chapter 12 Section 1 Aliens Act.

Legal Framework

Asylum Policy Unit (APU) Notice 1/2003

“Discretionary leave may be granted to an applicant who ... has an Article 3 claim on medical grounds or severe humanitarian cases.”

In the United Kingdom, protection of severely ill migrants is granted only outside of immigration rules. Section 3 (1b) of part 1 of the 1971 Immigration Act¹³¹ governs that a person who is not *patrial*¹³² but who already resides in the United Kingdom may be given leave to remain.¹³³

Responsible for immigration and citizenship for the whole of the UK, the Secretary of State lays down rules regarding the practice to be followed in the administration of the Immigration Act.¹³⁴ The Asylum Policy Unit (APU) Notice 1/2003¹³⁵ rules that in cases in which refugee status as defined by the 1951 Refugee Convention is not applicable, but the individual is nonetheless in need of international protection or cannot be removed on grounds of other truly compelling reasons might qualify for leave to remain.

Humanitarian protection applies to any person who would face a serious risk to their life or person if returned to their country of origin, such as the death penalty, unlawful killing, torture or inhuman or degrading treatment arising from intentional ill treatment. If the migrant’s claim for humanitarian protection is solely based on their medical condition and the lack of adequate medical treatment in their country of origin, their case will be assessed by the Home Office as to whether or not they qualify for discretionary leave.

The granting of discretionary leave is *inter alia* applicable where a person's removal would be in breach of Article 3 of the ECHR, owing to the acute suffering that would be caused by that person’s medical condition in the case of their deportation. The threshold for establishing the claim is very high. A distressing medical condition may not be sufficient to meet this threshold.¹³⁶ According to the Home Office policy, the test is “whether the applicant’s illness has reached such a critical stage (i.e. they are dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and to send him home to an early death unless there is care available there to enable him to meet that fate with dignity”.¹³⁷ The Home Office’s guide makes reference to the *N v SSHD case*,¹³⁸ in which the House of Lords ruled that notwithstanding the applicant’s difficulty to receive adequate treatment in her country of origin, which would result in a drastically reduced life expectancy,¹³⁹ these circumstances were not considered exceptional enough to reach the very high threshold required to establish a breach of article 3 ECHR.

¹³¹ Regulation of entry into and stay in United Kingdom, which forms Part 1 of the Immigration Act 1971.

¹³² The term *patrial* refers to persons having the right to be considered legally a British citizen (by virtue of the birth of a parent or grandparent). See Section 2 (6) Part 1 Immigration Act 1971.

¹³³ Leave to remain is an authorisation to stay issued by the United Kingdom either as limited leave (permission to stay in the United Kingdom temporarily for the length of time stated in the visa) or indefinite leave to remain (permission to stay permanently in the United Kingdom). Leave to remain resembles a residence permit.

¹³⁴ See Section 3 (2) Part 1 Immigration Act 1971.

¹³⁵ See <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/hpanddl.pdf?view=Binary> (retrieved on 1 June 2008).

¹³⁶ For example, a medical condition which involves life expectancy or affects mental health.

¹³⁷ The Home Office, ‘Considering Human Rights Claims’, available online at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/> (retrieved on 1 June 2008).

¹³⁸ As mentioned in chapter 2 of this report.

¹³⁹ *Ibid.*

General Requirements

If the applicant qualifies for discretionary leave but does not have a passport or valid identity document, they may apply for a certificate of travel if documented evidence can be provided of formal and unreasonable refusal of a passport by the authorities of the country of origin.¹⁴⁰

Generally, leave to remain may be refused if the applicant's conduct has shown that they have deliberately and consistently breached the conditions of their stay.¹⁴¹ For example, applicants are required to 'maintain and accommodate themselves' without 'recourse to public funds' or 'work or engaging in a business'.¹⁴² This requirement does not apply however, to the granting of discretionary leave, since it is granted outside the immigration rules and thus not subject to the general conditions.

Once the claim is established, the initial period of discretionary leave should be granted for three years unless there are clear reasons for granting a shorter period. The leave is then renewable for a further 3 years, after which 'indefinite leave to remain' may be granted.

