Comparative Research on the State Practices on the Accessibility of Medical Treatment and/or Medication in Countries of Origin

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Asylum at ICMPD

ICMPD's work on asylum aims to further develop the knowledge base on asylum-related issues, to facilitate cooperation and to respond to an increased demand for more policy-relevant research. This work is policy-oriented and empirical with an interdisciplinary, comparative and international approach. The present report has been commissioned by the Dutch Ministry of Security and Justice.

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Executive Summary

In recent years, an increasing trend of claims by foreigners based on the medical condition with the prospect of being granted the leave to remain in the host country has become evident. Such claims are often connected with the asylum process or come up during the return of a foreigner to the county of origin. EU countries respond differently to such claims, based on applicable international or national legal provisions, international and/ or national case-law or country-specific policies. As a consequence, the national practices and policies developed in a different manner among the individual states. The present study researched the state practice in dealing with medical migration cases in five selected EU countries: Belgium, Finland, Germany, Sweden and the United Kingdom.

Among the five selected countries, Belgium is the only country that developed a specialised medical procedure, where medical doctors are an integral part of the decision making process, supporting the decision-makers. In the remaining countries, medical claims are mainly dealt with after international protection has been denied, in the form of an additional question in the asylum procedure.

To initiate a special procedure based on medical elements a medical claim must have reached a certain threshold, in other words, the common practice in all five countries researched is that light diseases cannot constitute a right to stay. However, the countries apply different definitions (and thus a different threshold) to determine when a disease is "severe". The formulations range from "in the final stage of a disease" (United Kingdom) to a "significant deterioration of the health" (Germany) while the remaining countries' policies may be classified somewhere in-between these two positions.

The assessment whether humanitarian considerations demand the host country to grant leave to remain, requires an answer to the question whether the applicant can obtain the necessary medical treatment/ medication in the country of origin. In answering this question, the state policies are guided by different principles and differentiate between whether the medication/ treatment is "available" in the country of origin, and whether the individual has *de facto* "access" to the treatment/ medication given his/ her individual circumstances. All reviewed countries assess whether treatment/ medication is "available", while only Belgium and Germany apply additionally a systematic research to determine the "accessibility" of medical treatment/ medication to the individual in the country of origin. However, the research showed that the borderlines between interpretations of "availability" and "accessibility" are not always clear-cut, encompassing a number of grey and overlapping areas particularly in cases when an applicant's disease is connected with several other distressing circumstances such as the lack of any financial means, the incapability to work, the lack of family support, etc.

The countries under this survey rely strongly on the case-law that evolved in cases with a medical component. Strict definitions or policies are rare, mainly because of the very complex assessment required for medical claims. Each disease and thus the applicant's potential humanitarian need requires an individual assessment to answer questions regarding the

availability (and/ or accessibility) of treatment and/ or medication in the country of origin. Nevertheless, the case-law of the reviewed countries provides some guidance to the decision-makers and has, naturally, also shaped the national policies to the extent possible. A direct comparison of policies is nevertheless not always possible as it depends on whether a certain situation had already been decided by the highest national court.

Abbreviations

AVR	Assisted Voluntary Return
CO	Country of Origin
COI	Country of Origin information
GGD	Association of Community Health Services
GHOR	Regional *Medical Emergency* Preparedness and Planning
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
MS	Member State
ICMPD	International Centre for Migration Policy Development
IOM	International Organization for Migration
MedCOI	Medical Country of Origin Information
REMEDA	REsearch on MEDical Accessiblity
RSD	Refugee Status Determination
SMB	Swedish Migration Board
UK	United Kingdom

Introduction

European decision-makers in asylum and migration processes are ever more often confronted with applications of foreigners that entail medical elements. Such claims may be part of applications for residence permits, part of an asylum application, or may be brought forward in the course of a return procedure. Caseworkers and decision-makers are constantly facing challenges when it comes to such requests, mainly because they are, as a rule, not medical doctors - and are unable to understand the specific details of the medical claim brought forward.

In migration cases involving medical background, European countries commonly need to establish whether the disease is of such ‘severity’ that treatment and/or medication is indispensable for the health condition of the applicant. The necessary treatment may need to be provided by the host country or the country of origin. When assessing whether the host country needs – mainly from a humanitarian point of view – to take over responsibility for the necessary medical treatment and grant a residence permit, the first step is to determine whether the treatment could be provided by the applicant’s country of origin.

In this respect, the first question is, whether the required medical treatment/ medication is in fact available in the claimant’s country of origin. Availability was defined in the context of an EU-funded project on medical country of origin information (MedCOI project) as whether “*medical treatment (including medication) for a specific case may be absent/ present/ sufficient or insufficient at least in a certain medical facility at a certain time somewhere in the country of origin”*. The **availability is thus the “objective” component of the assessment** as it aims to (objectively) verify whether a certain treatment and/ or medication is physically there in a certain medical facility in the applicant’s country of origin.

Beside the availability of medical treatment and/ or medication, some EU countries’ policies additionally demand to establish whether the medical treatment/ medication would also be individually accessible for the person concerned upon return. In the above mentioned MedCOI project, accessibility to healthcare was defined as “*whether an individual is able to, de facto, obtain medical treatment/medication given the person’s: financial situation, geographic location and irrespective of his/her race, religion, nationality, membership of a particular social group, or his/ her political opinion, upon returning to his/ her country of origin/ residence”*. As such, one may characterise the **accessibility as the “subjective” component of the medical assessment** as it looks into individual circumstances that may prevent the applicant from de facto receiving the treatment or the medication in the CO.

The research under the MedCOI project showed that all project partner countries research the availability of medical treatment/ medication. However, only some countries are required by national policy and/ or case-law to research also whether the individual can access the medical treatment/ medication in the country of origin given his/ her specific situation.

The current research aims at elaborating how and why selected EU MSs evaluate the availability and the accessibility to medical treatment/ medication in migration decisions.

1. Rationale for the Research

The Netherlands is one of those countries that has already for quite some years been receiving relatively high numbers of medical claims by third country nationals. The Dutch policy demands to research the availability but does not look into the accessibility of medical treatment/ medication like Germany and Belgium do.

The Dutch Research Council on Safety[1] recommended reviewing this state policy. In response to this demand the study at hand has been commissioned. The research was conducted in the period from October 2014 until January 2015.

The study aims at raising the awareness of the state practices in selected EU MSs on the requirements to determine the accessibility to medical treatment and/or medication in countries of origin of persons denied residence in migration decisions in selected EU MSs. In this context, the study particularly focuses on the decision making criteria for determining the accessibility to medical treatment/ medication in countries of origin. The present paper is the result of this research on the practices in five selected countries: Germany, Belgium, Sweden, Finland and the UK.

An overall number of 18 states, 16 EU Member States and 2 associated countries[2] took active part as partners in the still ongoing MedCOI project[3] in the period 2010-2015. The conducted surveys and statistical overviews with the project partners within the framework of the MedCOI project, showed that, out of the 18 partner countries, Austria, Belgium, Denmark, Finland, Germany, Ireland, Lithuania, Luxembourg, Norway, Sweden and Switzerland, requested information on both, the availability as well as the accessibility of medical treatment/ medication.[4] The Netherlands and the United Kingdom indicated that they would only review the availability of medical treatment/ medication in the country of origin. For the remaining countries – partly due to the fact that there were not many medical cases registered – no clear policy has developed yet.[5]

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[1] In its report "On the Safety of Aliens in the Netherlands" the Dutch Research Council on Safety recommended to include the accessibility of medical care in the decisions whether a migrant with medical issues should be expelled or not . See the Dutch Research Council on Safety (2014). The Safety of Aliens. The Hague. De onderzoeksraad voor Veiligheid (2014). Veiligheid van Vreemdelingen. Den Haag. www.onderzoeksraad.nl

[2] Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, Germany, Ireland, Italy, Lithuania, Luxemburg, Netherlands, Sweden, Slovenia, Slovak Republic, United Kingdom, Switzerland and Norway

[3] Project MedCOI: "Sharing of existing information and best practice, research on policies and jurisdiction in the EU and training of national authorities' officials aimed at developing a common approach on the collection and usage of Medical COI in individual cases (MedCOI)" is funded by the European Commission and started in September 2010. The project is currently in its third phase.

[4] The fact that the countries are listed here is due to their past involvement in accessibility research in the framework of the MedCOI project and does not necessarily mean that they also have developed a clear policy on the research on the accessibility of medical treatment and/or medication. It also does not necessarily mean that those countries consequently review the accessibility in all migration cases with a medical element.

[5] While there exists some indication also for some of the remaining EU countries on their national practice, the available information is too limited. An EU wide review of the different national practices in dealing with medical migration cases nevertheless is lacking.

For the current research it was essential to cover the practice of countries applying the research on the availability (the United Kingdom) and countries that additionally research the accessibility (Belgium and Germany) to medical treatment/ medication. In addition to these countries, also Finland and Sweden were selected initially assuming from previous experience that they research both, the availability and the accessibility. However, after a more thorough assessment it was concluded that both countries only research the availability of medical treatment/ medication in the country of origin. Furthermore, the selection of countries with a high influx of asylum seekers (such as Germany and Sweden) and countries with a moderate influx (such as Belgium and the United Kingdom) as well as a country with a relative low influx (such as Finland) was of strategic relevance to also better understand whether the policies are connected to the level of influx. Finally, it was the aim to have particular examples of countries with a rather rich experience and a clear policy (such as Germany and Belgium) included. The research would have benefited further from inclusion of an additional country conducting the research on the accessibility. However, this did not materialize due to the rather short time-frame foreseen for this research.

2. Methodology

The study aims at answering the four main research questions:

- What is the severity threshold of a foreigner's disease (health condition) for migration authorities of the EU MSs to start assessing the needs for humanitarian residence?
- What is the national decision practice with regards to the assessment of the availability of medical care/ medication in the foreigner's country of origin?
- What is the national decision making practice with regards to the assessment of the accessibility to medical care/ medication in the foreigner's country of origin?
- What kind of stay is granted to foreigners who cannot be returned because of their medical situation and, in case of a negative decision, how is the return organized in failed medical migration cases?

The study is based, in great part, on the interviews with decision-makers of the relevant stakeholders in the five selected countries. Prior to launching the interviews, a desk research has been conducted to gain an overview of the state policies and legal basis.

The preliminary desk research has been followed by the development of the research tools: a qualitative interview questionnaire and the corresponding interview guidelines as well as a first outline for the country chapters and the comparative part of the study.

The study has been developed in the following steps and timeline:

- 15.10.2014: official start of project REMEDA (contract signature)
- 15.10-15.11.2014: Preliminary desk research (continued throughout the duration of the project)

- 17.11.2014: presentation of research tools to the Supervisory Committee[6] in The Hague, the Netherlands
- 18.11.2014 – 21.01.2015: interviews with stakeholders in the five selected countries
  - 18/19.11.2014: Interviews in Belgium/ Brussels (Belgian Migration Office);
  - 11/12.12.2014: Interviews in Germany/ Nürnberg (BAMF);
  - 15/17.12.2014: Telephone interviews with Finish Immigration Service;
  - 14.01.2014: Interviews in Sweden/ Stockholm, (Swedish Migration Board and Migration Court);
  - 21.01.2015: Telephone interviews with UK Home Office.
- 18.11.2014 – 20.01.2015: Drafting of country chapters
- 19 – 26.01.2015: Drafting of comparative overview on the state practices in the five selected countries
- 26.01.2015: Submission of the report to the Dutch Ministry of Justice
- 29.01.2015: Presentation of the research results to the Project Board

[6] The Supervisory Committee has been established as a multidisciplinary committee to accompany and supervise the research. It comprised of experts from different substance units of the Ministry of Security and Justice, the Repatriation and Departure Service, the Naturalisation and Immigration Service, the (IND), the Association of Community Health Services (GGD's) and Regional *Medical Emergency* Preparedness and Planning (GHOR) as well as the International Organization for Migration (IOM).

Part 1 – Comparative Report

Comparative Report

Background

The health conditions of foreigners are becoming increasingly relevant in migration processes. Particularly in cases where return of a denied asylum seeker or an irregularly staying foreigner might not be possible due to their health condition. This special type of ground to stay becomes relevant once a foreigner claimed that his/ her health condition would not allow the return to the country of origin. The health condition, nevertheless, is not part of an assessment for international protection, encompassing refugee protection according to the 1951 Geneva Refugee Convention[7] and subsidiary protection according to the EU Qualification Directive[8]. Health conditions, thus, mostly manifest a national protection ground which may derive from international or regional law, mainly the European Convention on Human Rights (ECHR), but is based on national law.

The European Court of Human Rights (ECtHR) developed a rich case-law on the influence of the medical state of an applicant and the individual possibilities of return to his/ her country of origin. The European Court approaches this issue mainly from the perspective of the rights granted by the ECHR, particularly its Articles 3 and 8:

Article 3 – Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 – Right to respect for private and family life
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Both Articles play a crucial role in determining whether the return of a sick person to the country of origin is in line with the duties of the receiving country under the Convention or not. At first glance, this might be surprising as the provisions of both Articles do not offer an obvious clue to why a Member State of the Convention should be held liable for the wellbeing of foreign citizens

[7] See Art 1A of the Geneva Convention of 28 July 1951 relating to the Status of Refugees (1951 Refugee Convention).
[8] See Article 15 of the EU Qualification Directive - Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

who reside irregularly on their territory and claim that there would be no proper medical treatment in their country of origin. However, the Court repeatedly recalls

> *"at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. However, in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of democratic societies. The Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment."*[9]

These absolute terms of Art. 3 ECHR, as determined by the Court, mean that there are no exceptions and limitations to Art. 3, even if the applicant committed serious criminal offences, as laid down, inter alia, in D vs UK.

> *"… [the Court] also notes the gravity of the offence which was committed by the applicant and is acutely aware of the problems confronting Contracting States in their efforts to combat the harm caused to their societies through the supply of drugs from abroad. The administration of severe sanctions to persons involved in drug trafficking, including expulsion of alien drug couriers like the applicant, is a justified response to this scourge."*[10]

However, in exercising their right to expel such aliens, Contracting States must have regard to Art. 3 of the Convention, which enshrines one of the fundamental values of democratic societies. It is precisely for this reason that the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Art. 3 prohibits, in absolute terms, torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question.

Art. 3 preliminary referred to inhuman or degrading treatment or punishment by intentionally inflicted acts of public authorities or from non-state bodies without the proper protection given by the authority. The Court nevertheless established a broader understanding of this Article and reasoned this approach, inter alia, in D vs UK:

> *"… the Court must reserve to itself sufficient flexibility to address the application of that Article (Art. 3) in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article (Art. 3). To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State.*
>
> *Against this background the Court will determine whether there is a real risk that the applicant's removal would be contrary to the standards of Article 3 in view of his present*

[9] Among many, see SCC vs Sweden (Application no. 46553/99), p 7.
[10] D vs the UK (Application no 30240/96, para 46.

medical condition. In so doing the Court will assess the risk in the light of the material before it at the time of its consideration of the case, including the most recent information on his state of health."[11]

The Court repeatedly decided on cases with medical aspects in migration cases based on this well-established case-law.

3. Medical claims in migration cases

The health situation may play a significant role in different migration processes such as:

- a part of legal migration for third country nationals to seek medical treatment in another country because their own country does not provide a certain treatment
- a part of a national protection tool for foreigners that already reside in a host country and get seriously sick
- a part of an asylum procedure where health problems are brought forward in the course of an application for international protection
- a part of the return process where a returnee brings forward medical claims that potentially would impede the return process.

Crucial in determining the responsibility of state is the question whether the applicant resides in his/ her country of origin and applies from abroad or, whether the foreign applicant is residing in the host country. Only in the latter case, the host country has responsibility for the well-being of the persons residing on its territory and is thus also responsible for following the obligations deriving from Art. 3 ECHR. Medical or health related problems of migrants are thus mainly seen in the context of (humanitarian and national) protection needs of the foreigner concerned.

3.1. Types of migration cases

Out of the five countries encompassed by study, only Belgium developed a distinct procedure for medical cases clearly separated from the asylum procedure. While medical claims are considered outside the protection status determination in Finland, Sweden and Germany, it is mainly the asylum caseworker who determines whether a person should be granted some form of stay due to the health condition. Even if Belgium foresees a separate procedure, the bulk of medical claims derive from the asylum process.

Medical claims by foreigners are thus mainly brought forward during asylum and return processes. The close relation with the asylum process may be reasoned with the fact that there are hardly any legal migration channels based on medical grounds (e.g. medical residence permit) in EU countries, which can be applied for from abroad. Consequently, medical claims may only be brought forward by persons already residing in the host country.

Because of the presence of third country nationals, the host country has developed its obligation to protect the person, as the state is responsible for all persons staying under the sovereignty of

[11] D vs the UK (Application no 30240/96, para 49.

that country.[12] As a consequence of this sovereignty, the host country has also the duty to protect the person from harm and, as a matter of this study, the duty to prevent anyone from being subjected to inhuman or degrading treatment and torture as stated in Art. 3 ECHR.

Nevertheless, as will be illustrated further in this comparative study, the countries under review take notice of Art. 3 and its jurisprudence in a different way: While the UK is directly referring to Art. 3 ECHR when dealing with medical migration cases, the other four countries mainly refer to a national ground for the impediment to return or the issuance of a residence permit on humanitarian grounds, which may derive from Art. 3 but are shaped as a national (humanitarian) protection ground. As it becomes evident from the case studies, one of the consequences of such different approaches is reflected in a rather different perception of the severity threshold for medical cases, which is significantly higher in the UK, following the jurisprudence of the ECtHR, than in the remaining countries.

3.2. Legal basis

With the exception of the UK, the legislative frameworks of the researched countries foresee a specific provision referring either explicitly or implicitly to the health situation as one of the reasons why a person may not be returned to his/ her country of origin. The health situation has thus primarily developed as an impediment to return. While not part of the written law, the UK case-owners are obliged by the Human Rights Law to act in accordance with the ECHR and are thus bound directly by Art. 3 ECHR when deciding on administrative claims (such as migration claims).

The selected countries' legal frameworks do not allow for a return of a sick person if the returnee's health situation would require medication and/ or medical treatment, which may not be at his/ her disposal in the country of origin. Under such circumstances, the return may be considered impossible or legally not permissible due to humanitarian reasons and may be of longer term, depending on the individual circumstances of the particular case.

In addition, all selected countries foresee separate provisions which forbid returning a person due to obstacles that are connected with the enforcement of the return. The question whether a person is fit-to-fly is one such example, but it may also encompass other reasons that are equally of shorter, temporary duration.

