

the federal **Ombudsman**



MEDICAL REGULARISATION

THE FUNCTIONING OF THE IMMIGRATION OFFICE
9TER DIVISION

INVESTIGATION REPORT / 02

SUMMARY OF THE INVESTIGATION REPORT

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9ter Division

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INTRODUCTION

Article 9ter of the Aliens Act reflects the legislature's concern that a particularly vulnerable group, i.e. aliens suffering from a life-threatening condition or a disease that is likely to affect their physical integrity if they are deported, should be allowed to remain on the territory.

In view of this objective, the procedure that facilitates the implementation of article 9ter merits analysing.

The duration of the procedure is clearly a critical point of attention. In 2012, a medical filter was put in place to quickly dispense with any applications which, on the basis of the medical details presented, manifestly do not qualify for this procedure so that more resources and attention can be given to other (admissible) applications.

The second determining factor is the quality of the analysis and of the medical assessment of the files. The manner in which this medical assessment is performed forms part of the administration's overall decision-making process and is essential if the quality of the decisions, whether positive or negative, is to be sustained.

In that light, the investigation on the functioning of the Immigration Office (IO) 9ter Division focused on the following two key aspects of the procedure: time and quality.



PROCESSING TIME

The investigation brought to light that the time it takes to process applications is haphazard and can vary considerably from one file to the next, for no objective reason. There is no internal control system to ensure efficient monitoring of the time frame or to identify backlogged files.

This situation poses unacceptable risks:

- To the seriously ill who do not have access to the necessary care;
- To public health, because it increases the risk of communicable diseases spreading;
- To the public finances, because appropriate care for people who are seriously ill is delayed.

The Federal Ombudsman issues two recommendations:

- Set a strict deadline to decide whether applications are admissible (filter).
- Put an internal control and alert system in place to detect backlogged files.



QUALITY OF THE PROCESSING

1. Medical assessment

The quality of the processing of the applications will in first instance depend on the quality of the medical assessment of the files by the Immigration Office (IO) physicians. Their opinion should make it possible to identify any cases where a sick alien will run an unacceptable risk if he was to be sent back to his country of origin.

Even though they are acting in an advisory capacity only, IO physicians are still bound by the Code of Medical Ethics in everything they do. Thus, the IO must also ensure that they can do their work in circumstances that are compatible with these ethics.

The results of the investigation on the functioning of the medical assessment cell fall into four basic categories:

1.1. Physicians' professional autonomy is not guaranteed

The physicians issue their opinion completely independently and the investigation did not bring any interference from the IO in individual files to light. But the conditions under which they perform that task are inconsistent with the professional autonomy they are entitled to:

- Ban on contacting the treating physician¹;
- Deterrence to examine the sick alien;
- Organisational obstacles in terms of coordination and intervision;
- Working methods and choice of sources dictated by the administrative cell;
- No access to training or advices from specialists.

1.2. Continuity of care is not assured

Example:

Mrs Song, a Cameroon national, is suffering from a terminal renal condition and arterial hypertension, compounded by anaemia and episodes of pulmonary oedema. She also has HIV. According to her treating physician, Mrs Song is likely to die within two to three weeks if she doesn't have access to dialysis. In line with the information in the MedCOI database, the IO physician established that treatment and follow-up for her condition are available in Cameroon.

Where the seriousness of the condition is not disputed but the opinion concludes that appropriate treatment is available in the country of origin, the IO physician is obliged to pass on the relevant information to the treating physician or to the officials organising the (voluntary or forced) return to ensure that the person in question does indeed have access to care, in particular emergency treatment, in the country of origin².

1.3. The selection of physicians and the organisation of the medical assessment cell do not guarantee an appropriate and qualitative medical assessment

The IO does not have the proper tools to identify and reinforce the assessment requirements of the medical cell, whether in terms of recruitment or training. Knowledge-sharing is not structurally organised.

1.4. The lack of coordination and guidelines impair the equal treatment of applicants

The physicians acknowledge that identical pathologies in similar stages of advancement can give rise to radically different decisions.