Procedure

Migrants who are in possession of leave to enter or remain at the time when their application is made may expect an extension of this status during the period in which their application for a variation of leave remains undecided or under appeal.¹⁴³ The stay of persons *without* leave remains unauthorised during the procedure.

The UK Border Agency deals with applications for discretionary leave as well as other forms of 'leave to remain' which fall outside the traditional rules. The caseworkers are administrative staff with special civil service training. According to the Border Agency, complex cases are referred to senior caseworkers who also monitor the 'decision quality'. For their search on situations in the countries of origin, these caseworkers use various sources in the public domain, such as official UK websites (e.g. from the National Health Service or embassies) and foreign government websites. If additional information is needed, the 'Country of Origin Information (COI) Service' will make further enquiries, and the diplomatic services may also be asked to research and provide specific information. The operational guidance notes and country policy bulletins produced by the Country of Origin Information Service also include brief information on medical treatments available in the country of origin, which is compiled by the Home Office from various sources (e.g. embassies, international organizations, NGOs, etc.).¹⁴⁴ The information published by the COI Service is reviewed by the Advisory Panel on Country Information, a board of independent experts.

The applicant must show that there are substantial grounds for believing that, should they return to their country of origin, there is a real risk of them being subjected to serious harm or treatment that would otherwise breach their rights as defined in the European Convention.¹⁴⁵

¹⁴⁰ See <http://www.bia.homeoffice.gov.uk/ukresidency/traveldocuments/types/certificateoftravel/whoqualifies/> (retrieved on 1 June 2008) and the Immigration Directorates' Instructions, chapter 22 section 1 (Passports and Travel Documents, July 2002), retrieved on 1 June 2008 from <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idichapter22/>.

¹⁴¹ See Immigration Directorates' Instructions, chapter 9 section 4 'Refusal of Variation of Leave to Enter or Remain on General Grounds' (Paragraph 322 HC 395). Retrieved on 1 June 2008 from <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter9/>

¹⁴² *Ibid.*

¹⁴³ See Immigration Directorates' Instructions, Chapter 1 Section 5 – Section 3C and 3D of the Immigration Act 1971 (as amended), September 2006. Retrieved on 1 June 2008 from <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter1/>.

¹⁴⁴ Retrieved on 1 June 2008 from <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/csap/>

¹⁴⁵ Retrieved on 1 June 2008 from <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/consideringanddecidingtheclaim/>.

To do this, the applicant must submit a certificate from a healthcare practitioner confirming:¹⁴⁶

- The nature of their specific medical condition;
- The treatment they have been receiving, its duration and the consequences of ceasing the treatment;
- Their life expectancy if the treatment continues and if it does not continue; and
- Their ability to travel if required to leave the country.

If necessary, the caseworkers may additionally obtain further expert guidance from the Department of Health to expand on the information already provided by the applicants doctors.¹⁴⁷ Independent doctors are not contacted by the caseworkers..

Other Residence Permits and Expulsion

If a person fails to qualify for either humanitarian nor discretionary leave, they may be granted 'Leave Outside the Rules' as a last resort.¹⁴⁸ This status will only be permitted in cases in which the migrant qualifies for one of the concessions provided within current immigration policy or in cases of particularly compelling circumstances which do not qualify for asylum or protection status as mentioned above. Usually, the leave to remain will be granted only for the necessary duration of stay required and does not convey any expectation of further leave or eventual settlement. Indefinite leave may be granted in exceptional cases in which it is nearly certain that no change in circumstances will take place within five years.

The 1998 Human Rights Act brought the rights outlined in the ECHR into UK law and made it possible for UK courts to hear cases on violations of the Convention. Expulsion of severely ill migrants is prohibited if removal would be contrary to the United Kingdom's obligations under the International Refugee Convention of 1951 and its 1976 Protocol or under the ECHR.¹⁴⁹

¹⁴⁶ See Immigration Directorates' Instructions, chapter 1, section 8 (medical examination).

¹⁴⁷ *Ibid.*

¹⁴⁸ See Immigration Directorates' Instructions, chapter 1, section 14. Retrieved on 1 June 2008 from <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/idischapter1/>.

¹⁴⁹ See 395 (d) of the Immigration Rules.