The latter obstacle to return is of little relevance for the current study, because the obstacles to the enforcement of the return are not associated with the health care situation in the country of origin. As such, the availability and accessibility to medical treatment and/ or medication are in these cases of no, or limited, concern. In the first case however, it is mainly the situation in the country of origin, and thereby, in particular the question whether the medical treatment/ medication will be available and/or accessible to returnee once she/ he is back in the country of origin.

[12] Article 1 ECHR requires states to "secure" the Convention rights to "everyone within their jurisdiction". This includes foreigners staying on the state's territory.

	Belgium	Finland	Germany	Sweden	UK
Legal basis for medical claims	Law/ Jurisprudence	Law/ Jurisprudence	Law/ Jurisprudence	Law/ Jurisprudence	Case-law/ guidance notes
Main legal reference	Art 9ter 1980 Aliens Law	Sec. 51; 52 Aliens Act	Sec. 60 para 7 Residence Law	Chapter 5 Sec 6 Aliens Act	Art. 3 ECHR
Organisational responsibility	Migration Office	Finish Immigration Service (FIS)	Federal Office for Migration and Refugees (BAMF)	Swedish Migration Board (SMB)	Home Office
Specific responsibility	special unit for medical claims	(mainly) asylum unit	(mainly) asylum unit	(mainly) asylum unit	(mainly) asylum unit
(main) Procedure	special medical procedure	after denial of international protection, following the asylum procedure	after denial of international protection, following the asylum procedure	after denial of international protection, following the asylum procedure	after denial of international protection, following the asylum procedure

Table 1: Overview of medical claims in migration cases in the five selected countries (The overview is based on the five country case studies below)

While Art. 3 ECHR is of relevance and certainly applicable to all EU countries, only the UK directly refers to the ECHR in medical cases and is thus closely connected to the high threshold as defined in the cases *D vs UK* and *N vs UK*. The remaining countries refer to national legislation which mostly foresees a lower threshold than determined by the jurisprudence of the ECtHR.

3.3. Procedures in medical migration cases

Only in Belgium the Aliens Law foresees a special procedure for applications for medical residence. Such an application may be submitted by a foreigner who resides in Belgium and who has a medical problem that cannot be treated in the country of origin. The remaining four countries deal with medical claims preliminary as a follow up of the asylum procedure (see Table 1). As such, the asylum caseworkers first determine whether a person may be granted refugee status according to the 1951 Geneva Refugee Convention, and if denied, whether the person would be eligible for subsidiary protection according to Art 15 Qualification Directive.[13] If international protection is denied, the caseworker needs to decide whether return is possible (Germany, UK) or whether other humanitarian reasons are relevant to grant residence to the person (Finland, Sweden). Consequently, Germany grants an “impediment to return”, the UK would grant a “discretionary leave to remain”, Sweden grants a residence permit on “exceptionally distressing circumstances” and Finland - a residence permit on “compassionate grounds”. Belgium grants an exceptional stay following the special medical procedure.

[13] As referred to above, both, refugee protection and subsidiary protection are referred to as international protection according to Art. 2 lit a Qualification Directive.

3.4. Organisational structure

As a consequence of the procedures where medical claims are mainly treated within the selected countries, in Finland, Germany, Sweden and UK, it is mainly the asylum caseworkers under the asylum authority who are responsible for medical cases. Even if medical issues may also arise in other migration processes (such as return) the case would still be forwarded to the asylum authority due to the protection element enclosed. Only Belgium has a specialised unit exclusively responsible for medical claims. The medical section of the Belgium Immigration Service receives all medical claims by foreigners. Should a medical element come up in another migration procedure (such as in the asylum procedure), the applicant would be advised to submit a medical claim to the medical section of the Immigration Service.

3.5. Statistics

While it was the aim to also provide statistical data on the numbers of medical claims submitted in the selected countries, such are only collected in Belgium, due to the fact that only Belgium foresees a special procedure solely dedicated to medical claims. The Belgium law further dedicates Art 9ter solely to medical claims. In the remaining four countries, the relevant legal provisions are dedicated to humanitarian grounds in general, medical grounds being only one of several concerned by the provision. As a consequence, Finland, Germany, Sweden and the UK do not register medical claims separately. In addition, medical claims may also be looked at in cases where other, additional, elements are reviewed. The end decision is thus not necessarily dedicated solely to the health aspect of the claim but also may include other – humanitarian – grounds.

According to the data published by the Belgium Immigration Service, in 2014, 3078 persons submitted a medical claim at the specialised medical section of the Immigration Service. The Immigration Service granted 295 exceptional stays for foreigners based on the medical claim. According to the UK Guidance on Human Rights Claims on Medical Grounds, as of October 2012 no Art. 3 medical case has been successful in the UK courts (or the ECtHR).[14]

4. Threshold for considering a migrant's health conditions with respect to impediment of return

One crucial question of the medical assessment of the health situation of a foreigner refers to the "severity" of the disease or the health situation of a foreigner when assessing whether or not a situation reaches up to an impediment to return or a humanitarian residence permit. It is in this respect also the question whether caseworkers need to take all medical claims into account and, as a consequence need to research the treatment possibilities and medication in countries of origin even in less severe cases or only in severe cases. Consequently the question of the threshold is relevant in this context.

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[14] Home Office 2014, Guidance on Human rights claims on medical grounds – Version 6.0, 20 May 2014, p 16 accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315909/Human_rights_on_med_grounds_v6.0_EXT.pdf (accessed on 22.01.2015)

4.1. Threshold for "severity" of a disease

The threshold for taking medical claims into account in most of the five reviewed countries is lower than the one applied by the ECtHR. In some countries, like Belgium, the severity threshold needed to be scrutinized due to increasing numbers of applications.[15] Nevertheless, among the selected countries some distinctive features could still be defined with regards to determining the threshold for checking the severity of a disease .

The highest threshold is applied by the UK, as the UK strictly follows the threshold determined by the ECtHR jurisprudence on Art. 3 ECHR, which requires a disease to be in its final stage and with the prospect of a dying applicant. Similarly, Sweden applies a rather high threshold keeping the life threatening element in the centre of consideration. In Belgium and Finland the life threatening element is not that decisive: Belgium sets the threshold at a "worsening of the health situation", while Finland requires an expected "shortening of the life span" as the decisive indicator. Germany assesses whether there would be "significant deterioration of the health". As such, the latter three countries rather assess whether the health situation worsens and thus put less importance on the stage of the disease (while certainly a disease in the final stage would be particularly taken into consideration).

Practically all countries also take other elements into account, such as the complexity of the health situation, other humanitarian issues, or the timeframe of an expected deterioration of the health situation. The more complex the individual circumstances of an applicant are, the more serious the situation is evaluated.

Severity - check	Belgium	Finland	Germany	Sweden	United Kingdom
threshold	significant worsening of the health situation	shortening the life-span; remarkable physical and mental pain	significant deterioration of health	exceptionally distressing circumstances	final stage (applicant will die)
disease must be life threatening	no	no	no	yes	yes
Relevance of other factors	yes: e.g. age, complexity of disease, etc.	yes: e.g. other humanitarian issues may strengthen the case	yes: deterioration must be (1) significant, (2) immediately after return (3) with reasonable probability	yes	yes: e.g. care, family members, support by relatives, etc.
who determines the severity	medical doctor of the Immigration Service	decision-maker based on medical attestation	decision-maker based on an attestation	decision-maker based on medical attestation	case owner based on medical attestation

[15] Belgium introduced a medical filter in their medical procedure in 2012, mainly because the numbers of medical claims rose over the years and contained also diseases of minor severity.

Severity - check	Belgium	Finland	Germany	Sweden	United Kingdom
burden of proof	applicant	applicant	applicant	applicant	applicant
evidence	attestation that must follow international applied standards	medical attestation	medical attestation must lead up the requirements indicated by jurisprudence	medical attestation following specific standards set by the Social Board[16]	medical attestation following internal instructions

Table 2: Overview of the threshold for medical claims in migration cases in the five selected countries (The overview is based on the five country case studies below)

4.2. Severity of a disease in practice

In practical terms, the severity of a disease is checked mainly against the medical attestation, which is brought forward by the applicant. The applicant bears the burden of proof in all five countries. Some countries require high standards regarding the form of medical attestation which must satisfy certain criteria (Belgium, Sweden), or follow the standards repeated by jurisprudence (Germany), or internal standards (Finland, UK).

The severity is checked in all countries except Belgium by decision-makers against the medical attestation submitted by the applicant (or the legal representative). Only in Belgium the severity check is conducted by a medical doctor employed by the medical section of the immigration service. Medical doctors are usually not involved in Finland, Germany, Sweden and the UK. Only in exceptional circumstance medical doctors may be involved.

The medical attestation is the main evidence for determining whether the threshold for the severity is met or not. In Belgium a medical filter[17] allows, to divide severe from less severe cases. The medical doctors in Belgium have some discretion in this respect and may challenge the medical attestation, but may also advise the decision-maker that a disease is considered highly severe.

5. Availability of medical treatment/ medication in countries of origin

5.1. Definition of availability in the national context

The availability of medical treatment/ medication in countries of origin is the central element in deciding whether a foreigner may be returned to his her country of origin. The availability check is an important step to identify whether a certain disease could be treated in the country of origin

[16] See Social Board (SOSFS 2005:29); see also the Swedish country chapter below.
[17] The medical filter is part of the admissibility stage and foresees that a medical doctor advices the decision-maker whether an applicant suffers from an affection in such a way that this affection poses a genuine risk for his life or his physical integrity or in such a way that this affection poses a genuine risk of an inhumane or humiliating treatment in his country of origin or in the country where he usually resides (See the country chapter on Belgium below).

or not. The availability check is conducted in all five countries researched, after a decision has been made that the disease is that severe that treatment must be secured, primarily in the country of origin and, only if not available, in the host country.

Availability	Belgium	Finland	Germany	Sweden	United Kingdom
Relevance	yes	yes	yes	yes	yes
Definition	no	no	no	no	no
Availability is assessed by	the medical doctor	the decision-maker	the decision-maker	the decision-maker	the decision-maker
Supported by	COI	COI	COI	COI	COI
Assessment of availability is based on	expert knowledge of medical doctors & case-law	preliminary work for the Aliens Act	guidance by case-law	guidance by case-law	Case-law

Table 3: Overview of the application of "availability" of medical treatment and/ or medication in the five selected countries (The overview is based on the five country case studies below)

While the "availability" of medical treatment and/ or medication seems rather straightforward at first glance, detailed interpretation of nuances may turn out to be rather complex when applied in reality. A medication may be registered in a country of origin but may be temporarily (or even longer) out of stock. A countries' economy may also be rather weak and the black market may in parts work more efficiently or even be more reliable than the official supply (of medication for example). A treatment or medication may be available but of lower quality than in the (current) host country of the applicant.

None of the researched countries has developed a definition as regards the availability of medical treatment and/ or medication. It is evident for all countries that the medication or treatment must exist or physically be present in the country of origin. In some countries some case-law developed on the borderlines for availability and most countries mentioned some elements that they would need to look when deciding whether treatment/ medication is "available".

The availability is determined in all countries except Belgium by the decision-makers, mainly supported by the Country of Origin (COI) unit. In Belgium, the availability is assessed by medical doctors, who would then advise the decision-maker on the availability (and accessibility – see below).

5.2. Availability in practice

Finland, Germany and the United Kingdom mainly need to establish that the medication/ treatment is "physically" present in the country of origin. The registration of medication is considered as the first element of availability by Belgium. General supply problems are taken into account in all countries, while Germany stated that, at the time of the decision, the medication should physically exist in the country of origin. Sweden considers the applicant's earlier treatment in the country of origin as a certain indication of its availability. The question

whether treatment is available in a public or private facility plays a role, but this question is rather connected with the costs.[18]

relevant elements	Belgium	Finland	Germany	Sweden	United Kingdom
medication/ treatment must be …	√ registered + on stock	√ physically present in CO	√ physically present in CO when deciding	√ there	√ physically existence in CO

Table 4: Elements to determine the availability to medical treatment/ medication in the country of origin in the five selected countries (The overview is based on the five country case studies below)

Belgium also takes substitutes into account and may, in consultation with the medical doctors, define and search for locally available alternatives to medical treatment/medication. In Germany, substitutes require an additional confirmation from the treating physician about the possibility to use the substitute.

It could not be clearly answered by all countries whether the black market could be regarded as a legitimate source to determine the availability of a certain medication. Belgium, Finland and Sweden would qualify such a supply as too insecure, also because the medication would require an illegal purchase. In Sweden, a court decision particularly stated that "it would not be reasonable that a person would need to make use of unofficial or even illegal channels to obtain the necessary medication"[19]. Both, Germany and UK argued that *a priori* black market may not be excluded, but it would require an in-depth assessment. In the absence of a court decision no clear answer could be given.

Are the following examples considered as available?					
	Belgium	**Finland**	**Germany**	**Sweden**	**United Kingdom**
medication at black market	no, because too insecure	no	so far no valid interpretation (by court or policy) by now	no, because too insecure and illegal	no case-law yet; both ways arguable
medication via internet pharmacy	no, because too insecure	if "legal", it may be considered available	so far no valid interpretation (by court or policy) by now	no case-law	no case-law yet; both ways arguable

Table 5: Examples for the "availability" of medical treatment and/ or medication in the five selected countries (The overview is based on the five country case studies below)

Similarly, without any practical experience, and to the question about the black market, the countries responded to the question whether medication via internet pharmacies is to be considered available - that it would depend on the security and legality of such a form of supply.

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[18] See as an example the case law in Germany, where the court established that treatment which is only available in private but not in public facilities may become relevant if the costs in the private facility are very high (See below under the German country chapter; Federal Administrative Court from 29.06.2005, Az 1 B 174/04).
[19] See Migration Court of Appeal, 25 October 2010, UM 7664-09.

The fact that the treatment/ medication would be of higher quality in the country of residence than in the country of origin, is determined by practically all countries. In most countries respective court decision clarified that a lower level of medical care in the country of origin than in the host country cannot be an argument for granting any permit to stay.[20]

6. Accessibility of medical treatment/ medication in countries of origin

As already mentioned not all countries research and evaluate the accessibility to medical treatment and/ or medication in the country of origin. While all countries need to establish whether a certain medical treatment or medication would be available, the costs of the medication (hereby referred to as part of the "economic accessibility"), the distance between the residence of the returnee in his/her home country and the location where treatment is available (herby referred to as "geographic accessibility") and whether there are any discriminatory practices as regards the factual access for a returnee (hereby referred to as "political accessibility") vary among the selected countries as regards their importance for granting or denying residence permit based on medical reasons.

At first glance it seems rather clear that among the five researched countries only Belgium and Germany research the accessibility, while Finland, Sweden and the UK do not take into account potential obstacles that may prevent returnee from being able to physically get hold of the necessary and available treatment/ medication.

In other words,: the availability describes the objective presence of a certain medical treatment/ medication in the country of origin of a returnee, while the accessibility describes subjective preconditions for an individual to physically get hold of the (objectively) available treatment/ medication.

As also described above, from the ruling of the ECtHR both approaches may be deducted: the ECtHR made it rather clear, that the threshold of Art. 3 for medical cases does not depend necessarily on only one element[21], but that the threshold may be reached in an accumulation of different elements that together amount to exceptional circumstances. These elements may include availability and accessibility considerations.

The countries, with the exception of the UK, have their national legal provisions on medical residence permits in place, which mostly demand a lower threshold than the one set by the ECtHR. While only Belgium and Germany foresee the determination of the accessibility to medical treatment/ medication as a component of the medical assessment, the remaining countries may take accessibility issues into account – particularly in cases of accumulation of several elements that altogether would have a severe impact on the medical treatment in the country of origin upon return.

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[20] See the case studies below for Belgium, Finland, Germany, Sweden and UK.

[21] In the D. v. the United Kingdom case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support (see Case of N. v. The United Kingdom, Application no. 26565/05; para 42).

6.1. Definition of accessibility in the national context

Neither Belgium nor Germany applies a strict definition of the accessibility to medical treatment. Belgium clearly states that, as a principle, the decision-maker is obliged to research and indicate in the decision whatever has been mentioned in the applicant's claim. For the assessment the decision-maker is thus dependent on the applications submitted.

Accessibility	Belgium	Finland	Germany	Sweden	United Kingdom
Relevance	Yes	no*	Yes	no*	no*
Definition	no definition	n/a	no definition	n/a	n/a
Features	scope often depending on the applicant's claim	n/a	no obstacle to get hold of treatment/ medication	n/a	n/a
** Interviewees from these countries denied the relevance of the accessibility to treatment/ medication for the decision making process. Nevertheless, in different examples the accessibility may play a role, even though it cannot be considered as a strict part for the decision making process.*					

Table 6: Overview of the definition and main features for the "accessibility" of medical treatment and/ or medication in the country of origin (The overview is based on the five country case studies below)

For Germany it is essential that, if a person is forcibly returned, there must not be any obstacles for her/ him to get hold of the treatment and/ or the medication she/ he needs to avoid a significant deterioration of health.

6.2. Accessibility in practice

6.2.1. Economic accessibility

The probably most exhaustive assessment with regards to the economic accessibility is conducted by Germany. Decision-makers in Germany need to establish the costs of the treatment/ medication in the first step. The costs are then measured against the returnee's own resources plus possible external financing, by e.g. family members or the state (health insurance). When considering the applicant's self-financing, the German Administrative High Court took into account the average or minimum income in the country of origin as well as the unemployment rate. The assessment done by Germany, is naturally not a precise calculation of costs, but rather approximate evaluation if the costs are, for example, exorbitantly high (or very low) and whether the chance to get the treatment financed is rather likely (or impossible).

Economic accessibility	Belgium	Finland	Germany	Sweden	United Kingdom
relevance	Yes	No	Yes	no	no
relevant elements	√ can the person work √ social health care √ family support √ support by IOs	may become relevant if different elements accumulate	√ costs √ support by family √ support by state √ average/ min. income to compare	n/a	may become relevant if different elements accumulate to a violation of Art. 3 ECHR

Economic accessibility	Belgium	Finland	Germany	Sweden	United Kingdom
irrelevant elements	√ costs are irrelevant	√ costs are irrelevant (case-law)	n/a	√ costs are irrelevant (case-law)	Court: DvUK indicates a very high threshold

Table 7: Overview of the main features for the "economic accessibility" of medical treatment and/ or medication in the country of origin (The overview is based on the five country case studies below)

The Belgian position has equally been developed through case-law, which clearly determined that the cost of treatment is not relevant. The Belgian Courts argued in this regard that it may not be derived from the ECHR that the treatment should be free of charge. Also the necessity to pay bribes cannot be taken into consideration. At the same time, the Belgian Court developed the argument, that the Immigration Service must determine in its decision whether the applicant's disease would hinder him/her to work. Decision-maker thus needs to identify whether the person concerned is capable to work, whether s/he would be covered by a social health care system, through family support or by any other charitable or international organization active in the country.