Both the administrative cell and the hierarchy of the Medical Section openly object to any form of coordination and intervision between the IO physicians even though that would facilitate a standardisation of the working methods, an exchange of information and the introduction of guidelines on the manner in which the seriousness of pathologies is assessed, on the equivalence of treatments and on the risks in the event of deportation.

¹ Articles 113, 122 and 126 § 4 of the Code of Medical Ethics

² Article 113 of the Code of Medical Ethics

2. Decisions

The decision itself is taken by the administrative cell of the Immigration Office (IO) Medical Section. This process calls for a number of comments:

2.1. In the case of minors, the examination of the file does not provide for any assessment of the impact of the intended decision on the child. In other words, it does not allow for a minor's specific interest to be taken into account

Example:

Mrs Rizzo is regularly put under observation and treated in a psychiatric ward. The risk of suicide and endangerment of her minor children are real. The IO physician feels that the illness does not require medical treatment. The application is ruled inadmissible without any consideration for the situation of the children.

2.2. The review of the accessibility of treatment in the country of origin pays insufficient attention to the obstacles certain vulnerable groups are faced with

Example:

Two children of a Serbian family of Roma descent are suffering from an incurable disease which will be fatal in the short term. The family fears that it will not be able to access the necessary medical care in Serbia on account of its Roma roots. Several international reports have indicated that, especially as far as access to health care is concerned, discrimination against the Roma population persists.

2.3. Where a residence permit is not extended on the basis of the information the applicant presented, the IO does not allow either the applicant or his physician to submit their observations. This is not only inconsistent with the right of every person to be heard in matters that affect him but also with the principle of careful management and leads to poorly substantiated decisions³

2.4. Where the IO deems that appropriate treatment is available and accessible in the country of origin, the reasons for that decision do not give the applicant or the latter's physician any insight into the factual elements the IO based itself on

3. Overall process efficiency

When article 9ter was adopted, the objective of the legislator was to ensure proper protection for the applicants, while, at the same time, effectively combating abusive applications. The 2012 reform reaffirmed that objective by introducing the medical filter.

However, the investigation brought to light that:

- It is impossible to assess the efficiency of the medical filter on the basis of the data the IO collects;
- The manner in which the medical assessment cell is organised does neither guarantee the quality of the opinions nor the equal treatment of applicants;
- The lack of transparency in the decisions and the lack of intervision between the IO physicians and the treating physicians contribute to the submission of unfounded applications and the multiplication of pointless appeals. This indicates a lack of trust in the treating physicians and in the medical profession as a whole;

³ Where the IO physician finds that the disease is not serious enough or that an equivalent therapy to the one the treating physician is prescribing is available in the country of origin, he is, on foot of article 126 § 4 of the Code of Medical Ethics, obliged to contact the treating physician before taking any decision that may interfere with the patient's therapy.

- The lack of structured coordination between the medical assessment cell and the Deportation Department does not allow for an effective enforcement of refusal decisions in line with the principle of continuity of care.

CONCLUSION

The Federal Ombudsman issues 26 recommendations:

In particular, the Immigration Office (IO) must:

- Reinforce the professional autonomy of the IO physicians, and more specifically
 - Guarantee working conditions that are compatible with medical ethics,
 - Lift the ban on contacting the treating physician,
 - Reinforce the role of physician-coordinator and the consultation and intervision mechanisms within the medical assessment cell.
- Perform a specific assessment of the impact of its decisions on the children and substantiate its decisions with the overriding interest of the child in mind.
- Consider the humanitarian circumstances that complicate access to care for vulnerable groups.
- Allow the sick alien and his physician to submit their observations on the elements that led to the application for an extension of the residence permit on medical grounds to be turned down.
- Ensure the systematic transmission of information between the medical assessment cell and the Deportation Department to guarantee continuity of care.
- Give the treating physician access to the sources on which the IO based itself to conclude that appropriate care is available and accessible.
- Collect and publish relevant data to assess the efficiency of the 9ter procedure as a whole and of the medical filter in particular.

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