Throughout the course of this research, respondents from governmental and non-governmental agencies overwhelmingly agreed that a reliable, independent and comprehensive source of country of origin information is crucial to provide the only safeguard to guarantee a fair and adequate assessment whether an ill migrant would be able to obtain necessary medical treatment following their deportation. Such information is not only vital for the evaluation of an application for a residence permit in an EU member state for medical reasons, but also for those who wish to return to their countries of origin and who would like to have reliable information on the availability and accessibility of medical treatment in order to make informed decisions.

One means of obtaining the most concrete information as possible on the availability and accessibility of the required care in the countries of origin could be through the creation of an independent, reliable and comprehensive medical database. Such a database would be based on medical and technical information, completed with social, economical, geographical, and other information.

A significant element of this study involved the collection of comments, recommendations and concerns from relevant authorities, NGOs and healthcare practitioners regarding the creation of a European medical database. Participants were requested to provide comments on the information to be contained in such a database, access and supply to the database, and their perceived need for such a database.¹⁵⁰ The following is synthesis of the main findings from the questionnaire and interviews.

What Type of Information Should the Database Contain?

Concerning the contents of the proposed medical database, respondents favoured the inclusion of as much data as possible. Aside from a few responses, the majority wished to see a database that would contain the following information about the country of origin: nature and standard of healthcare facilities, state of the healthcare system, availability and accessibility of drugs, financial requirements for access, physical access to healthcare facilities (i.e. the geographic location of the healthcare facilities), and non-discriminatory access to health care facilities. Only data on the access and availability of drinking water and clean sanitary facilities was judged irrelevant by half of the respondents, with some commenting that this information was too general and not relevant for the purpose of the database.

Some additional information to be included in the database was also suggested. One authority who responded to the questionnaire requested information on well-known falsifications of medical certificates. An NGO proposed the addition of contact details for local NGOs and projects in the country of origin. A knowledge centre suggested information on the general security situation, and an NGO suggested including data on mortality rates for life-threatening diseases.

Level of Quality Control of the Information in the Database

Respondents were asked to identify some possibilities to ensure that the information included in the database was trustworthy. One possibility would be to have a database that would contain strictly quality-controlled information (e.g. with an administrator who would verify all inputs). Another option would be

¹⁵⁰ See “Annex-Questionnaire.”

to have a database that would contain more information but would be less rigorously screened.

Overall, participants were slightly in favour of a database that might contain limited information but the information would be strictly controlled for quality. One respondent stressed that the database should include quality-controlled information as well as other information but that a clear distinction should be made between both categories. Some respondents commented on the primary importance of rigorous screening and an independent status for the database. One participant warned that the information contained in a database would always be general, as applications are always linked to individual cases. Therefore, matching the data with the individual case would always be approximate.

Supply of Information to the Database

A possible list of contributors to the database was provided in the questionnaire and contained the following actors: relevant authorities, caseworkers, state-affiliated and independent medical advisors, NGOs, international organisations, the applicant's lawyer, insurance companies, and universities.

Relevant authorities were not seen as potential suppliers of information to the database by the majority of NGOs who responded to the questionnaire. However, authorities themselves as well as healthcare practitioners favoured relevant authorities to be allowed to supply information. Apart from healthcare practitioners, very few participants wanted *caseworkers* to supply information into the database.

Twice as many respondents favoured *independent medical advisors* as suppliers of information compared to *state-affiliated medical advisors*. Only one authority who filled in the questionnaire would allow medical advisors,

whether independent or state-affiliated to submit information. In the NGO sector, one third was in favour of state-affiliated medical advisors as suppliers, and three quarters were in favour of independent medical advisors. Healthcare practitioners favoured data from both medical advisors.

NGOs were the most favoured possible supplier of information to the database with over three quarters of participants ticking this box. This general figure was confirmed by the NGOs themselves and the health care practitioners but only one authority made this selection.

International organisations, such as the World Health Organisation, the World Bank or the United Nations, would also be welcomed as potential suppliers of information, achieving a similar score as NGOs. Moreover, international organisations were chosen by all actors and countries almost equally.

The applicant's lawyer should not be allowed to supply information, according to authorities. Half of the NGOs and one third of the health practitioners shared the same opinion.