In the Finnish practice, the preparatory work for the Aliens Act, determines that even if health care is expensive in a country, it does not in itself constitute the basis for issuing a residence permit on compassionate grounds. Costs thus may play a role in Finland only if a number of different elements would accumulate in a specific case.

In Sweden, the Migration Court in second instance ruled that high costs would make the medication not accessible to an applicant from Kosovo and that a residence permit should be granted. This decision was then though overruled by the Migration Court of Appeal (upon appeal of the Swedish Migration Board) ultimately decided that the treatment may cost more in the Country of Origin than in Sweden, but that would not be reason enough to grant a permit to stay in Sweden.[22] As such, the costs of treatment and medication are an issue but one which has been solved by the Migration Court of Appeal.

The UK finally, concludes from the case-law by the ECtHR that the costs of treatment are irrelevant. It is though thinkable that such arguments would come up during the appeals procedure and may then play a role and may be challenged.

6.2.2. Geographic accessibility

Following the German reasoning that there should not be any obstacle for the person to obtain the medication or receive the medical treatment, the geographic proximity is of relevance in Germany. The geographic distance between the place of origin of the returnee and the place where medical treatment is available is in so far relevant as it may have a significant impact on the costs for travel or may even require a special permission to enter this part of the country or may depend upon a registration in another region. The geographic proximity thus needs to determine whether there may be any obstacles for accessing the treatment in reality.

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[22] Migration Court of Appeal, MIG 2007:48.

Geographic accessibility	Belgium	Finland	Germany	Sweden	United Kingdom
relevance	no	No	No	No	no
relevant elements	n/a	may be relevant if distance accumulates with other elements (e.g.: the security situation; etc.)	may get relevant if distance accumulates with other elements (e.g. costs for travel; special allowance/ registration to reach med/ treatment, etc.)	may be relevant if a special allowance would be needed to reach med/treatment	n/a
irrelevant elements	√ geographic distance irrelevant - the person may relocate (case-law)	√ distance √ long travel √ travel costs	√ the sole distance from place of residence	√ distance √ long travel √ travel costs	n/a

Table 8: Overview of the main features for the "geographic accessibility" of medical treatment and/ or medication in the country of origin (The overview is based on the five country case studies below)

Finland and Sweden only exceptionally consider the geographic accessibility relevant, particularly, for example, in connection with the security situation in a certain region on the way to the treatment (Finland) or if (similar as in the German example) any special permits or registration in a certain part of the country were are prerequisite for obtaining a treatment there. However, in principle (and with the exception stated) Sweden is of the opinion that the geographic proximity is not relevant because it would also not be uncommon in the Swedish context that citizens need to travel within Sweden to receive the treatment not be available in their place of residence.

The Belgian jurisprudence made it rather clear that the geographic proximity is not relevant in the Belgium reality because hypothetically, a person also may relocate closer to the place where the treatment/ medication is available.

In the UK, the geographic accessibility has not been subject to a court case yet, but in a leading case by the Upper Tribunal, the Tribunal stated that it there may be a practical matter beyond their [the returnees] reach for example because they [the returnees] would have to travel a long distance which is prohibited by their health or personal circumstances. As such, the geographic accessibility is not relevant in the UK practice but may become relevant under specific circumstances.

6.2.3. Political accessibility

The political accessibility may well be disregarded in the context of granting or denying of residence permit in connection with the medical situation of a foreigner. None of the five countries considers the political accessibility decisive in medical cases, because such an

assessment is clearly primarily attributed to refugee status determination in the context of the asylum procedure.

Political accessibility	Belgium	Finland	Germany	Sweden	United Kingdom
relevance	no	no	No	no	No
relevant elements	relevant if claimed in the application	n/a	n/a	n/a	n/a
irrelevant elements	part of RSD	part of RSD	part of RSD	part of RSD	part of RSD

Table 8: Overview of the main features for the "political accessibility" of medical treatment and/ or medication in the country of origin (The overview is based on the five country case studies below)

Only Belgium mentioned that the political accessibility may play a role if it has been claimed in the application. In such case the decision-maker would need to address this issue. In the UK usually the political accessibility also is of no relevance unless the RSD did not conclude an individual persecution but discrimination would still be relevant when it comes to the access to treatment and/or medication. Nevertheless, no case-law has developed yet.

7. Residence and Return

7.1. Residence granted

Should an applicant's health situation reach the distinct national severity threshold and the necessary treatment/ medication were not available and/ or accessible in the country of origin, the person receives, in all five countries studied, a residence permit. The types of residence permits are often connected with the reasons for an impediment to return (Germany, UK) or are qualified as national (humanitarian) protection grounds (Finland, Sweden, Germany, Belgium).

The duration depends on the disease and the necessary treatment in Sweden, while Belgium and Finland grant at first a residence for 1 year, Germany for 3 years and the UK for 2,5 years. The permit is extendable in all five countries following a new assessment of the applicant's health situation.

Permit	Belgium	Finland	Germany	Sweden	United Kingdom
Type of permission to stay	exceptional stay	residence permit on compassionate grounds	impediment to return	residence permit on exceptionally distressing circumstances	discretionary leave to remain
Duration	1 year	1 year	3 years	depends on the disease and treatment	30 months (2.5 years)
Extendable	yes	yes	yes	yes	yes

Permit	Belgium	Finland	Germany	Sweden	United Kingdom
Issuance	Municipality	Finish Immigration Service	Foreigners office in the Länder	Swedish Migration Board	Home Office

Table 9: Overview of the types of residence permits granted (The overview is based on the five country case studies below)

In Finland (the Finish Immigration Service), Sweden (the Swedish Migration Board) and UK (Home Office) the same authority which reviewed the case issues the residence permit. In Belgium the municipality of applicant's residence issues the residence permit upon receipt of the decision by the Belgium Immigration Service. The German Federal Office for Migration and Refugees forwards the decision to the regional Foreigners Offices, which then issues the respective residence permit.

7.2. Residence denied

Should the threshold for the severity not been reached or the applicant could receive treatment and/or medication in the country of origin, the foreigner is to be returned. The countries foresee forced and voluntary return programmes.

Medical check before return	Belgium	Finland	Germany	Sweden	United Kingdom
fit to fly	yes	yes	yes	yes	yes
check of the medical situation	yes, must be checked	yes, is checked	check of other obstacles to return deriving from DE (e.g. Family, etc.)	check of NEW (medical) facts that stand against the return	*no reply*

Table 10: Overview of the medical checks before return in the five selected countries (The overview is based on the five country case studies below)

While all countries conduct a fit-to-fly assessment for returns via air, the policy in Germany (being responsible for the return) needs to further evaluate whether the return is also possible. In this assessment the police also needs to check medical issues that are not connected with the country of origin, but with the returning country (Germany). As such, the police for example needs to check the situation with family members remaining in Germany but also to get the necessary contacts in the country of origin to meet the returnee upon return and possibly also to prepare already the access to the health care system.

Medical support	Belgium	Finland	Germany	Sweden	United Kingdom
in cash	No	no	No	no	no
in-kind	No	no	No	no	no

Medical support	Belgium	Finland	Germany	Sweden	United Kingdom
other support in connection with return	√ special needs programme	√ Assisted Voluntary Return (AVR) programmes by IOM may contain medical support	√ police needs to support returnee to factually get access to (e.g.) health care in CO	√ medication may be provided until doctors can be visited in CO	√ several return programmes - not as a rule, but there may be additional support

Table 11: Overview of medical support for returnees (The overview is based on the five country case studies below)

In Sweden, the SMB must conduct another review of the medical situation of the applicant before return. The litigation unit of the SMB needs to evaluate whether there have been new elements with regards to the health situation or not. This check should provide a final confirmation that there are no obstacles from the medical point of view to return the person concerned.

8. Conclusions

The research in the five selected countries, Belgium, Finland, Germany, Sweden and the United Kingdom showed that the countries developed rather different responses to medical claims by foreigners.

In all countries the medical claim must be of a certain severity. Not all medical problems necessarily demand from national authorities to review the medical claim. The disease must be serious – "light" diseases do not meet the threshold to start considerations on a residence permit on medical grounds. The threshold, nevertheless, differs between "in the final stage of a disease" (United Kingdom) to a "significant deterioration of the health" (Germany).

As regards the applied procedures for medical claims, the Belgian practice encompassing a specialised medical regularisation procedure stands out among the researched countries. While in most countries medical claims are reviewed in the course of an asylum procedure (i.e. after international protection has been denied), Belgium developed a special medical regularisation procedure.

While not always easy to distinguish between availability and accessibility, all countries look into the availability of medical treatment and/ or medication in the country of origin. Only Belgium and Germany additionally also assess whether the person de facto has access to the available medication and/ or treatment.

The scope of availability is not that clear-cut and the countries hardly developed a solid definition for the scope and content of the availability. It is mainly at the discretion of the decision-maker to establish whether a medication may be considered as available or not.

The accessibility is researched, in the most detailed manner, in Germany by an assessment that includes economic (the costs of medication/ treatment; the possibilities to finance the costs) and geographic elements. Belgium developed a similar clear policy on the accessibility, which has evolved, as in Germany, from the national case-law. Finland, Sweden and the UK do not look

into the accessibility. However, also in those countries questions of the accessibility may become relevant if, in an individual case, a number of different elements accumulate.

The countries grant a residence permit, an impediment to return or a leave to remain, which lasts between 1 (Belgium, Finland), 2,5 years (UK) and 3 years (Germany) or may be granted for the duration of the disease and the treatment (Sweden). The permits are renewable.

If the medical claim is denied, none of the countries has regular programmes for bridging the period until the returnee has settled and may factually access medical care in the country of origin. However, a number of return programmes are running in all selected countries which may have included some support also for returnees with health issues.

From the research the following may be concluded:

- the main source for developing the national policies derives from case-law
- the researched countries did not develop definitions for “the severity”, the “availability” or the “accessibility”. The countries consider these terms to be more flexible and leave some discretion to the caseworkers to interpret an individual case in the light of the legal provisions further interpreted by case-law.
- The borderline between the “availability” and the “accessibility” is not always clear-cut and consists of several grey areas that may be attributed to the availability but at the same time also to the accessibility. Also the different elements of accessibility (economic, geographic and political accessibility) cannot be clearly separated from each other.
- Even countries that claim not to review the accessibility to medical treatment/ medication in the country of origin, include some elements of this assessment also in their determination of the claim – particularly when many different obstacles accumulate.

Part 2 – Country Reports

Case Study - Belgium

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1. Medical claims in migration cases in Belgium

1.1. Legal Basis

The main law dealing with migration in Belgium is the Law from 15 December 1980 on access to the territory, residence, reception and removal of aliens (further on referred to as the 1980 Law).[23]

In Belgium the possibility to apply for a residence permit on medical grounds goes back to Art 9.3 of the 1980 Law, which foresaw the possibility to ask – under exceptional circumstances – for a legal status in Belgium.

With the transposition of the EU Directives[24], Art 9.3 has been lifted and split into two separate Articles[25]:

- Art 9bis refers to requests for authorisation to stay for humanitarian reasons, and
- Art 9ter refers to requests for authorisation to stay for medical reasons.

With Art 9ter, Belgium thus created a specialised procedure for the regularisation of third country nationals residing in Belgium applying for stay based on medical grounds. This procedure is considered a specialized procedure for all medical claims. Regardless of the type, all cases involving medical background of the applicant are referred to the same specialised medical section. To initiate the procedure, the third country national needs to submit an application for the stay based on medical grounds also in case the medical claims has been brought forward in other migration processes.

1.2. Organisational Structure/ Responsibilities

The competent organisation dealing with migration issues and thus implementing the 1980 Law, is the Migration Office. The Migration Office is divided into four directorates based on competencies:

- Directorate for Control of the Territory and Border Control,
- Directorate for Asylum,
- Directorate for Entry and Residency, and

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[23] Loi du 15 Decembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Coordination Loi du 15/12/1980 Version 30/09/2014)

[24] Particularly with respect to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

[25] 'Arrêté royal du 17 mai 2007 (M.B. du 31.05.2007) fixant les modalités d'exécution de la loi du 15 septembre 2006 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers", which came into force on 01.06.2007; see: https://dofi.ibz.be/sites/dvzoe/FR/Guidedesprocedures/Pages/Autorisationdes%C3%A9jourpourraisonsm%C3%A9dicalesarticle9ter.aspx.

- Directorate for Exceptional Stay.

Medical migration issues are dealt with under the "Directorate for Exceptional Stay", which has two sub-divisions, the Section 9bis (authorization for humanitarian reasons) and the Section 9ter (for stay on medical grounds).

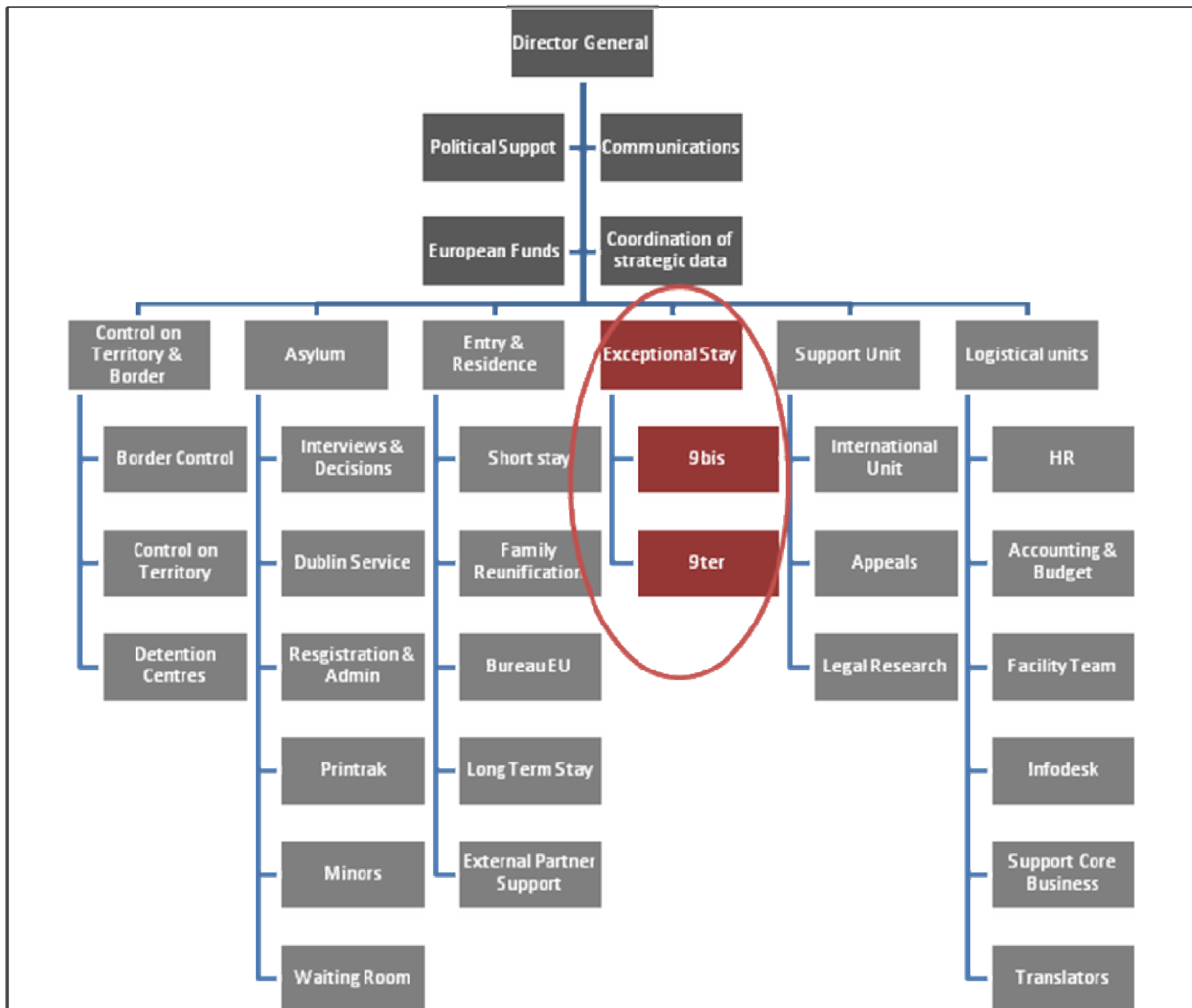

Chart 1: Organigram of the Migration Office (presentation by ICMPD, based on: Belgium Migration Office at https://dofi.ibz.be/sites/dvzoe/FR/Apropos/Pages/Organisation.aspx (accessed on 22.11.2014).

The medical Section (also referred to as "9ter Section") further on is divided into 4 units:

- The Unit of Decision-makers (around 22 decision-makers)
- The Unit of Medical Doctors (around 10 medical doctors)
- The Unit of Medical Secretaries, and
- The Unit for Medical Country of Origin Information (MedCOI)

The medical doctors unit issues expert opinions about the clinical situation of applicants and is thus closely involved in medical migration procedures. The Directorate for Exceptional Stay is also responsible for the fight against medical fraud in this context; this is the responsibility of the Section Quality Control.[26]

1.3. Statistics

The Belgium Migration Office publishes statistical data at the Office's webpage. The statistics also show the number of applications for a medical stay in Belgium. In 2014, a total of 3078 persons applied for a residence permit on medical grounds.

Number of incoming applications for medical procedure (9ter) in 2014[27]	
January	435
February	298
March	262
April	402
May	214
June	262
July	235
August	170
September	200
October	199
November	194
December	207
Total	3078

This constitutes roughly an average of about 250 applications per month. The Belgium Migration Office granted an exceptional stay based on medical reasons in 295 cases.

1.4. Procedure in medical migration cases

With the so-called "9ter procedure" Belgium introduced a special procedure for medical cases. Irrespective of whether the applicant started an asylum procedure or is being subjected to the return procedure, s/he may submit an application for residence based on medical grounds (as part of exceptional stay in Belgium). If another migration procedure is ongoing, these procedures run in parallel. A third country national may only be returned if all procedures have been completed with a negative decision.

The medical procedure entails two parts:

- the admissibility stage, where it is checked whether the application can formally be admitted to the procedure, and

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[26] Migration Office at https://dofi.ibz.be/sites/dvzoe/FR/Apropos/Pages/Competences.aspx (accessed on 22.12.2014.

[27] See Web page of the Migration Office at https://dofi.ibz.be/sites/dvzoe/NL/Statistieken/Pages/Uitzonderlijk_Verblijf.aspx accessed on 20.01.2015.

- the in-merit stage, where the application is reviewed on substance (in merit).

The procedure is characterized by a close cooperation between the units of the "medical section", in particular, the decision-makers unit, the medical doctors unit, the secretaries and the MedCOI unit.

1.4.1. Admissibility Stage

An application for a residence under exceptional stay based on medical reasons needs to fulfill specific criteria in order to be admitted to the procedure. The decision-maker of the medical section under the Migration Office thus needs to screen whether the application sent by post meets the following criteria:

Administrative conditions for admitting the medical application
1. The application must be sent by registered letter
2. The person must reside in Belgium
3. The Identity must be documented (only exception may be done in case of asylum seekers)
4. The application must contain a medical attestation that must not be older than three months with the following information:
a. Diagnosis
b. Treatment
c. Degree of severity of the disease
5. Review whether the application is a repeated application or not.

If one of the above criteria is not fulfilled, the decision-maker may reject the application based on inadmissibility. Only if these requirements are fulfilled, the decision-maker may proceed with the application to the medical doctor within the Medical Section under the Migration Office. The medical doctor conducts the next step in the procedure, applying the medical filter:

Medical conditions for admitting the medical application (medical filter)
The medical filter checks whether the disease is in accordance to art. 9ter 1§1

If the medical doctor concludes in his advice that the applicant suffers from an affection in such a way that this affection poses a genuine risk for his life or his physical integrity or in such a way that this affection poses a genuine risk of an inhumane or humiliating treatment when there is no adequate treatment in his country of origin or in the country where he usually resides (art 9ter 1§1), the decision-maker will declare the application admissible and the application will be reviewed on substance.

If the medical doctor concludes otherwise, the application is considered inadmissible and rejected directly by the decision-maker.

If the application is admissible, the application is reviewed on substance.

1.4.2. In-merit stage

The in-merit determination of the application contains an analysis of the medical situation and a check whether the applicant could receive treatment/ medication in the country of origin or not. As such this phase encompasses the following steps in Belgium:

In-merit review
1. Art. 9ter 1§1: degree of severity of the medical condition
2. Is the medical treatment/ medication available in the country of origin
3. Is the medical treatment accessible in the country of origin

The review of the availability of and accessibility to medical treatment and/or medication may be regarded obsolete in case the medical doctor advises not to return a person due to his/ her very severe health situation, for example, in case of a very complex health problem, in case of hospitalisation and/ or in case of inability to travel.

1.4.3. Decision

If the medical doctor – in his advice to the decision-maker – states that the degree of severity is not in accordance to art. 9ter 1/1, or that the medical condition is no longer present, or that the medication is available AND accessible for the individual concerned, the decision-maker denies the application.[28]

If otherwise, the medical doctor states that the degree of severity is in accordance to art. 9ter 1/1, that the medical condition is still present, and that the medication is not available or accessible for the individual concerned. The decision-maker additionally checks if the applicant forms no threat to public safety. If not, the application is granted and the applicant receives the right to stay in the country.

The decision-maker would thus forward the decision to the municipality of the applicant and give the municipality instructions to issue a (temporary) residence permit and the applicant would receive an A-Card for temporary residence for 1 year.

The decision-maker is not bound to the expert opinion provided by the medical doctor, but usually follows it in the decision.

2. Threshold for considering a migrant's health condition with respect to impediment of return

In Belgium a special procedural step has been introduced to take into account the severity of the disease. The so called "medical filter" was introduced in 2012, mainly because the numbers of medical claims rose over the years and contained also diseases of minor severity. In order to avoid taking each and every medical claim into a detailed procedure on the merit, admissibility

[28] The denied applicant's return though still may be pending due to another, in parallel brought forward asylum application. If return already can be effectuated, the person concerned may make use of the "special need programme", should her/his situation fall under this programme.

requirements have been introduced to check the degree of severity of the medical claims before the review on substance. The applications that are not in accordance with the required degree of severity are rejected as inadmissible without further in-merit review.

2.1. Threshold for "severity" of a disease

In general, there is no applied definition for "severity" of a disease that is applied in order to identify which medical application should be admitted to the 9ter procedure and thus should be further investigated.

Every disease is different. A common applicable definition of "severity" that can be used is thus not possible to give. The medical doctors of the Medical Section in Belgium decide on an individual case whether a certain disease or medical problem has a certain degree of severity or not and thus whether it "passes the medical filter" or not.

In the absence of a clearer definition an illness is considered as severe by the Belgian Migration Service if the applicant suffers from an affection in such a way that this affection poses a genuine risk for his life or his physical integrity or in such a way that this affection poses a genuine risk of an inhumane or humiliating treatment when there is no adequate treatment in his/ her country of origin or country of return.

But even such a definition cannot be applied without looking into further additional factors, such as the age or the complexity of a disease, or of many smaller diseases that accumulate to an overall severity of the state of health of a person.

2.2. Severity of a disease in practice

In a court case, the Court had to decide on an issue closely related to the severity in connection with the medical attestation and the applicability of Art 9ter in general: The Court stated that the applicants' medical certificate would not have demonstrated that their return would result in panic attacks due to the pressure and stress of the regime in Russia/ Chechnya, as stated in the applicants' appeal. One could further not imply that the return to the Country of Origin *ipso facto* would provoke panic attacks by the applicants. The Court further ruled that the applicants would have access to PTSD treatment in Russia/ Chechnya and that a granting of residence based on Art 9ter would contradict its very meaning. Otherwise, every foreigner with PTSD, whose causes lie in the country of origin, would be entitled to a residence permit. Such an interpretation though finds according to the Court no support in Art 9ter of the Aliens Law 1980.

3. Availability of medical treatment/ medication in countries of origin

The availability check falls under the responsibility of the medical doctors. The medical doctors determine whether treatment and/ or medication is available according to the needs of the patient. The decision-makers are not involved in this part of the procedure.

3.1. Definition of availability in the national context

There is no clear and generally applicable definition of "availability" in Belgium. The medical doctors within the 9ter section are responsible to determine the availability and do have a certain discretion in this respect.

At the least, the medication must be registered in the country of origin. The medical doctors research the registration in the country of origin by using the generic and not the brand names. If applicable, medical doctors would also investigate whether there is any alternative medication. Preferably medication should be not only registered but also on stock in drugstores and pharmacies. Medication from the black market or from on-line pharmacies is considered as too insecure: the availability would thus be denied in such cases.

With regards to the availability of medical treatment, the medical doctor of the migration office reviews the attestation by the treating physician and checks whether the prescribed treatment is necessary for the described disease of the applicant. When the medical doctor assesses whether the treatment is available in the country of origin, the doctor also researches on the quality of the care in the country of origin. Although the Belgium case-law clearly determined that the quality may be lower than the one offered in Belgium, still the medical doctors need to investigate whether the available treatment would provide some minimum care possibilities.

3.2. Availability in practice

As availability of medication and/or treatment is based on a very individual assessment of the disease, an availability assessment in the one case might be not sufficient in another.

Ideally, medical doctors dispose of more sources on the availability of medical treatment/ medication than just the registration of the medication. Medical doctors usually would check the availability in the capital of the country of origin, unless there is some significant information on the region such as in the context of Chechnya and the Russian Federation.

Should the medical doctor wish so, she/ he can also ask the applicant for supplementary medical attestations/ reports and/ or conduct an additional examination of the applicant. This examination can be done at every stage of the in-merit procedure.

In national jurisprudence and practice the following elements have been considered as regards the availability of medical treatment and/ or care:

- The court stated that the quality of the healthcare in the country of origin doesn't need to be of the same level as in Belgium.[29]

4. Accessibility of medical treatment/ medication in countries of origin

Once the medical doctor has determined that the medication/ treatment is available in the country of origin, the medical doctor further assesses the accessibility to medical treatment/ medication in the country of origin and is thereby supported by the decision maker.

4.1. Definition of accessibility in the national context

Generally there is no all-encompassing definition that would give clear guidance on what needs to be established as regards the accessibility to medication/ treatment. The law, solely determines that the medical doctor needs to establish whether the access to treatment/ medication would be possible for the returnee.

[29] Court of Appeal; Decision Number: 122.034.

4.2. Accessibility in practice

As a general rule, decision-makers need to respond to the claims addressed in the application for exceptional stay. It is thus to a certain extent the applicant who determines what decision-makers in the medical procedure in Belgium need to establish in their decisions.

Should the applicant not claim that treatment/ medication in the Country of Origin would not be accessible for her/ him, the medical advice refers to the following elements, which were developed as the main criteria over the years, further shaped by jurisprudence.

4.2.1. Economic Accessibility

Belgium mainly considers the "economic accessibility" and is thus preliminary researching and determining whether the applicant could gain a living her/ himself or whether other subsidiary sources like the public health care, family members or other organizations could support the applicant. These elements were developed taking into account the national court decisions as well as the developed national practice. Summarised, the following elements are usually checked by decision-makers when looking into the accessibility to medical treatment/ medication in countries of origin:

- ✓ Can the applicant work?
    - This element is established by looking at the age of the applicant (is the person in an age where she/ he can work?)
    - Did the medical doctor attest that the applicant would be too ill to work?
    - Does the applicant have any particular degree/ education/ work experience?
- ✓ Social health system
    - Is support by a social health scheme possible?
    - If the claimant would bring forward any "individual reasons" why she/ he cannot benefit from the health care system, the decision-maker needs to respond to such claims. Quoting a general report would though be considered as not sufficient. The applicant has to give individual proof that she/ he cannot benefit from the social health system.
- ✓ Presence of family in the country of origin
- ✓ IOM additionally offers in many countries re-integration programmes which further could support the "access" to social benefits or other support schemes
- ✓ Jurisprudence of the ECHR

The ability of an applicant to work has been challenged by an applicant, who argued that he would not have access to medical treatment/ medication in the country of origin because of not being capable to work. In the appeal the applicant referred to medical records confirming the applicant's stay in a psychiatric clinic twice. The court determined that while evidently the applicant could not work during the time when admitted to the psychiatric clinic, this does not

mean that the applicant would in general not be **capable to work**. In the absence of any further evidence for the applicant's general incapability to work, the court upheld the 9ter decision.[30]

Similarly, the court ruled that the medical doctor of the Migration Office explained that the claimant's disease would **not** be **of such severity** that it **would prevent her from being able to work**. The applicant therefore would be capable to provide for her livelihood and may, by means of income from work, also take care of the medical expenses she would need. It is also understood that she can get assistance by her partner and family members. Additionally the court [first instance] decision pointed out that the claimant could address IOM. The court held this reasoning of the 9ter decision as not manifestly unreasonable.[31]

For the economic accessibility, Belgium neither reviews the costs of medication nor other conditions in the country of origin such as e.g. the unemployment rate. In accordance with the national jurisprudence and the Belgium understanding of the specific case-law of the European Court of Human Rights on Art. 3 ECHR, neither the costs nor the unemployment rate could constitute sufficient arguments for an impediment to return.

Accordingly the Court argued by interpreting the case-law of the European Court of Human Rights, when deciding that "the applicant's argument on the prices of medical care and the necessity of bribes/ informal payments indicate an understanding that the medical care should be free of charge. This interpretation would though be contrary to the ECHR. The European Court of Human Rights ruled that Article 3 of the ECHR does not guarantee the access to the territory of a state for the sole reason that the state may provide better medical care than the country of origin of the foreigner. Even the fact that the expulsion would affect the health status of the foreigner, would not be sufficient to constitute a violation of that provision."[32]

4.2.2. Geographic accessibility

The Belgian Migration Office is not required to assess the geographic accessibility. The court in Belgium held in several judgments, that a long distance between the applicant's home region and the place where treatment and/ or medication would be available, is irrelevant for the determination whether treatment and/ or medication would be accessible for the person concerned. The court in this respect argued that, as the applicant came a long way from his/ her country of origin to Belgium, a relocation within the applicant's country of origin would be the same reasonably.

From these court decisions the Belgium regularisation decision-makers concluded that the geographic accessibility is of no concern and thus does not need to be researched.

4.2.3. Political accessibility

The political accessibility is only researched upon explicit claims in the application that there would be any difficulties with this respect. This ground though is invoked at times – especially in the context of Roma from Serbia.

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[30] Decision 83.460 from 21st June 2012; see also Decision Nr 81399.
[31] Decision 81.943 from 30th May 2012; see also Decision Nr. 82232, Nr. 82161, Nr 83407.
[32] Decision 81.359 from 15th May 2012.

5. Residence and Return

Once the decision-maker has collected information on the accessibility, the result of this research is forwarded to the medical doctor, who drafts a medical statement based on the results of the availability and accessibility research together with an overall assessment of the applicant's illness. The statement is then passed to the decision-maker who then issues the decision taking into account the medical expert opinion. The medical expertise is attached to the decision in an envelope which only can be accessed by the applicant him/ herself.

5.1. Residence granted

Should the Migration Office come to the conclusion that the medication and/ or treatment would not be available or not accessible for the applicant in the country of return/ country of origin, the 9ter division of the Ministry of Immigration would decide that the applicant cannot be sent back to the country of return.

The 9ter division would send the decision to the municipality where the applicant is residing. The municipality would grant a resident permit (A-Card for "temporary (exceptional) stay") based on medical grounds to the applicant. The applicant gets notified and may pick up the residence permit. With the A-Card the applicant may request for a working permit.

The residence permit is, per analogiam, similar to the residence permit for subsidiary protection and is thus first issued for the duration of 1 year. After 1 year the 9ter division again looks into the medical situation of the applicant and may – if there are no changes in the situation of the applicant – prolong the residence permit for another 2 years. After 2 years there will again be an examination of the case which may lead to another prolongation for another 2 years. 5 years after the introduction of the application and no changes in the medical situation, the applicant may be granted a permanent residence permit (B-card).

5.2. Residence denied

Should the decision-maker of the 9ter division come to the conclusion that the applicant has access to available medication/ treatment in the country of origin, the decision-maker would reject the application and issue the order to leave. The denied applicant then needs to leave the territory within a given timeframe.

There is no foreseen "bridging support" (in kind or in cash). Nevertheless there is a "special needs programme", which is an EU funded project to support returnees with special needs.

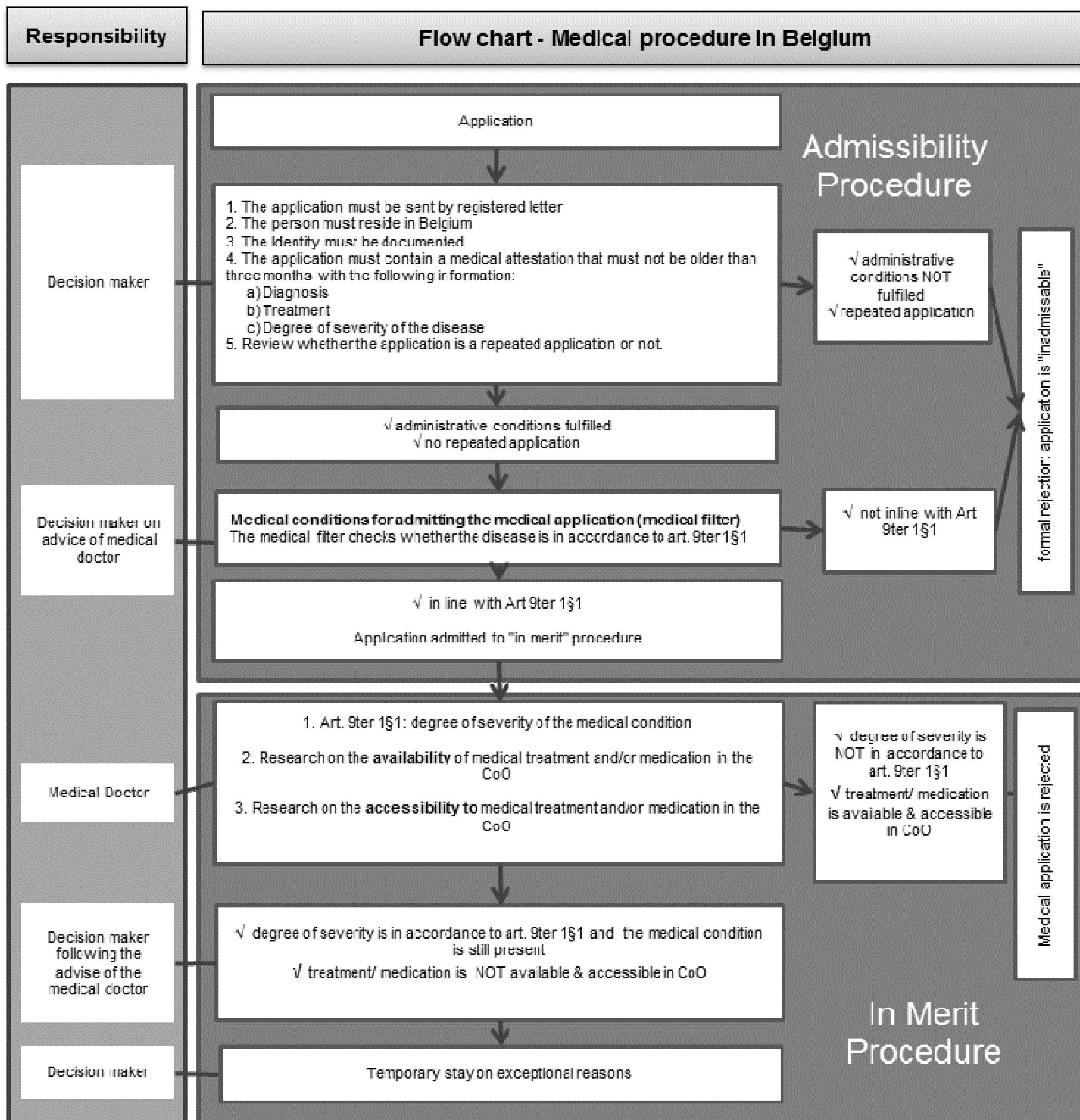
Additionally, the Aliens Law also contains a provision (Art 74/13) stipulating that the authority must take the medical situation of a returnee into account before the removal.

6. Summary

- Belgium has a specialised procedure for medical applications.
- A specialised section (referred to as the Medical or "9ter Section" deriving its name from the relevant article of the 1980 Migration Law) within the Migration Office deals with medical claims.