Insurance companies were not seen as relevant suppliers for the database by an overwhelming majority of the participants. Only three respondents ticked this box.

Universities were favoured as a supplier by nearly half of the NGO respondents and one third of the healthcare practitioners and authorities.

A healthcare practitioner also suggested the addition of local hospitals and healthcare providers to the list, and an NGO warned that only NGOs that could supply relevant information should be allowed to do so.

Participants were also asked if they would submit information to the database, should they be allowed to do so. Three quarters of the respondents would like to input information into

such a system. The authorities who filled in the questionnaires stated they would all supply information to the database if allowed to. Ten NGOs stated they would rather not provide information to the database. Six of them did not believe their organisation possessed relevant information to supply to the database. One participant was afraid of being criticised as partial or partisan if submitting information to the database. Another respondent was afraid that their information could be used to deport an applicant. Two respondents did not declare why they preferred not to submit information to the database.

Who Should be Allowed to Access the Information in the Database?

In general terms, respondents were much more receptive to allowing different actors access to the information on the proposed database than to allowing them to supply information to it. The possible list of actors who should be allowed to access the database in the questionnaire included the same actors as in the possible list of suppliers.

Well over half of the participants thought that relevant authorities should be allowed to access the database. NGOs and healthcare practitioners both shared this view.

Regarding *medical advisors*, the results were very similar: both affiliated and independent advisors would be allowed to access the database according to three quarters of the respondents. Aside from the authorities, who did not believe that independent or state-affiliated medical advisors should have access to this database, the results were positive across all other actors and countries.

NGOs again were seen as a key user of the proposed database with nearly all the respondents favouring their access. Only four respondents, two of them authorities, would prefer NGOs to be denied access to the database.

International organisations were the only group that received less ticks to access the database than to supply information to it. They still obtained nearly three quarters of the responses in their favour, however, with a comparable result for all countries.

The *applicant's lawyer* was also identified as a key user of the database, achieving the same approval rate as NGOs. Apart from a couple of responses from the authorities, there was broad support for the applicant's lawyer to have access to the database.

Insurance companies again were not seen as relevant regarding the database, and few participants saw a need for them to have access to it.

Universities should be allowed access to the database, according to nearly half of the respondents. Half of the NGO and health practitioner respondents agreed with this, while only one authority would allow them to access the database.

Additional Comments Concerning the Medical Database

Many of the respondents perceive the lack of a medical database as a real problem, and all but a few NGOs and healthcare practitioners agreed that a medical database would be very useful in this sector. Of the respondents who did not identify the lack of a database as a problem, most commented that they felt that the authorities would misuse such a database as a tool for expulsion.

The relevance and accuracy of the information included in the database was of primary importance to many respondents. Two NGOs stressed the importance of authentic information and requested a strict screening process for all of the information. Several organisations highlighted that the source of the information should always be included and, if possible, the contact details in order to verify and/or individualise the information.

An NGO commented on the broader issue of residence permits on medical grounds and advocated for a harmonisation of the procedures on a European level. Another NGO described the situation by which the government produces pathology files listing which diseases can be treated in which country. The risk that the authorities would misuse this information made them reluctant to embrace the idea of a medical database, as it could be used solely as a means of expulsion.

Several organisations also commented on some previous and existing European wide sources of country of origin information concerning medical issues. Médecins Sans Frontières Belgium (MSF) previously developed a database of information from the countries in which MSF is active worldwide. This collection resulted in the Information on Treatment and Healthcare Accessibility in Countries of Origin (ITHACA) database, which was discontinued in 2008. Another source of information is the European Country of Origin Information (ECOI) network, which provides up-to-date and publicly available country of origin information with a special focus on the needs of asylum lawyers, refugee counsels and persons deciding on claims for asylum and other forms of international protection.¹⁵¹ This website started as a database providing information relevant to asylum cases, but the recent intake of information from the ITHACA project and the creation of a section covering all health-related information are broadening its applicability to include cases of residence permits on medical grounds, as well.

¹⁵¹ www.ecoi.net.

The protection standards for seriously ill migrants are far from coherent and vary significantly throughout EU member states. While some EU member states provide explicit provisions for granting residence permits to migrants with severe health problems, the legislation and procedure in others remains ambiguous. Since all EU member states are parties to the European Convention on Human Rights (ECHR), they have legal obligations to restrain from expulsion of ill migrants if their expulsion would amount to inhumane or degrading treatment, thus raising an issue under Article 3 of the ECHR. As seen in Chapter 1 on European Legal Standards, the threshold for Article 3 of the ECHR claims is, however, extremely high. Moreover, the ECHR only prohibits expulsion and leaves aside the question of what residence status should be granted to ill migrants who cannot be deported. If the authorities refrain from granting a residence permit, foreigners are left in a legal limbo, protected against expulsion but without a right of residence and thus excluded from a range of social rights linked to a residence permit.

This shortcoming was discussed during the parliamentary discussions on the *Directive of the European Parliament and of the Council on common standards and procedures in the Member States for returning illegally staying third-country nationals* (“Returns Directive”). Regrettably, the European Parliament withdrew its decision to oblige member states to grant residence permits to persons suffering from a serious illness and did not include its 23(d) amendment of Article 5, which stipulated:

“When implementing this directive, Member States shall take due account of . . . (d) The state of health: Member States shall grant a person suffering from a serious illness an autonomous residence permit or another authorisation conferring a right to stay so as to have adequate access to healthcare, unless it can be proved that the person in question can receive appropriate treatment and medical care in his or her country of origin.”

The final text adopted by the Parliament on 18 June 2008 states:¹⁵²

“When implementing this directive, Member States shall take due account of ... (c) State of health of the third country national concerned and respect the principle of non-refoulement.”

Hence, it will still be left to the member states’ discretion whether residence permits are granted to seriously ill migrants in order to ensure adequate treatment and a secure residence status.

In most of the countries studied in this report, no mechanism exists to ensure that the data collected by the relevant authority is accurate and verifiable.¹⁵³ In the United Kingdom the information published by the Country of Origin Service (COI Service) is reviewed by a board of independent experts, the Independent Advisory Panel on Country Information. Often the decisions do not state the exact sources of the relevant country of origin information,¹⁵⁴ which makes it very cumbersome for the applicant to verify the decision taken by the authorities.

Databases on country of origin information used by the authorities are often not open to the public. Thus, many applicants are excluded from the benefits of the information and are denied access to comprehensive, compiled data on the same level as the authorities. For the authorities, as well, it is often cumbersome and time-consuming to search for information on the country of origin information in each individual case, especially in countries without a database on this kind of information. Special experts from COI services¹⁵⁵ often must take on the search for the caseworkers. A database focused specifically on medical data for various countries of origin did not exist in any of the EU member states consulted.

A key finding of this report is that while governments often collect information on health care in countries of origin, this information is oftentimes not available to the applicants or their lawyers. Therefore, this report proposes the

¹⁵² See European Parliament, *Position of the European Parliament adopted at first reading on 18 June 2008 with a view to the adoption of Directive 2008/ . . . /EC of the European Parliament and of the Council on common standards and procedures in member states for returning illegally staying third-country nationals* (P6_TC1-COD(2005)0167). Retrieved on 6 July 2008 from <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0293&language=EN>.

¹⁵³ Aside from the possibility for the migrant to challenge a negative decision at appeal.

¹⁵⁴ See, for example, Spain.

¹⁵⁵ COI Services, who assume the search, exist in Hungary and the United Kingdom, for example.

creation of an independent European medical database containing information on the availability and accessibility of medical treatment around the world.

The medical database, containing high-quality information, would meet the following needs:

- Accurate information for those interested in independent return. Some foreigners, whether residing regularly in the host country or not, wish to return to their countries of origin, often after several years have passed. Certainty on the availability and accessibility of specific medical treatment is crucial in informing this decision.
- Factual substantiation of applications to obtain and to prolong residence permits on medical grounds. When the necessary medical treatment for severely ill persons is either unavailable or inaccessible in the country of origin, this knowledge is important in the case for protection against expulsion and in the application for a residence permit. Applicants often are required to provide extensive and reliable data on medical treatment in the country of origin. The database would aid applicants and their support networks in retrieving this information. In residence permit procedures, the burden often falls on the applicant to demonstrate the lack of adequate medical treatment in the country of return. Unlike some authorities who have access to state-run databases of information on medical treatment in countries of origin, applicants must consult several incoherent sources, often proving to be a cumbersome, time-consuming and, at times, insufficient process.
- Promotion of adequate national and international health care policies. Authorities, institutions and NGOs can gain knowledge of the availability and accessibility of medical treatment in countries of origin, a very useful tool in informing policy makers.