- The procedure is characterised by a strong involvement of medical doctors in the decision making process. Decision-makers and medical doctors in fact share the responsibility for different parts during the procedure.
- A third country national claiming medical reasons needs to apply to the Medical Section under the Belgium Migration Office.
- Belgium has a rich case-law on medical related issues.
- The Belgium policy on medical migration cases thus reflects closely the decisions of the appeals courts and the highest court of Belgium

The workflow of the medical procedure may be visualised in the following way:



The main elements and definitions may be summarised om the following way:

	Definition/ applied practice	Basis for used definition
Severity of the disease (threshold for admission of a medical claim)	In the absence of a clearer definition an illness is considered as severe by the Belgian Migration Service if the applicant suffers from an affection in such a way that this affection poses a genuine risk for his life or his physical integrity or in such a way that this affection poses a genuine risk of an inhumane or humiliating treatment when there is no adequate treatment in his/ her country of origin or country of return.	Practice; no clear definition
Availability	No applied definition – upon discreation of the medical doctors	n/a
Accessibility	As a basic rule, the decision-maker needs to response to all statements brought forward in the application. If no statements were brought forward the following elements must be established: - Applicant's ability to work. - Social health system in CO. - Family Members in CO. - Support by other organsiations (e.g. IOM)	Case-law
Residence permit	If the disease is severe AND/ OR if treatment/ medication is not "available" and/ or not "accessible" the applicant is granted a temporary residence permit on exceptional grounds (1 Year – 2 Years – 2 Years). 5 years after the introduction: B-card	1980 Law
Return	Generally, no benefits (or "bridging support" like medication or cash for a certain period to pay for medication) are foreseen. In case of special needs a needy returnee may request the support from a specialised programme ("special needs programme").	Law; EU funded programme

7. Sources

If not otherwise quoted in the case study, the information contained is based on interviews with heads, decision-makers and COI researchers of the medical section of the Belgium Migration Office.

Case Study - Finland

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1. Medical claims in migration cases in Finland

1.1. Legal Basis

The Main Legal Act for migration cases involving medical elements in Finland is the Aliens Act 2004/301. Sec. 51 and Sec. 52 stipulate specific provisions for residence permits due to a foreigners' health situation.

Sec. 51 provides for a temporary residence permit if the foreigner residing in Finland cannot be returned to his/ her country of origin due to temporary health reasons.

> ***Section 51: Issuing residence permits in cases where aliens cannot be removed from the country***
>
> *(1) Aliens residing in Finland are issued with a temporary residence permit if they cannot be returned to their home country or country of permanent residence for temporary reasons of health or if they cannot actually be removed from the country.*
>
> *(...)*

Similar in nature, Sec. 52 provides for a continuous residence permit on compassionate grounds, if the refusal of the residence permit would be considered manifestly unreasonable with regards to the health situation of the applicant.

> ***Section 52: Issuing residence permits on compassionate grounds***
>
> *(1) Aliens residing in Finland are issued with a continuous residence permit if refusing a residence permit would be manifestly unreasonable with regard to their health, ties to Finland or on other compassionate grounds, particularly in consideration of the circumstances they would face in their home country or of their vulnerable position.*
>
> *(...)*

A special application for residence permit on medical grounds is not foreseen according to the Finish migration system. The medical migration cases are mainly connected with asylum cases, or come up in relation to persons irregularly staying in Finland, or persons whose residence permit ends, and they cannot be sent back due to his/her health situation.

Important guidelines for the interpretation of Sec. 51 and Sec. 52 are the preparatory works of the governmental proposal for the Aliens Act. The corresponding case-law concerning the issuance of residence permits related to an applicant's state of health has been based on these sources.

1.2. Organisational Structure/ Responsibilities

The Finish Immigration Service is the body responsible for issuing residence permits and thus also for the determination on whether compassionate grounds that would stand against the return of a foreigner to his/ her country of origin may exist.[33]

1.3. Statistics

The Finish law does not foresee a specific provision exclusively dealing with medical claims. The above cited Sec. 52 Aliens Act refer only inter alia, to medical claims. As a consequence, the Finish Migration Service does not register medical claims separately. No reliable data on medical cases are thus collected.

1.4. Procedure in medical migration cases

The state of health of an applicant (for asylum or other residence permit) is at times pleaded as a ground for issuing the applicant a residence permit. The medical country of origin information is often relevant in these cases.

Applicants often refer to the lack of available or adequate medical treatment in the country of origin (CO) in general or concerning some specific illnesses, a situation which is claimed to cause serious problems for the applicant´s health or threaten his life if he is to be returned to his country of origin. Sometimes it is also claimed that the treatment available in the country is too expensive for the applicant.

The basic rule (based on the Aliens Act and the governmental proposal of the Aliens Act and confirmed by the case-law in the Administrative Courts) is that a residence permit can be issued on grounds related to the applicant’s health, if it is not possible for the applicant to receive necessary treatment in the CO.

Finland does not foresee any specialized procedure for medical issues in migration processes. Medical problems of foreigners are mainly brought forward during the asylum procedure. In the course of the asylum interview, one of the questions asked by the interviewer is whether the asylum applicant has any medical problems. Should the applicant mention some health problems, s/ he is asked by the Finish Immigration Service to submit a medical attestation for the condition. A statement by the applicant alone would not suffice to further consider the medical aspect of the asylum claim.

The burden of proof lies with the asylum seeker. The asylum seeker must submit an attestation by a medical doctor. The attestation needs to transparently clarify what kind of disease the applicant has and how severe the disease is.

If the disease is transparently shown by the attestation, the decision-maker may bring up the medical situation in the procedure in case no reasons for refugee and subsidiary protection status have been identified. Only if international protection has been denied, grounds for compassionate stay based on medical reasons are reviewed.

[33] The Finnish Immigration Service is not the only authority to issue residence permits, also the police may issue them. Nevertheless, it is the Immigration Service that issues most of the first residence permits.

1.4.1. Temporary residence according to Sec. 51 Aliens Act

Sec. 51 Aliens Acts foresees a (short term) temporary residence permit for cases when a foreigner cannot be returned for specific medical reasons that can be considered of temporary nature. Sec. 51 is connected with the enforcement of the return and thus mainly of concern to the enforcement agency, the police. The Immigration Service is not responsible for examining whether a decision on removal is enforceable. In normal situations, the enforcing authority, the police, will examine if there are any obstacles to removal.[34] The Supreme Administrative Court stated that the purpose of Sec. 51 was to avoid a legal limbo for refused asylum applicants who could not be forcibly removed. In order for a person to qualify for a residence permit under section 51 it is required that the obstacle to the removal is of a technical nature.[35] Sec. 51 may, for example, be applied in case the returnee is not fit to fly.

A temporary residence permit according to Sec. 51 is of short term nature, and only until the impediment to return ceases. The Supreme Administrative Court took the view that the nature of a residence document as specified in Section 51 of Aliens Act is a temporary and time-limited. Its validity is dependent on the prevention of actual removal. It delays refoulement but does not have any effect on a negative judgment refusing international protection and a residence document. If the conditions for granting a time-limited residence permit still prevail, based on section 54(5) of the Aliens Act, after a two year stay a permanent residence permit is granted.[36]

1.4.2. Residence permit according to Sec. 52 Aliens Act

A residence permit on compassionate grounds (Sec. 52 Aliens Act) is issued if a person cannot be returned into the country of origin because of a lack of appropriate medical treatment in the country of origin.[37]

As opposed to Sec. 51, Sec. 52 is of continuous duration, first issued for 1 year and may be prolonged thereafter, if the reasons remain valid after one year. Sec. 52 is reviewed by the Finish Immigration Service. The main elements that are to be reviewed according to Sec. 52 is the medical situation in the country of origin and whether the applicant could receive the necessary treatment/ medication in the country of origin.

As a precondition for applying Sec. 52 Aliens Act, the foreigner must already reside in Finland (see Sec. 52 and the respective explanation by the governmental proposal of the Aliens Act). An

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[34] Supreme Administrative Court, 22 November 2013, KHO:2013:180. A summary of the decision may also be read at http://www.asylumlawdatabase.eu/en/case-law/finland-supreme-administrative-court-22-november-2013-kho2013180#content (accessed on 19.01.2015)

[35] Ibid.

[36] Supreme Administrative Court, 25 April 2013, KHO:2013:78. A summary of the decision is accessible in English at http://www.asylumlawdatabase.eu/en/case-law/finland-supreme-administrative-court-25-april-2013-kho201378#content (accessed on 19.01.2015)

[37] Health reasons are only one of several "compassionate grounds for issuance of a residence permit according to Sec. 52 Aliens Act. In addition to the health related situations the points mentioned in section 52 concern also issuing a residence permit on compassionate grounds because of ties to Finland or some other specific situations that might relate to families with children or other individuals who are in a vulnerable situation as well as unaccompanied minors who are not in need of international protection, but cannot return to the country of origin because their parents have passed away or their whereabouts are not known. See preliminary remarks to the Aliens Act (HE 28/2003).

application for medical care based on Sec. 52 is thus not possible. According to the government bill, this provision would concern asylum applicants who are not issued a residence permit based on international protection, but who still cannot be presumed to return to his/ her country of origin (if that would amount to inhumane treatment).[38]

In the case of Sec. 52 it is thus impediment to look into the situation in the country of origin while this is less of importance in the case of Sec. 51.

2. Threshold for considering a migrant's health conditions with respect to impediment of return

2.1. Threshold for "severity" of a disease

Beside the disease, also the level of the (available) treatment in the CO is relevant for the threshold of severity if it amounts to a serious harm to the health of the applicant. The general circumstances in the CO are thus generally relevant if returning there would shorten the life-span of the applicant or cause remarkable physical or mental pain. According to the Finish practice all such facts which make it impossible for the applicant to return to the country of origin are relevant.[39]

The threshold in the Finish case-law is thus lower than the one taken by the European Court of Human Rights. While the "severity" of the disease is to a certain extent also in the Finish practice of relevance, but the disease must not necessarily be in the final stage and also does not need to be of a life threatening nature.

2.2. Severity of a disease in practice

One of the main elements to judge whether a disease is severe or not, depends on the medical attestation. The Finish Immigration Service does not need to follow the assessment of the medical doctor in the provided attestation. Finish doctors would commonly consider it advantageous if a person were treated in Finland rather than in the country of origin, since the Finish health system is considered to be of very high standards. Nevertheless, in practice, the standard of the health care is not considered relevant as long as necessary medical treatment is available in the country of origin.

Nevertheless, the Immigration Service would still take the medical attestation as given and would analyse whether it is clear enough and would further look at the diagnosis.

3. Availability of medical treatment/ medication in countries of origin

3.1. Definition of availability in the national context

The Finish Immigration Service considers the governmental proposal of the Aliens Act as regards to Sec. 52 as most conducive for clarifying the scope of "availability".

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[38] See preliminary works for the Aliens Act (HE 28/2003). When drafting Sec. 52 these were the situations in which this section was presumed to be most often applied.

[39] See preliminary work for the Aliens Act as regards to Sec. 52 Aliens Act.

According to the preliminary works for the Aliens Act, Sec. 52 concerns situations in which it would be manifestly unreasonable to refuse a residence permit with regard to the applicant's health.[40] The preliminary works state as regards to Sec. 52 Aliens Act, that it is impossible for the foreigner to receive necessary care in the home country. Additionally it requires that the (quality) level of care or the availability of it in the home country would seriously harm the health of the alien (if he/ she was to return there).

Beside the preliminary work there is no further guidance for decision-makers on the interpretation of "availability". To a certain degree it also remains at the discretion of the decision-maker whether a treatment/ medication is considered available or not.

3.2. Availability in practice

For examining the availability the decision-maker uses the services of the country of origin information unit to verify whether medical treatment and/ or medication exists in the country of origin and whether there are hospitals that provide the treatment. The Immigration Service needs to verify whether the sources for such treatment/ medication are officially available. Medication on the black market is not considered as available. Also the supply via official pharmacies needs to be guaranteed to satisfy the availability criteria. Supply via, for example, internet pharmacies would require additional research as regards to whether this would be "legal or illegal".

Should there be a disease which cannot be healed at either place (neither in the country of origin, nor in Finland), this would equally not lead to a residence permit according to Sec. 52 Aliens Act. Nevertheless, there still might be sufficient reasons to issue a residence permit on compassionate grounds (e.g. reasons related to severe suffering together with the vulnerability of the person in the country of origin).

4. Accessibility of medical treatment/ medication in countries of origin

4.1. Definition of accessibility in the national context

Finland, in general, does not look into the accessibility of medical treatment as such. This clearly refers to the economic accessibility (see below). Nevertheless, in cases of an accumulation of several issues that all together would make the access to medical treatment very cumbersome for the applicant, questions of accessibility may become relevant. Nevertheless, the Finish Immigration Service does not automatically review the accessibility to medical treatment.

4.2. Accessibility in practice

4.2.1. Economic Accessibility

Applicants in Finland often claim that the treatment in the country of origin is too expensive and that they could thus not access it once in the country of origin.

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[40] It should be well noticed that Sec. 52 Aliens Act also encompasses other – non health related – reasons that may be relevant grounds for the issuance of a residence permit on compassionate grounds such as the ties to Finland or other individual humane reason.

According to the preliminary works[41] for the Aliens Act, the fact that health care is expensive in a country, does not in itself constitute the basis for issuing a residence permit on compassionate grounds. Following this understanding, the Finish Immigration Service concludes that Sec. 52 Aliens Act does not require evaluating the costs of medical treatment and/ or medication in the country of origin when applying Sec. 52 in health-related cases. Finland consequently does not research the economic accessibility to treatment/ medication.

Costs may only exceptionally play a role in medical cases according to Sec. 52 Aliens Act, specifically in cases where different elements accumulate would add up to circumstances in the CO that would cause the person concerned remarkable physical or mental pain.

4.2.2. Geographic accessibility

The Finish Immigration Service does not look into the geographic accessibility. Treatment and/ or medication must be available in the region where the applicant comes from. Whether the person would have access to the treatment/ medication from a geographic point of view alone would not be decisive to decide on issuing a residence permit on compassionate grounds.

Should treatment and/ or medication be only available in the capital but not in the region of the returnee, the Immigration Service would need to take this into consideration when deciding upon a residence permit on compassionate grounds: The geographic accessibility would be reviewed if different accumulating issues came together. If such cumulative issues would make the situation of the applicant unreasonably harsh if he were to be returned to his/ her country of origin, a residence permit on compassionate grounds may be granted. Such an assessment is thus very individual.

As possible examples the interviewees mentioned the geographic distance combined with an unsecure travel to the facility where she/ he would receive treatment/ medication. In a case at the Court, the lack of specific cancer treatment for some types of cancer in Kosovo has been regarded as insufficient as the returnee would have to travel to Belgrade or Skopje.

The geographic accessibility per se is thus not reviewed by the Finish Immigration Service. Usually it would be enough if treatment/ medication would be available in the capital. The geographic accessibility nevertheless may play a significant role if more than “only” the geographic proximity would create significant obstacles for a returnee to access the medication.

4.2.3. Political accessibility

The political accessibility usually is already determined and taken into consideration during the refugee status determination process. The political accessibility therefore is not relevant in medical cases.

[41] See preliminary works for the Aliens Act (HE 28/2003).

However, in a decision by the Supreme Administrative Court[42] an Afghan asylum applicant with a severe heart disease was treated in Finland, received a pacemaker and needed constant control by a cardiologist and medication. According to the court, there was basic medical care available in Afghanistan. Interestingly enough the court also stated in the decision that it was not to be expected, that the Afghan authorities would set the applicant intentionally to a worse position than other citizen. As such, the court considered potential political accessibility in this case.

5. Residence and Return

5.1. Residence granted

According to section 67 of the Aliens Act, the Finnish Immigration Service is responsible to issue the first residence permit to an alien who has entered the country without a residence permit e.g. also in cases according to sections 51 and 52.

If a disease is considered severe and medication and or treatment is not available in the country of origin, the Immigration Service issues a residence permit on compassionate grounds.

In cases of Sec. 52 Aliens Act, the residence permit is at first valid for 1 year and may be prolonged thereafter, following a re-evaluation of the case and if the reasons are still valid.

In cases where the enforcement of return would not be possible due to health reasons, the police may postpone the enforcement of the removal.

According to Sec. 78 para 3 Aliens Act, a foreigner may work with a residence permit on compassionate grounds. According to same section, a foreigner is entitled to work also if the issuance of the residence permit is based on section 51 of the Aliens Act.

5.2. Residence denied

If a residence permit is denied, the foreigner has to return to the country of origin. Finland usually does not provide any further supply of medication for a potential bridging period, upon return to the country and actual access to the treatment. In some cases of voluntary return there are IOM programmes which may have some component for the supply of medication.

The police is responsible for the enforcement of the return decision and thus for the assessment whether return is technically possible. Should any legal issues come up, such as the medical conditions of the returnee, the case may be re-directed to the Finish Immigration Service. The police themselves would nevertheless not look into the medical situation in the country of origin of the returnee.

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[42] See decision from the Supreme Administrative Court from 6th March 2009, case number 538, accessible in Finish at: http://www.finlex.fi/fi/oikeus/kho/muut/2009/200900538?search%5Btype%5D=pika&search%5Bpika%5D=ulkomaalainen. The applicant was considered not in a vulnerable position required by section 52 of the Aliens Act and thus the court decided that the refusal of issuance of a residence permit was not unreasonable and not contrary to Art. 3 of the ECHR either.

6. Summary

	Definition/ applied practice	Basis for used definition
Severity of the disease (threshold for admission of a medical claim)	While the "severity" of the disease is to a certain extent relevant, the threshold is lower than the one taken by the European Court of Human Rights. The disease is not necessarily to be in the final stage and also does not need to be of a life threatening nature but the return would shorten the life-span of the applicant or cause remarkable physical or mental pain.	Sec. 52 Aliens Act; the preliminary works to Sec. 52 Aliens Act.
Availability	It must be impossible for the foreigner to receive necessary care in the home country. Additionally it requires, that the (quality) level of care or the availability of it in the home country would seriously harm the health of the alien (if he/she was to return there).	preliminary works for the Aliens Act Sec. 52
Accessibility	Accessibility is not reviewed. Neither the financial nor the economic or the political accessibility are of relevance. Accessibility may be only of concern, if several elements would accumulate in an individual case.	preliminary works for the Aliens Act Sec. 52 as regards the costs of treatment
Residence permit	A residence permit based on Sec. 52 Aliens Act on compassionate grounds is issued by the Finish Immigration Service for 1 year and may be prolonged.	Sec. 52 Aliens Act
Return	Following Sec. 51 Aliens Act, a temporary residence permit may be issued until the return can be enforced.	Sec. 51 Aliens Act

7. Sources

Interviews

If not otherwise quoted in the case study, the information contained is based on interviews with caseworkers and senior advisor of the Finish Immigration Service.

8. Annex

Finnish Aliens Act (sections 51 and 52).[43]

Section 51: Issuing residence permits in cases where aliens cannot be removed from the country

[43] The unofficial translation of the Finish Aliens Act is accessible at http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf (accessed on 20.01.2015)

(1) Aliens residing in Finland are issued with a temporary residence permit if they cannot be returned to their home country or country of permanent residence for temporary reasons of health or if they cannot actually be removed from the country.