In order for the database to adequately meet the needs mentioned above, it must meet some general criteria. The information must be reliable, with clear citations of the sources of information. Similarly, frequent updates and time stamps will be essential to ensure the accuracy and relevance of the information included in the database.

A medical database containing comprehensive information on medical treatment in the countries of origin would enhance the fairness and accuracy of the already-strict procedure for granting residence permits on medical grounds. Such an information source would ensure a more transparent system and thus would be of utmost importance. Considering the high vulnerability of seriously ill undocumented migrants, the consequences would be dire should a residence permit be withheld, or, in the worst case, should the expulsion order be enforced.

Annex - Questionnaire

Organisation:

Name:

Date:

E-mail:

Tel:

Presentation of the study

Of the many groups in Europe facing insufficient access to health care, undocumented migrants with severe illnesses are among the most vulnerable. This report aims to analyse the main problems and challenges facing severely ill migrants when trying to obtain a permit to remain in an EU member state based upon medical grounds. PICUM, the Platform for International Cooperation on Undocumented Migrants, is an NGO platform representing over 180 members in 20 countries. Promoting respect for the human rights of undocumented migrants within Europe, PICUM uses its network to formulate recommendations for improving the legal and social position of these immigrants, in accordance with the national constitutions and international treaties. This study aims to provide a concise overview of the procedure for the granting of medical stay permits in 11 EU member states: Austria, Belgium, France, Germany, Hungary, Italy, Netherlands, Portugal, Spain, Sweden and the UK. It will define the procedure used to gather information on the availability and accessibility of medical treatment in the country of origin and will explore the role of NGOs providing assistance and services to ill undocumented migrants. The study also aims to investigate the need for an independent European Medical Database that may prove to be an independent and reliable information source on the availability and the accessibility of medical treatment in the country of origin.

Based on high-quality data, the information provided could meet the following needs:

- Offer support for voluntary return,
- Provide information on the medical treatment possibilities in the country of origin, and
- Promote an adequate national and international health care policy.

By gathering the views and concerns of those involved with the issue of medical stay permits, both in governmental and non-governmental agencies, PICUM will assess the need for the creation of such a database. By participating in this brief questionnaire, you will assist us in drafting a fair and comprehensive report that may be used as an advocacy tool to lobby for a database which can be of benefit to all.

The questionnaire is protected in order to facilitate the collection of the answers. You can only tick the boxes and provide a written statement (.....) in the sections highlighted in grey. Most of the questions can be answered through a multiple-choice answer. It is possible to tick more than one box for each question, except when the answer is 'Yes' or 'No', in which case, of course, only one answer may be chosen. Please do expand as much as possible when asked for details.

NGOs

1. Is your organisation active in a concrete way to support residence applications for medical reasons?

Yes, how:

- Provide legal counselling
- Represent undocumented migrants with medical conditions before the relevant authorities
- Represent undocumented migrants with medical conditions before the court
- Provide medical certificate through an affiliated doctor
- Other(s), please specify:

No

2. Do you know any other NGOs or organisations in your country that are active in a concrete way to support residence applications for medical reasons?

Yes, please specify name of organisation:

No

3. Please provide a brief outline of the vision and the activities of your organisation?

.....

AUTHORITIES AND PROCEDURES

4. Aside from discretionary leave, are there other possibilities for severely ill undocumented migrants to obtain an authorisation to remain in your country?

.....

5. Does the possibility exist to grant a residence permit in special cases even if the usual legal requirements are not met (e.g. through a hardship commission)?

Yes, please specify the name of the procedure:

No

.....

6. Which authority deals with an application for discretionary leave?

7. What is the professional background of the staff who make the decision?

- Judiciary
- Medical
- Social welfare
- Others, please specify:

8. What are the generic criteria applied when deciding on an application for a certificate of temporary residence?

9. Do the persons handling the application investigate the availability and accessibility of medical treatment in the country of origin?

Yes

No

10. If yes, which source(s) of information is consulted? Please specify the name of the source/organisation for each category.

Media/ internet:

International NGOs:

Local NGOs:

International organisation:

Embassies:

Ministry of Foreign Affairs:

Medical services:

Other(s), please specify:

11. Is there a mechanism in place to ensure that all the data collected is accurate and verifiable? (i.e. in order to avoid unjustified decisions based on insufficient or erroneous country of origin information)

Yes, please specify:

No

12. Do the authorities possess any statistics on the number of people applying for a discretionary leave on medical grounds? (e.g. the number of applications submitted and the number of permits actually granted)

13. Is there a medical advisor, affiliated with the government, who is contacted by the authorities during the procedure?

Yes, please specify from which governmental department:

No

HEALTHCARE PROFESSIONALS

14. Does the caseworker contact an independent medical advisor to provide advice on the availability and accessibility of medical treatment in the country of origin?

- Yes
- No

If no, skip to the question 15.

15. On what criteria are the independent medical advisors selected?

- Knowledge of the healthcare system in the country of origin
- Specialist in the relevant medical condition
- Other(s) expertise, please specify:

16. Does the medical advisor (contacted by the authorities or the applicant) search by himself or herself for patient-specific information on the availability and accessibility of medical healthcare in the country of origin?

- Yes
- No

17. If yes, which source(s) of information are consulted by the medical advisor? Please specify the name of the source/organisation for each category.

- Media/ internet:
- International NGOs:
- Local NGOs:
- International organisation:
- Embassies:
- Ministry of Foreign Affairs:
- Other(s), please specify:

18. Does the medical advisor contact doctors in the country of origin to acquire information?

- Yes
- No

19. Is the information obtained restricted to the procedure of granting a residence permit? Or are the caseworkers also allowed to use this information for the expulsion procedure?

- Information can only be used for residence permit application
- Information can also be used for the expulsion procedure

MEDICAL DATABASE

This section is aimed at gathering your opinion on the creation of a European medical database. The proposed medical database would be a tool for obtaining the most concrete information possible on the availability and accessibility of the required care in the countries of origin. It should be based on medical-technical information, completed with social, economical, geographical, and other information.

20. Should the medical database contain information on the following?

- Nature and standard of healthcare facilities (state of hospitals, clinics, etc.)
- State of healthcare system (public health insurance, number of doctors, etc.)
- Access and availability of drinking water and clean sanitary facilities
- Availability and accessibility of drugs
- Information whether the healthcare facilities are accessible with regards to the:
 - Applicant's individual financial means
 - Individual physical access to the healthcare facilities
 - Non-discriminatory access to healthcare facilities
- Other information, please specify:

21. Should the database focus on basic essential quality controlled information? (i.e. a basic database where an administrator would verify all inputs) Or a more extensive database with information (+ respective source) that is less rigorously screened?

- Basic quality controlled database
- More extensive database
- Or do you have another suggestion:

22. Who should be allowed to supply information for the database?

- Relevant authorities, please specify which one(s):
- Caseworker handling applications for discretionary leave
- Medical advisors
 - State-affiliated
 - Independent
- NGOs
- International organisations (e.g. WHO, World Bank, UN)
- Applicant's lawyer for a discretionary leave procedure
- Insurance companies
- Universities
- Others, please specify

Who should be able to access the database?

- Relevant authorities, please specify which one:
 - Caseworker handling applications for discretionary leave
 - Medical advisors
 - State-affiliated
 - Independent
 - NGOs
 - International organisations (e.g. WHO, World Bank, UN)
 - Applicant's lawyer for a discretionary leave procedure
 - Insurance companies
 - Universities
 - Others, please specify:

23. If allowed to input information to the system, would you/your organisation be willing to do so? If no, please elaborate on your answer.

- Yes
- No, because:

24. Do you experience the lack of such a European medical database as a problem?

- Yes
- No

25. Do you have any further suggestions or comments regarding the creation of a European medical database?

26. Do you have any comments or questions about the questionnaire?