(2) Issuing a residence permit does not require that the alien have secure means of support.

(3) If aliens are issued with a residence permit under subsection 1, their family members residing abroad are not issued with a residence permit on the basis of family ties.

Section 52: Issuing residence permits on compassionate grounds

(1) Aliens residing in Finland are issued with a continuous residence permit if refusing a residence permit would be manifestly unreasonable with regard to their health, ties to Finland or on other compassionate grounds, particularly in consideration of the circumstances they would face in their home country or of their vulnerable position.

(2) Issuing a residence permit does not require that the alien have secure means of support.

(3) If aliens are issued with a residence permit under subsection 1, their family members are issued with a residence permit under section 47(3).

(4) If unaccompanied minor children who have entered Finland are issued with a residence permit under subsection 1, their minor siblings residing abroad are issued with a continuous residence permit. A requirement for issuing a residence permit is that the children and their siblings have lived together and that their parents are no longer alive or the parents' whereabouts are unknown. Another requirement for issuing a residence permit is that issuing the permit is in the best interest of the children. Issuing a residence permit does not require that the alien have secure means of support.

Case Study - Germany

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1. Medical claims in migration cases in Germany

1.1. Legal Basis

In Germany the main legal basis applicable to migration cases with a medical element derives from Sec 60 Law on Residence, Employment and Integration of Foreigners in the Federal Territory (Residence Act).[44] Sec 60 Residence Act lays down the conditions in the country of return under which a foreign national cannot be deported from Germany (impediment to return).

The main provision in Sec 60 Residence Act that potentially refers to the impediment to return in cases of medical issues brought forward by a foreigner in migration procedures is:

> *Sec 60 para 7/1 Residence Act provides that: "From the deportation of a foreigner in another state shall be refrained if there is a considerable specific danger to life, limb or liberty."*[45]

Germany applies the 'national impediment to return' in migration cases with medical elements and does not directly refer to Art. 3 ECHR in such cases. As it will be shown further, Germany also applies a lower threshold to impede return than the one developed by the European Court of Human Rights since the judgment of D vs UK. The impediment to return according to Sec 60/7 Residence Law is developed as a national subsidiary protection ground (Sec 60/7 in combination with Sec 25/3 Residence Act).

1.2. Organisational Structure/ Responsibilities

Migration cases with a medical element are dealt with by two organisations, the German Federal Office for Migration and Refugees[46] and the Foreigners Office[47], which is responsible for the return of migrants. Both entities are responsible for the implementation of the respective provisions under the Residence Act and are thus determining whether there would be any obstacles to the return of a foreigner. However, the portfolio of these two entities differs with respect to the facts that each of them needs to determine:

- The Federal Office for Migration and Refugees needs to determine whether there are any obstacles to return a foreigner which lie in the country of origin of the returnee. The

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[44] *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Aufenthaltsgesetz - AufenthG)*

[45] Art 60 (7) Residence Act reads: „*Von der Abschiebung eines Ausländers in einen anderen Staat soll abgesehen werden, wenn dort für diesen Ausländer eine erhebliche konkrete Gefahr für Leib, Leben oder Freiheit besteht.*"

[46] Bundesamt für Migration und Flüchtlinge. The Federal Office for Migration and Refugees is mainly responsible for granting and denying international protection as well as granting and denying the impediment to return. Besides, the BAMF holds additional portfolios such as the integration of foreigners or information on return programmes. See: http://www.bamf.de/DE/Startseite/startseite-node.html.

[47] Ausländerbehörde. The Foreigners Office is responsible for the implementation of the Residence Act and thus issues or denies stay and residence permissions and executes the return of foreigners without a legal right to stay in Germany. Additionally, besides further tasks, the Foreigners Office also decides on the exceptionally leave to remain ("Duldung").

determination is thus future-oriented, looking into obstacles that the returnee would face if returned to his/ her country of origin.

- The Foreigners Office, however, needs to determine whether there are any obstacles to the return of a foreigner because of the “now and here”, e.g. the returnee is not fit to fly or has developed strong family ties in Germany.

Thus, the main entity responsible for migration cases involving medical background, and of interest for this study, is the Federal Office for Migration and Refugees. Only this governmental organization looks whether a foreigner could receive the necessary medical treatment in the country of origin upon return thereto.

Should an irregularly staying migrant be apprehended and does not claim international protection, the Foreigners Office needs to involve the Federal Office for Migration and Refugees to determine whether there are any obstacles related to Sec 60/5 and 60/7 Residence Act for the return of a foreigner in the country of origin (e.g. insufficient medical treatment in the country of origin causes an individual danger to the health of the migrant).

Within the Federal Office for Migration and Refugees, a specialised unit for medical cases supports decision-makers during the decision making process. The unit provides advice on how to handle medical cases according to the German jurisprudence of the Federal Administrative High Court, and conducts research in cooperation with the COI experts from the Information Centre Asylum and Migration using specialised databases to determine whether medical treatment and/ or medication would be available and accessible in the country of origin for the person concerned. This competence is vested in Division 410: Policy on the Asylum Procedure. The division is responsible to maintain (among many other tasks) an overview of the leading case-law in medical cases, provide advice to the decision-makers on certain policy relevant issues or to provide information on the minimum pre-conditions for medical attestations.

1.3. Statistics

The Federal Office for Migration and Refugees does not register medical cases in a separate way. The statistics provide only information on decisions as regards to the impediment to return according to Sec 60/7 Residence Act, which does not only cover impediments to return due to medical reasons.

1.4. Procedure in medical migration cases

In Germany, there is no medical migration procedure as such. Nevertheless an alien may apply for a residence permit based on medical reasons either in the framework of the asylum procedure or during a residence procedure. Medical reasons are mainly brought forward if a denied asylum seeker or an apprehended irregular migrant suffer from a disease which would worsen in case of return to his/ her country of origin. Subsidiary protection under Sec 60 para 7/1 of the German Residence Act thus may apply if the foreigner concerned contends in the proceedings that a return to the country of origin is impossible for health reasons.

1.4.4. Assessment

To determine whether Sec 60 para 7/1 Residence Act is applicable, the responsible authority needs to assess the following:

a. Preliminary Question:

As a preliminary question the decision-maker needs to assess:

> **"whether a disease of an asylum seeker or foreigner has been reasonably demonstrated**."

The asylum seeker thus has to 'reasonably demonstrate' the disease to the decision-maker. This is regularly done by presenting an attest from a medical doctor. The requirement for such a substantiation arises from the obligation of the applicant to cooperate in the investigation of the facts, which is especially true for circumstances that fall within the sphere of the applicant (Sec 15 para 1 sentence 1 AsylVfG).

The Federal Administrative Court in Germany additionally clarified the requirements for an attest. From a medical attestation it therefore *"(…) must be comprehensibly understandable, on what basis the medical specialist formulated the diagnosis and how the disease develops in the particular case. This encompasses information about how long and how often the patient has been receiving medical treatment and whether the applicant's complaints are confirmed by the medical specialist's findings. Furthermore, the attest should provide information on the severity of the disease, the treatment required as well as the previous course of treatment (medication and therapy).*[48]

Once the applicant reasonably demonstrated the disease, the decision-maker needs to assess the main facts of the attestation.[49]

b. Questions in fact

The justification for a prohibition of deportation for health reasons is subject to the condition that a:

> **"significant or even life-threatening deterioration of health is to be expected with reasonable probability immediately after returning to the country of origin".**

The different elements contained in the determination for the threshold for considering a migrant's health condition with respect to an impediment to return, may be defined as follows:

- "Significant or even life-threatening deterioration of health": The risk of a "significant or even life-threatening deterioration of health" must always be a personal threat to the individual asylum-seeker, even if the respective disease is very common in the country of origin. It must exceed the level of danger for the population at large. In past judgments, German courts decided, that these elements must be a "threat of extraordinary intensity" (BVerwG, Urt. v. 29.06.1999, Az.: 9 C 2.99) or "extraordinary severe physical or physical damage and/ or existence threatening situation" (OVG NRW, B.v.20.09.2006 22, Az.: 13 A 1740/05).

[48] See BVerwG 10 C 8.07 from 11. September 2007.
[49] Ibid.

- "Immediately" after returning to the country of origin: If the risk will not manifest itself within a foreseeable period it cannot be considered as "immediately".
- "With reasonable probability": To meet this requirement, it does not suffice for the physician to find that the person's health might possibly deteriorate for one reason or another, or that a certain consequence for his or her health cannot be completely ruled out. The risk of a deterioration of health will only warrant granting protection, if it is a considerable risk, i.e. if it is very likely to happen. The evaluation must be focused on the case at hand considering both the reasonableness of the risk resulting from the return and the priority of the legal interest at risk.
- "After returning to the country of origin": The health risk must exist after the applicant's return to the country of origin. Health-related risks arising as a consequence of, or in connection with the deportation, that are unrelated to the specific conditions in the country the applicant is to be deported to (i.e. the barriers to return lie in the host country, Germany, and not in the country of origin of the foreigner concerned) fall under the competence of the Foreigners Office.

c. Exclusion criteria

Finally, after having assessed that the applicant suffers from a disease (see above under "a"), which would "significantly, or even life-threatening deteriorate the health with reasonable probability immediately after returning to the country of origin" (see above under "b"), the decision-maker needs to assess whether there are any reasons for excluding the impediment to return according to Sec 60 para 7/1 Residence Act. An applicant can be returned if she/ he could receive medical treatment/ medication in the country of origin.

The impediment to return may thus be excluded and the applicant could be returned if

> **"it is reasonably determined, that a therapy is available and accessible in the country of origin, which is sufficiently effective to prevent a deterioration of health with reasonable probability".**

For further information on the "availability" and "accessibility" see further below under point 4 and 5.

1.4.5. Decision making

In order to come to a decision the decision-maker needs to assess different aspects of the necessary and available treatment by answering the following questions:

- The legal aspect: what treatment standards and expected treatment success are required?
- The medical aspect: what treatment is required, and
- The country of Origin Information aspect: what resources to respond to the medical treatment needs are available and accessible in the country of origin of the applicant?

2. Threshold for considering a migrant’s health condition with respect to impediment of return

2.1. Threshold for “severity” of a disease

The stage of the disease is considered less relevant for the question whether to grant the impediment to return or not . The decisive criterion is whether or not the medical condition will significantly worsen or even become life-threatening after his or her return to the country of origin. The responsible authority thus needs to estimate how the situation of the applicant would develop once returned to the country of origin (future oriented assessment). Only if the situation is likely to significantly worsen or even be of a life threatening nature, the Federal Office for Migration and Refugees needs to decide whether such situation poses an impediment to return according to Sec 60 pare 1/7 Residence Act.

A “severity assessment” of the disease per se is thus not required. As indicated above, it is up to the asylum seeker or foreigner to provide substantive evidence e.g. in form of a reasonable attestation by a medical doctor which clarifies the medical situation, previous treatment and future required treatment. According to the Federal Administrative Court, the severity of the disease forms only one of the elements that a medical attest should pay attention to.

2.2. Severity of a disease in national jurisprudence

See the requirements on a reasonable proof of the applicant’s medical state in form of an attestation by a medical doctor according to the German jurisprudence above under point 2.

3. Availability of medical treatment/ medication in countries of origin

The treatment options for the specific medical condition in the country of origin are examined as well, because a lack thereof would constitute one of the reasons preventing deportation under Sec 60 para 7/1 of the Residence Act.

An effective treatment must be available. The Federal Office for Migration and Refugees seeks advice from the attending physician or an expert on the treatment required to prevent the asylum-seeker's health from deteriorating with reasonable probability. Based on this information the Federal Office investigates whether such treatment is available in the respective country of origin.

3.1. Definition of availability in the national context

There is no applicable definition for “availability” of medical treatment in the country of origin in Germany. In the absence of a clear definition, medication or medical treatment can be considered “available” if the medication is physically present or if the medical treatment is practiced in the country of origin. The source for the medical treatment/ medication is of secondary consideration – all that matters is the fact that the medication and/ or the medical treatment exist in the country of origin. Nevertheless, decisive is the fact whether the treatment/ medication exist at the time of the decision and the supply is secured. Medication which is registered but regularly out of stock is not considered “available”.

In the absence of clear decisions by the Federal Administrative Court on the availability, the Federal Office needs to determine whether a certain medication/ treatment would be reliably

available and of adequate quality. The quality in this respect must be of such a level that the danger as described in Sec 60 para 7/1 (significant or even life-threatening deterioration of health) would not materialise. The case-law in this respect clarifies that there is no legal right for a treatment that would go beyond the necessary treatment. Possible higher standards in Germany or in other European countries are thus irrelevant if the treatment in the country of origin would constitute the necessary treatment, even if it would be of lower quality.[50]

3.2. Availability in practice

The decision-makers of the Federal Office for Migration and Refugees are responsible to research on the availability of medication/ treatment in the country of origin in specialized databases. The decision-makers are thereby supported by the services provided by the Information Centre Asylum and Migration (IZAM, Group 22).

The Federal Office needs to determine in the decision whether the medication/ treatment needs of the applicant as outlined in the medical attestation is reliably available in the country of origin.[51]

According to the Federal Office for Migration and Refugees the treatment in the country of origin must be provided by professional (specialized) medical doctors to satisfy the availability assessment. Medication is preliminary checked against the medication indicated by the treating physician; substitutes may be checked and regarded as available only if the treating physician also agreed to those substitutes (see also below).

As indicated above, the German courts have so far not determined the very meaning of “availability” of medical treatment/ medication. Nevertheless, there are some judgments that provide guidance as regards certain questions in the context of availability:

With regards to substitute medication, the Court decided that the Office needs to receive a respective attestation by the treating physician of the applicant indicating whether the specific substitute would be acceptable for the applicant.[52]

In another decision, the Administrative Court Braunschweig decided that shortcomings in the supply of necessary medication in public hospitals could be considered relevant, even if the medication is available in private hospitals, if the private hospital would be too expensive for the applicant.[53]

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[50] OVG Lüneburg vom 18.05.2010, Az. 11 LB 186/08 with further references.

[51] Federal Administrative Court from 29.10.2002, Az. 1 C 1/02

[52] Federal Administrative Court from 29.06.2005, Az. 1 B 174/04

[53] Administrative Court Braunschweig, 20.06.2011: The applicant comes from Cote Ivoire and suffers from Bilharziose and an early stage of HIV and had to undergo operations and needs follow up treatment. The Court determined that HIV could generally be treated in Cote Ivoire, but recently there were registered shortcomings in the supply of the necessary medication. While the private clinic would be too expensive for the applicant, the public treatment gets more and more fragile and insecure. In case of a further worsening of the medical situation in Cote Ivoire the applicant would fall into real risk of an aggravation of the health situation. The applicant was granted impediment to removal.

4. Accessibility of medical treatment/ medication in countries of origin

4.1. Definition of accessibility in the national context

As regards the accessibility to medical treatment and/ or medication, there is no applied definition. As a general rule, the decision-maker needs to determine that there are no obstacles for the person concerned to receive medical treatment and/ or to physically get hold of the necessary medication. The treatment and/ or the medication therefore also must be affordable for the person once returned to his/ her country of origin. The treatment must be accessible as regards the existence of a sufficient number of places for treatment or such a place must actually be within reach.

4.2. Accessibility in practice

In Germany, the Court established the practice to first consider the general availability of the medical treatment. Once the availability is determined, the Court individually examines whether the treatment and medication is individually accessible for the applicant, e.g., among others, the treatment must be financially affordable by the applicant. The Court, for example, stated that

> *"[a]n impediment to removal also may be applicable, although the treatment/ medicine is available in the country of origin. This particularly in case of certain situations in the country of origin, which hinder the applicant from access to the necessary treatment/ medication. A particular danger to physical integrity and life therefore also may exist for the applicant, if the treatment is available, but due to the financial situation of the applicant not accessible."*[54]

The accessibility to medical treatment and/ or medication must be thus researched by decision-maker, in particular as regards the economic and geographic accessibility. In the past, and as a result of several decisions by the Courts in Germany, the following criteria for the establishment of the economic and geographic accessibility have developed over the years.

4.2.1. Economic Accessibility

The economic accessibility is of importance in the German context and needs to be determined by the decision-maker. When determining whether the applicant would face financial barriers to factually access the treatment/ medication in the country of origin, the Federal Office first needs to establish the costs of the treatment/ medication in the country of origin. In a next step the financial resources available to the applicant are to be determined, which potentially consist of three possibilities:

1. The applicant can afford the costs for treatment/ medication by him/ herself
2. The applicant may be financially supported by family members[55]
3. The applicant may rely on external financing by the social system in the country of origin[56]

[54] Federal Administrative Court from 29.10.2002, Az. 1 C 1/02.
[55] Federal Administrative Court from 01.10.2001, Az. 1 B 185/01.

Having collected the financial information, the decision-maker would need to contrast the costs for medical treatment and/or medication with the available resources of the applicant. The Federal Office thereby does not need to count into the very last detail, but rather makes an approximate comparison of the costs of the medication/ treatment with the average or minimum income in the country of origin and the possibility for external financing (such as for example by family members or the state).

The different Administrative Courts determined the **economic accessibility** in a number of cases and regularly refer to the average income of nationals of the country of return or the individual circumstances of the claimant and his possibilities with regards to access to the labour market upon return. In a case concerning a Roma applicant citizen of (former) Yugoslavia with the place of former residence in nowadays Kosovo the court held that in principle treatment and medicine would be available in Kosovo. The Court further determined that the husband of the applicant is already 60 years and it is therefore unlikely that he would find a job in Kosovo, considering an unemployment rate of 45%. The Court thus stated that

> "*due to the economic situation in Kosovo and the fact that neither the applicant nor her husband would manage to find a job, the medical treatment would be not accessible for the applicant*."[57]

In another case the *Administrative Court Braunschweig* determined that the applicant, a citizen of Côte d'Ivoire, could not earn enough money for the medical treatment. The average income in Côte d'Ivoire is about 61 Euros per month, while half of the population lives below the minimum income of 1,25 Dollars per day. The applicant therefore would need all earnings for his living. He further could also not rely on his family as they moved further to Niger or died.[58]

4.2.2. Geographic accessibility:

The geographic distance of the place where the medication/ treatment would be available is not the main consideration under the geographic accessibility. An applicant could thus be returned if medical treatment/ medication is available in another part of the applicant's country of origin than his/ her region of origin. The Federal Office, nevertheless, needs to determine whether there are any additional barriers for the applicant to get access to the medication in practice.

As such, the treatment is not considered accessible if it is available in the capital but the applicant with medical issues would be prevented from registering there under the laws of his or her country of origin and if additionally it would very far away from his or her place of residence.

Equally, high costs for the applicant to reside in the city where the necessary treatment/ medication is available, is considered as not accessible for the applicant.

The **geographic accessibility** may get relevant in case it collides for example with the lack of financial means to settle close to a place where the medical treatment would be available. As such the Administrative Court in Aachen decided that

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[56] The access to the social system is to be determined by the Foreigners Office according to the Federal Administrative Court.
[57] Administrative Court Braunschweig from 17.01.2012.
[58] Administrative Court Braunschweig, 20.06.2011.

"the applicant expects in Turkey, with substantial probability, a significant worsening of his condition, because it is not expected that he will succeed to establish the center of his life in Turkey close to a clinic which is familiar with the particular pump technology, which may ensure the timely emergency treatment in hospital. The system used on the applicant is available in Turkey, but he lacks the financial resources to rent a home near the hospital for his treatment together with his parents, who currently provide the indispensable support for his well being".[59]

4.2.3. Political accessibility

The political accessibility in the medical context only plays a minor role as this element would have been determined already earlier, during the refugee status determination process.

4.2.4. Accumulating circumstances

The Administrative Court Goettingen dealt in 2009 with **the family ties** in the country of return of applicants from Sri Lanka. The male applicant suffered from diabetes and needed daily insulin. Returnees to Sri Lanka depend very much on social networks of families that could support the returnee, particularly in the first time of return. Even if the applicant would receive the necessary insulin, there would be no place where he could cool the medicine. As aggravated fact the Court determined that the peculiar situation of the male applicant could lead to a situation that the family might lose the bread earner of the family. Summarised the court determined

"that the availability is questionable and the accessibility difficult with no possibility to rely upon family or relatives upon return."[60]

German courts further determined in different case the special situation of the foreigner concerned and took this specific situation into account when deciding whether there would be any obstacles against the return of the foreigner. The Administrative Court Chemnitz dealt for example with a Kurdish applicant from Turkey. The applicant suffered from chronically posttraumatic stress disorder (PTSD) with difficulties to speak (stutter) and (medically attested) low intelligence. The first instance denied an impediment to removal as the necessary treatment and medicine for the applicant would be available in Turkey as well. The court held,

*"that due to the **special circumstance of the applicant** (minor with parents who legally reside in Germany, chronicle PTSB, speech difficulties and low intelligence), he would not be able to help himself to prevent the chronicle disease, although the medical treatment would be available in Turkey. The applicant was granted impediment to removal."*[61]

Similarly, the Administrative Court in Braunschweig dealt with the claim of a Roma from former Yugoslavia from the nowadays territory of Kosovo with respect to the medical treatment in Serbia. The Court held that

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[59] Administrative Court Aachen from 26.07.2010.
[60] Administrative Court Goettingen from 08.10.2009.
[61] Administrative Court Chemnitz from 26.07.2010.

"Serbia would offer a free social system, which can be enjoyed by persons resident and registered in Serbia. As the registration would be in general too difficult to obtain and particularly for a member of the Roma minority, also the return to Serbia was considered not possible."[62]

5. Residence and Return

5.1. Residence granted

If the Federal Office for Migration and Refugees comes to the conclusion that the foreigner cannot be returned because the return would lead with reasonable probability to a significant or even life-threatening deterioration of health immediately after returning to the country of origin, the Office would decide that applicant cannot be returned according to Sec 60 para 1/7 Residence Act.

The Federal Office then forwards this decision to the Foreigners Office, which is responsible to issue the residence permit according to Sec 25/3 Residence Act. According to Sec 25/3 Residence Act, the foreigners Office shall issue, in such a case, a residence permit if no other exclusion grounds are applicable (see Sec 25 para 3, 1-4 Residence Act).

The residence permit is valid for 3 years and may be renewed after this period, following a review of the foreigner's circumstances.

5.2. Residence denied

If the Federal Office for Migration and Refugees comes to the conclusion that the foreigner can be returned because the return would **not** lead with reasonable probability to a significant or even life-threatening deterioration of health immediately after returning to the country of origin, the Office would decide that applicant can be returned according to Sec 60 para 1/7 Residence Act.

The Federal Office would also in this case forward the decision to the Foreigners Office. The Foreigners Office, nevertheless still needs to determine whether there would still be any obstacles to return that are deriving from the inland (i.e. Germany) and not from the country of origin (which has already been determined by the Federal Office for Migration and Refugees). This assessment consists of two parts:

1) Fit to fly assessment: this assessment is a regular determination whether the returnee can be returned by flight or whether any health reasons would pose an obstacle to the return.
2) Obstacles to return that derive from the inland: this assessment needs to determine whether there are any obstacles to return that derive from the fact that the applicant would need to leave Germany. In this context, the Foreigners Office needs (for example) to take into account whether the segregation from family members who stay in Germany would have any influence on the applicant's state of health. Another example refers to the factual possibility to access the health system in the country of origin after being

[62] Administrative Court Braunschweig from 17.01.2012.

returned from Germany. In the latter context the Foreigners Office would take all the necessary steps for the “re-inclusion” into the welfare system of the country of origin should such steps be necessary. Further health risks which stand against the deportation may include the stopping of a therapy in Germany, suicide potential or any other massive deterioration of mental health prior to or during the deportation.

Once the Foreigners Office has established that there are no further obstacles deriving from “the here and now”, the returnee may be returned to his/ her country of origin.

Should the Foreigners Office reach the conclusions that there would be further obstacles for the return, the person concerned would not be returned and would receive a “Duldung” (tolerated stay) until the obstacles for return do not further exist anymore.

6. Summary

Summarising the main elements and definitions the following parts may be summarised:

	Definition/ applied practice	Basis for used definition
Severity of the disease (threshold for admission of a medical claim)	The severity of the disease is **not relevant** but whether or not the health situation of the foreigner would “significantly or even life-threatening deteriorate with reasonable probability immediately after returning to the country of origin”	Jurisprudence on Sec 60 pare 7/1 Residence Act
Availability	No applied definition. The basic tenor could be described as: “*Treatment and/or medication must be there in the country of origin – irrespective whether it is registered or not*”.	Sec 60 pare 7/1 Residence Act
Accessibility	No applied definition. The basic tenor could be described as: ”T*here must not be any obstacle for the applicant to get hold of the medication or the treatment*”.	Sec 60 pare 7/1 Residence Act
Residence permit	If the health would significantly or even life-threatening deteriorate with reasonable probability immediately after returning to the country of origin, and the applicant would not have any medication and/or treatment available and accessible, the foreigner is granted a residence permit, which is issued by the Foreigners Office in the federal countries upon the decision on the impediment to return issued by the Office for Migration and Refugees	Sec 60 para 7/1 in connection with Sec 25 para 3 Residence Act
Return	If there is no significant or even life-threatening deterioration of the health situation to be expected with reasonable probability immediately after returning to the country of origin, and/or the applicant would have medication and/or treatment available and accessible, the Federal Office for Migration and Refugees decides that the return is possible. The Foreigners Office in the federal country then needs to further look whether there are any obstacles to return that are vested in Germany (and not in the country of origin!). If there are no obstacles the foreigner may be returned. If there are any obstacles, the foreigner may be granted a stay until the obsacles ends (“Duldung”)	Sec 60 para 7/1 Residence Act;

7. Sources

Interviews

If not otherwise quoted in the case study, the information contained is based on interviews conducted on 14 January 2015 with caseworkers and senior advisors from the litigation unit from Swedish Migration Board and the Stockholm Administrative Court (Migration Court).

8. Annex

Legal basis

§ 25 AufG: Aufenthalt aus humanitären Gründen

(1) Einem Ausländer ist eine Aufenthaltserlaubnis zu erteilen, wenn er als Asylberechtigter anerkannt ist. Dies gilt nicht, wenn der Ausländer aus schwerwiegenden Gründen der öffentlichen Sicherheit und Ordnung ausgewiesen worden ist. Bis zur Erteilung der Aufenthaltserlaubnis gilt der Aufenthalt als erlaubt. Die Aufenthaltserlaubnis berechtigt zur Ausübung einer Erwerbstätigkeit.

(2) Einem Ausländer ist eine Aufenthaltserlaubnis zu erteilen, wenn das Bundesamt für Migration und Flüchtlinge die Flüchtlingseigenschaft im Sinne des § 3 Absatz 1 des Asylverfahrensgesetzes oder subsidiären Schutz im Sinne des § 4 Absatz 1 des Asylverfahrensgesetzes zuerkannt hat. Absatz 1 Satz 2 bis 4 gilt entsprechend.

(3) Einem Ausländer soll eine Aufenthaltserlaubnis erteilt werden, wenn ein Abschiebungsverbot nach § 60 Absatz 5 oder 7 vorliegt. Die Aufenthaltserlaubnis wird nicht erteilt, wenn die Ausreise in einen anderen Staat möglich und zumutbar ist, der Ausländer wiederholt oder gröblich gegen entsprechende Mitwirkungspflichten verstößt oder schwerwiegende Gründe die Annahme rechtfertigen, dass der Ausländer

1. ein Verbrechen gegen den Frieden, ein Kriegsverbrechen oder ein Verbrechen gegen die Menschlichkeit im Sinne der internationalen Vertragswerke begangen hat, die ausgearbeitet worden sind, um Bestimmungen bezüglich dieser Verbrechen festzulegen,

2. eine Straftat von erheblicher Bedeutung begangen hat,

3. sich Handlungen zuschulden kommen ließ, die den Zielen und Grundsätzen der Vereinten Nationen, wie sie in der Präambel und den Artikeln 1 und 2 der Charta der Vereinten Nationen verankert sind, zuwiderlaufen, oder

4. eine Gefahr für die Allgemeinheit oder eine Gefahr für die Sicherheit der Bundesrepublik Deutschland darstellt.

(4) Einem nicht vollziehbar ausreisepflichtigen Ausländer kann für einen vorübergehenden Aufenthalt eine Aufenthaltserlaubnis erteilt werden, solange dringende humanitäre oder persönliche Gründe oder erhebliche öffentliche Interessen seine vorübergehende weitere Anwesenheit im Bundesgebiet erfordern. Eine Aufenthaltserlaubnis kann abweichend von § 8 Abs. 1 und 2 verlängert werden, wenn auf Grund besonderer Umstände des Einzelfalls das Verlassen des Bundesgebiets für den Ausländer eine außergewöhnliche Härte bedeuten würde.

(4a) Einem Ausländer, der Opfer einer Straftat nach den §§ 232, 233 oder § 233a des Strafgesetzbuches wurde, kann abweichend von § 11 Abs. 1, auch wenn er vollziehbar ausreisepflichtig ist, für einen vorübergehenden Aufenthalt eine Aufenthaltserlaubnis erteilt werden. Die Aufenthaltserlaubnis darf nur erteilt werden, wenn

1. seine vorübergehende Anwesenheit im Bundesgebiet für ein Strafverfahren wegen dieser Straftat von der Staatsanwaltschaft oder dem Strafgericht für sachgerecht erachtet wird, weil ohne seine Angaben die Erforschung des Sachverhalts erschwert wäre,

2. er jede Verbindung zu den Personen, die beschuldigt werden, die Straftat begangen zu haben, abgebrochen hat und

3. er seine Bereitschaft erklärt hat, in dem Strafverfahren wegen der Straftat als Zeuge auszusagen.

(4b) Einem Ausländer, der Opfer einer Straftat nach § 10 Absatz 1 oder § 11 Absatz 1 Nummer 3 des Schwarzarbeitsbekämpfungsgesetzes oder nach § 15a des Arbeitnehmerüberlassungsgesetzes wurde, kann abweichend von § 11 Absatz 1, auch wenn er vollziehbar ausreisepflichtig ist, für einen vorübergehenden Aufenthalt eine Aufenthaltserlaubnis erteilt werden. Die Aufenthaltserlaubnis darf nur erteilt werden, wenn

1. die vorübergehende Anwesenheit des Ausländers im Bundesgebiet für ein Strafverfahren wegen dieser Straftat von der Staatsanwaltschaft oder dem Strafgericht für sachgerecht erachtet wird, weil ohne seine Angaben die Erforschung des Sachverhalts erschwert wäre, und

2. der Ausländer seine Bereitschaft erklärt hat, in dem Strafverfahren wegen der Straftat als Zeuge auszusagen.

Die Aufenthaltserlaubnis kann verlängert werden, wenn dem Ausländer von Seiten des Arbeitgebers die zustehende Vergütung noch nicht vollständig geleistet wurde und es für den Ausländer eine besondere Härte darstellen würde, seinen Vergütungsanspruch aus dem Ausland zu verfolgen.

(5) Einem Ausländer, der vollziehbar ausreisepflichtig ist, kann abweichend von § 11 Abs. 1 eine Aufenthaltserlaubnis erteilt werden, wenn seine Ausreise aus rechtlichen oder tatsächlichen Gründen unmöglich ist und mit dem Wegfall der Ausreisehindernisse in absehbarer Zeit nicht zu rechnen ist. Die Aufenthaltserlaubnis soll erteilt werden, wenn die Abschiebung seit 18 Monaten ausgesetzt ist. Eine Aufenthaltserlaubnis darf nur erteilt werden, wenn der Ausländer unverschuldet an der Ausreise gehindert ist. Ein Verschulden des Ausländers liegt insbesondere vor, wenn er falsche Angaben macht oder über seine Identität oder Staatsangehörigkeit täuscht oder zumutbare Anforderungen zur Beseitigung der Ausreisehindernisse nicht erfüllt.(...)

§ 60 AufG: Verbot der Abschiebung

(1) In Anwendung des Abkommens vom 28. Juli 1951 über die Rechtsstellung der Flüchtlinge (BGBl. 1953 II S. 559) darf ein Ausländer nicht in einen Staat abgeschoben werden, in dem sein Leben oder seine Freiheit wegen seiner Rasse, Religion, Nationalität, seiner Zugehörigkeit zu einer bestimmten sozialen Gruppe oder wegen seiner politischen Überzeugung bedroht ist. Dies gilt auch für Asylberechtigte und Ausländer, denen die Flüchtlingseigenschaft unanfechtbar

zuerkannt wurde oder die aus einem anderen Grund im Bundesgebiet die Rechtsstellung ausländischer Flüchtlinge genießen oder die außerhalb des Bundesgebiets als ausländische Flüchtlinge nach dem Abkommen über die Rechtsstellung der Flüchtlinge anerkannt sind. Wenn der Ausländer sich auf das Abschiebungsverbot nach diesem Absatz beruft, stellt das Bundesamt für Migration und Flüchtlinge außer in den Fällen des Satzes 2 in einem Asylverfahren fest, ob die Voraussetzungen des Satzes 1 vorliegen und dem Ausländer die Flüchtlingseigenschaft zuzuerkennen ist. Die Entscheidung des Bundesamtes kann nur nach den Vorschriften des Asylverfahrensgesetzes angefochten werden.

(2) Ein Ausländer darf nicht in einen Staat abgeschoben werden, in dem ihm der in § 4 Absatz 1 des Asylverfahrensgesetzes bezeichnete ernsthafte Schaden droht. Absatz 1 Satz 3 und 4 gilt entsprechend.

(3) Darf ein Ausländer nicht in einen Staat abgeschoben werden, weil dieser Staat den Ausländer wegen einer Straftat sucht und die Gefahr der Verhängung oder der Vollstreckung der Todesstrafe besteht, finden die Vorschriften über die Auslieferung entsprechende Anwendung.

(4) Liegt ein förmliches Auslieferungsersuchen oder ein mit der Ankündigung eines Auslieferungsersuchens verbundenes Festnahmeersuchen eines anderen Staates vor, darf der Ausländer bis zur Entscheidung über die Auslieferung nur mit Zustimmung der Behörde, die nach § 74 des Gesetzes über die internationale Rechtshilfe in Strafsachen für die Bewilligung der Auslieferung zuständig ist, in diesen Staat abgeschoben werden.

(5) Ein Ausländer darf nicht abgeschoben werden, soweit sich aus der Anwendung der Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten (BGBl. 1952 II S. 685) ergibt, dass die Abschiebung unzulässig ist.

(6) Die allgemeine Gefahr, dass einem Ausländer in einem anderen Staat Strafverfolgung und Bestrafung drohen können und, soweit sich aus den Absätzen 2 bis 5 nicht etwas anderes ergibt, die konkrete Gefahr einer nach der Rechtsordnung eines anderen Staates gesetzmäßigen Bestrafung stehen der Abschiebung nicht entgegen.

(7) Von der Abschiebung eines Ausländers in einen anderen Staat soll abgesehen werden, wenn dort für diesen Ausländer eine erhebliche konkrete Gefahr für Leib, Leben oder Freiheit besteht. Gefahren nach Satz 1, denen die Bevölkerung oder die Bevölkerungsgruppe, der der Ausländer angehört, allgemein ausgesetzt ist, sind bei Anordnungen nach § 60a Abs. 1 Satz 1 zu berücksichtigen.

(8) Absatz 1 findet keine Anwendung, wenn der Ausländer aus schwerwiegenden Gründen als eine Gefahr für die Sicherheit der Bundesrepublik Deutschland anzusehen ist oder eine Gefahr für die Allgemeinheit bedeutet, weil er wegen eines Verbrechens oder besonders schweren Vergehens rechtskräftig zu einer Freiheitsstrafe von mindestens drei Jahren verurteilt worden ist. Das Gleiche gilt, wenn der Ausländer die Voraussetzungen des § 3 Abs. 2 des Asylverfahrensgesetzes erfüllt.

(9) In den Fällen des Absatzes 8 kann einem Ausländer, der einen Asylantrag gestellt hat, abweichend von den Vorschriften des Asylverfahrensgesetzes die Abschiebung angedroht und diese durchgeführt werden. Die Absätze 2 bis 7 bleiben unberührt.

(10) Soll ein Ausländer abgeschoben werden, bei dem die Voraussetzungen des Absatzes 1 vorliegen, kann nicht davon abgesehen werden, die Abschiebung anzudrohen und eine angemessene Ausreisefrist zu setzen. In der Androhung sind die Staaten zu bezeichnen, in die der Ausländer nicht abgeschoben werden darf.

Case Study - Sweden

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1. Medical claims in migration cases in Sweden

1.1. Legal Basis

The main legal basis for migrations procedures, including the asylum procedure, in Sweden, is the Aliens Act (2005:716).[63] Two of its provisions are of specific relevance to the health conditions of a foreigner, and those are:

Chapter 5: ***Residence Permits***

Section 6: ***Residence permits on grounds of exceptionally distressing circumstances***

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 this 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.

For children a residence permit under the first paragraph is granted if the circumstances are particularly distressing. Act (2014: 433).

Chapter 12: Enforcement of refusal-of-entry and expulsion orders

Section 18: *If, in a case concerning the enforcement of a refusal-of-entry or expulsion order that has become final and non-appealable, new circumstances come to light that mean that*

1. there is an impediment to enforcement under Section 1, 2 or 3,

2. there is reason to assume that the intended country of return will not be willing to accept the alien or

3. there are medical or other special grounds why the order should not be enforced, the Swedish Migration Board may grant a permanent residence permit if the impediment is of a lasting nature.

If there is only a temporary impediment to enforcement, the Board may grant a temporary residence permit.

Children may be granted permanent or temporary residence permit under paragraph 3, although the points are not of the same seriousness and weight as required for the issuance of residence permits for adults.

(...)

While both provisions are rather similar they are examined at different stages in the procedure and by different units of the SMB, one by the asylum examination units and the other by the Litigation Department.

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[63] Utlänningslagen 2005:716.

1.2. Organisational Structure/ Responsibilities

The Swedish Migration Board (SMB) is the main institution in Sweden responsible for migration and asylum procedures.

A special unit of the SMB is responsible to conduct the asylum process[64], thereby determining whether international protection shall be granted to an applicant. The health of a foreigner may come up in the course of an asylum procedure. Taking the health of a foreigner into account, an asylum decision-maker may deny international protection but may still need to investigate on the national protection ground of Chapter 5 Section 6 Aliens Act. International protection is thus determined first, while the national protection ground of Chapter 6 Section 6 Aliens Act only needs to be looked at if the international protection ground has been denied.

Beside the asylum examination unit, it is the Litigation Department of the SMB, which defends the SMB's decisions in front of the court in case a decision has been appealed by the applicant. Approximately 100 persons work in the Litigation Department in 4 different areas spread over Sweden.

After all legal remedies have been exhausted, the Litigation Department still needs to check whether there are any impediments to return in accordance with Chapter 12 Section 18 Aliens Act.

Finally, beside the SMB, the Swedish police may be involved in the return[65] of foreigners, particularly in cases when the police apprehends an irregularly staying foreigner. If the foreigner in such cases does not apply for asylum, the police has the power to return the foreigner. Medical claims may thus also play a role in such procedures under the responsibility of the police. In the absence of further means or instruments to examine medical claims, the police would re-direct the foreigner to the SMB.

1.3. Statistics

The Swedish law does not foresee any specific provision exclusively dealing with medical cases. The above cited provisions refer, inter alia, to medical claims. As a consequence, the SMB does not register medical claims separately. No reliable data on medical cases are thus collected.

1.4. Procedure in medical migration cases

Sweden does not foresee any specific procedure for applying for a residence permit on health reasons. The possibility to remain in Sweden on health reasons is conceptualized as a special, national, protection ground, which is connected to, but procedurally separated, from the determination of international protection. As such, health reasons may be brought up and ultimately result in a stay in Sweden, if the person's health reaches a level of exceptionally distressing circumstances that would allow the foreigner concerned to remain in the country.

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[64] The asylum process is handled by two types of asylum units, of which there are a large number: *asylum application unit* and *asylum examination unit*. Previously these units formed the Asylum Division that was abolished in the reorganization of the SMB that came into effect on 1 January 2015.

[65] The SMB is responsible for voluntary return, the police for forced return. Any case where the returnee refuses to cooperate or absconds is handed over from the SMB to the police.

A similar assessment needs to be done, once all procedural legal remedies have been exhausted and due to new appearing facts the person concerned may not be returned.

1.4.1. Medical claims as national protection ground

The asylum examination unit under the SMB conducts the asylum procedure. The Board determines whether the applicant is eligible for refugee status. If refugee status is denied, the Board determines whether there are reasons for subsidiary protection in accordance with Art 15 of the Qualification Directive. If both, refugee and subsidiary protection are denied, the SMB still may determine whether the denied asylum applicant should be granted a residence permit on exceptional distressing circumstances.[66]

As exceptional distressing circumstances Chapter 5 section 6 Aliens Act lists, inter alia, the alien's state of health. The asylum examination unit of the SMB thus must also determine medical claims of asylum applicants within the asylum procedure, if the applicant mentioned any health related issues. At the same time, if a person evidently has medical problems the SMB would encourage the applicant to submit a medical attestation from a physician outlining the state of health of the applicant.

Once the asylum examination unit issued a negative decision, the asylum seeker may appeal to the Migration Court as the second instance. The Migration Court may alter the decision of the SMB in every direction and may decide in substance. Against the decision of the Migration Court, both, the applicant as well as the SMB may further appeal to the Migration Court of Appeal. This last instance though may only be appealed if the case is of exceptional importance for the interpretation of a specific provision or to establish legally binding jurisprudence on an important but disputed interpretation of the law. At both appeals instances, the SMB is represented by the Litigation Department.

The Litigation Department defends the position of the SMB at oral court hearings and may respond to an appeal by the applicant or file an appeal on behalf of the SMB. As such, the SMB's Litigation Department is also involved in the implementation of Chapter 5 section 6 Aliens Act.

The Migration Court of Appeal nevertheless determined that considerations under this clause must be separated from other protection issues, which are examined under the clauses defining refugees and people in need for subsidiary protection.[67]

1.4.2. Medical claims in the context of return

The Litigation Department of the SMB, nevertheless, fulfils an additional task in the context of medical claims of foreigners, connected with medical claims which are brought forward after all instances had been exhausted, the return decision came into force, but the applicant brings

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[66] In a non-health related case the Migration Court of Appeal stated that, before considering exceptionally distressing circumstances in a case, refugee protection and subsidiary protection must be first reviewed before looking into exceptionally distressing circumstances. See Migration Court of Appeal, 15 June 2007, MIG 2007:33, in English accessible at: http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-15-june-2007-mig-200733#content (accessed on 19.01.2015)

[67] Migration Court of Appeal, MIG 2007:33.

forward arguments that she/ he cannot be returned. The Litigation Department thus needs to examine this claim according to chapter 12 section 18 Aliens Act. In this very specific procedure, the SMB is the first and last instance. There is no possibility to appeal against the decision of the SMB.

2. Threshold for considering a migrant's health conditions with respect to impediment of return

2.1. Threshold for "severity" of a disease

As previously noted, Chapter 5 Section 6 Aliens Act refer to "exceptionally distressing circumstances". The assessment of whether a disease has reached the threshold to further look into the medical situation in the country of origin stays with the decision-maker of the SMB. The decision-makers are no medical doctors, their judgment on whether a disease is severe or not is thus closely depending on the medical attestation by a treating physician. The burden of proof lies with the applicant. Consequently, the applicant needs to submit such evidence in form of an attestation by the treating physician.

Sweden takes specific care that the attestation fulfils the basic requirements of a medical attestation. As such, the attestation must include, among others, information on the severity of the disease and the necessary treatment/ medication. The Swedish Migration Court of Appeal decided in this context that a sole record of the applicant's visits to the doctor would not suffice.[68] The attestation must fulfil certain standards requested by the Social Board (SOSFS 2005:29).

When considering the severity of the disease, the SMB looks particularly whether it would lead to a life threatening stage, if the person were to be returned. As such, the threshold for severity is high. The decision-maker decides on the threshold by examining the medical attestation by the treating physician. The burden of proof that a disease is life-threatening stays with the applicant. When assessing the severity of a disease, the SMB also takes the credibility of the medical doctor into account. Only in rare cases the SMB would involve medical doctors of the SMB.

Instead of "exceptionally" distressing circumstances the threshold for children has been set at "particularly" distressing circumstances (chapter 5 section 6, second paragraph Aliens Act). The law was changed to allow for differences between adults and children with effect on 1 July 2014.

2.2. ''Severity" of a disease in practice

Diseases like Leukaemia, HIV, and Diabetes are some examples of diseases which the Migration Court of Appeal assessed as severe, because of the life-threatening element those cases brought forward. Nevertheless, it is not the disease but the special individual circumstances of the person concerned that decide whether a health condition amounts to exceptionally distressing circumstances or not.

[68] Migration Court of Appeal, MIG 2007:35.

Mental diseases are considered difficult to assess with respect to whether a disease amounts to exceptionally distressing circumstances. In a case of a person suffering from a mental disease, the SMB denied protection and the applicant made several suicide attempts. In its decision, the Migration Court of Appeal said that it is decisive whether the suicide attempts are a consequence of the decision denying residence in Sweden or a consequence of a mental disease. According to this ruling, only the second would impede the return.[69]

In a case the SMB had to assess an applicant's health situation, which required kidney transplantation. The SMB determined in the decision that the person was suffering from a kidney disease and, if not treated, it would become life threatening. She would eventually need kidney transplantation. The question was whether the transplantation could be conducted in her country of origin or not. While the transplantation was not urgently needed, the SMB still classified the state of health as life threatening. The life threatening element is thus not necessarily connected with a specific time frame until when the life threatening moment needs to be expected.[70]

Chapter 5 Section 6 Aliens Act further also clarifies that the threshold for the exceptionally distressing circumstances is lower if children are concerned. Children thus may be granted a residence permit even if the circumstances do not have the "same seriousness and weight that is required for a permit to be granted to adults.

3. Availability of medical treatment/ medication in countries of origin

Once the severity has been confirmed by the SMB, the SMB needs to check whether the medical treatment/ medication is available in the country of origin, i.e. whether the life-threatening element could be eliminated or overcome by treatment/ medication in the country of origin of the applicant.

3.1. Definition of availability in the national context

The SMB has not developed a clear definition on availability yet, neither has such definition been proposed by jurisprudence yet. The Courts dealt with questions of availability but did not use the opportunity for a clear determination of what "availability" should mean in the sense of Chapter 5 Section 6 (or Chapter 12 Section 18) Aliens Act. As such, those decisions provide for some general guidance but do not allow for drawing an overall definition.

3.2. Availability in practice

So far, the Migration Court of Appeal decided on different elements as regards the availability of medical treatment/ medication.

In a case the applicants were a mother and a child from Eritrea. The child suffered from epilepsy. They claimed that there were no child-neurologists in Eritrea and that adequate medication would be sparse. The Migration Court of Appeal concluded that there are hospitals in Asmara and that the child **had been treated prior to departure** in Eritrea. As a consequence

[69] Migration Court of Appeal, MIG 2007:35.
[70] Migration Court, UM 4857-14.

of this decision, the prior treatment in the country of origin may be used for a clear indication of the availability of medical treatment in the country of origin.[71]

In the same decision, the Migration Court of Appeal also determined, that the fact that medical care in Sweden is of **higher quality** than in the country of origin, cannot be regarded as enough for granting a permission to stay according to the Alien's Act Chapter 5 Section 6.[72]

In a case of a Mongolian applicant, the Migration Court of Appeal had to deal with questions regarding the availability of medication on the **black market**: A woman from Mongolia, suffered from a disease which can be life threatening without proper medication. The applicant claimed that this medicine would only be available on the black market in Mongolia and the supply would be unreliable. The Court concluded that if necessary treatment is available only on the black market the availability is considered too uncertain. It would not be reasonable that a person would need to make use of unofficial or even illegal channels to obtain the necessary medication. The Court decided that "exceptionally distressing circumstances" were at hand and the woman was allowed to stay in Sweden.[73]

4. Accessibility of medical treatment/ medication in countries of origin

4.1. Definition of accessibility in the national context

Sweden does not apply the accessibility and thus also does not foresee any definition. Some court decisions though touched upon the accessibility and determined their non-applicability in the Swedish context.

4.2. Accessibility in practice

Sweden does not assess whether an available treatment and/ or medication would equally be also accessible in the country of origin for the person concerned. The non-application of the accessibility derived from Swedish jurisprudence, in particular from some judgments of the Migration Court of Appeal. The judgments have been issued partly already some time ago, but have not been challenged since.

4.2.1. Economic Accessibility

The economic accessibility has been the ground for a decision by the Migration Court of Appeal in a case of a family from Kosovo, belonging to a minority group. The father has diabetes, needs insulin injections regularly. They claim that they can't afford medication and because of their ethnicity have problems to find work and move freely. According to COI collected from the Swedish embassy in Belgrade private care exists and medicines can be purchased, but it may cost a lot. In first instance the SMB denied a residence permit, but the second instance, the

[71] Court of Appeal from 30 May 2007, MIG 2007:25. A summary of this judgement may be found in English at http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-30-may-2007-mig-200725#content (accessed on 19.01.2015).
[72] Ibid.
[73] Migration Court of Appeal, 25 October 2010, UM 7664-09; a summary of this decision can be accessed in English at http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-25-october-2010-um-7664-09#content (accessed on 19.01.2015)

Migration Court ruled that high costs would make the medication not accessible to the applicant and thus a residence permit should be granted. This decision was then appealed by the SMB and the Migration Court of Appeal ultimately decided that the treatment may cost more in the Country of Origin than in Sweden, but that would not be reason enough to grant a permit to stay in Sweden.[74]

Since this decision, the economic accessibility is of no relevance in the Swedish context. Neither the price nor the financial support by family members or the state or any health programme are thus of relevance.

4.2.2. Geographic accessibility

In the Swedish context it is not important where the returnee will be returned to and whether, in this specific region the treatment would be available. The geographic accessibility is thus not considered relevant. According to the SMB also in Sweden certain treatments are not offered in all parts of the country. Travel may thus be necessary to receive treatment also in Sweden.

There has not yet been any court decision that has dealt more closely with the geographic accessibility to medical treatment and/ or medication[75] The distance and/ or the costs of travel in combination with the geographic proximity are thus not to be taken into account.

4.2.3. Political accessibility

Political accessibility may be taken up by the SMB but at an earlier stage, during the refugee status determination procedure. Political accessibility would thus be more of an issue for refugee status and would be determined during this assessment and not at the later stage.

5. Residence and Return

5.1. Residence granted

If the SMB determined that the applicant's disease is of distressing circumstances and the necessary medication/ treatment is not be available in the country of origin, the SMB issues a residence permit on grounds of exceptionally distressing circumstances according to Chapter 5 Section 6 Aliens Act.

The duration of the residence permit usually depends on the disease and the necessary treatment. The main indicator for the decision on the duration of the residence permit derives from the medical doctor's attestation. The SMB usually follows the expected duration indicated in the medical attestation. Should the need for medical care be for a longer period, the SMB grants a permanent residence – again, depending on the medical attestation.

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[74] Migration Court of Appeal, MIG 2007:48.

[75] The interviewees nevertheless remarked that the geographic accessibility could be relevant if, for example, the person concerned cannot access the region where the necessary medication is available due to special allowances needed to access this region. Also with regard to the internal flight alternative, questions of geographic accessibility may arise. The asylum decision-maker in such case would need to assess whether medication and/or treatment are also available in the other, considered safe, region in the applicant's country of origin. Ultimately, the "accessibility" may play a role here. In the absence of a specific jurisprudence though, the geographic accessibility is currently not reviewed.

The SMB is the responsible body for issuing the residence permit.

5.2. Residence denied

If residence is denied by the SMB and there is no further legal instrument available (i.e. the decision came into power), the SMB (Litigation Department) still needs to determine – one more time – whether there are any reasons for an impediment to the enforcement of the return according to Chapter 12 Section 18 Aliens Act.

This provision foresees different facts that would manifest an impediment to return, even if all legal remedies have already been exhausted. Two facts also refer to the medical or health situation of the returnee:

- Firstly, the SMB needs to determine whether the person concerned is fit to fly.
- And secondly, the SMB also needs to determine whether there are "other special grounds" why the order to leave should not be enforced.

While the first fact is outside the scope of this study, the second fact, requires the SMB to look into the case and whether new facts that would stand against the enforcement of the order to leave came up in the meantime. Such an assessment is to be done upon application of the returnee but also ex officio by the SMB. This final assessment before the enforcement of the return should allow for another check whether the assessment has been correct and whether any new elements would have developed since the final decision.

While the determination does not differ from the one following Chapter 5 Art 6 Aliens Act, the level of in-depth assessment is lower, because already all remedies and checks have lead previously to the decision that the return would be possible.

This procedure to check whether there would be any new facts for an impediment to return is further characterized as a one instance decision: the SMB is the first and final instance, there is no appeal against this decision possible.

When it comes to return, the SMB does generally not provide the person with medicine or financial support for medical treatment. For people suffering from severe diseases, medicine may be provided for the process of return, i.e. until the person can visit a doctor in his/ her country of origin. When there is a re-admission agreement the SMB is obliged to inform the receiving country about the medical situation of the returnee and book the travel in advance. When there is no re-admission agreement and the person gives his/ her permission the SMB can contact the suitable authority (can also be an embassy) in the country of origin to inform about the person's medical condition and needs and make sure there is someone meeting the person upon arrival.

6. Summary

Summarising the main elements and definitions the following parts may be summarised:

	Definition/ applied practice	Basis for used definition
Severity of the disease (threshold for admission of a medical claim)	There is no legal definition of the "severity". The disease nevertheless must be life theatening. As such the threshold that must be reached is high. A decision whether a disease is severe or not, must be included in the attestation by the applicant's treating physician. The threshold for adults is higher (exceptionally distressing cicrumstances), while it is lower for children.	Chapter 5 Section 6 Aliens Law; Chapter 12 Section 18 Aliens Law
Availability	No definition. Some guidance are given by jurisprudence: - Black market does not manifest "availability" - Quality of treatment in country of origin compared to Sweden is irrelevant - Earlier treatment in the country of origin manifests a clear indication of "availability"	Case-law
Accessibility	Sweden does not apply the determination of the accessibility. In the past, the Court determined that the costs of treatment/ medication in the country of origin are irrelevant.	Case-law
Residence permit	Residence permit on grounds of exceptionally distressing circumstances. Duration depends on the disease and may be temporary or permanent (if an improvement of the health situation can not be expected over a longer period of time)	Chapter 5 Section 9 Aliens Act
Return	Before the return may be realised, the SMB must still determine whether there would be any impediment to removal as regards to the applicant; an assessment that encompasses the fit to fly check as well as new evidences as regards to the health of the returnee. There are no specific bridging support in the country of origin foreseen which would specifically apply for medical and health reasons. In exceptional cases medicine may be provided until the person can visit a doctor in the country of origin.	Chapter 12 Section 18 Aliens Act

7. Sources

Interviews

If not otherwise quoted in the case study, the information contained is based on interviews conducted on 14 January 2015 and information provided by the following persons from Swedish Migration Board and the Stockholm Administrative Court (Migration Court).

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1. Medical claims in migration cases in the United Kingdom

1.1. Legal Basis

The UK Immigration Rules do not include any specific norm as regards the medical background in migration cases. There is also no provision providing for a person to remain in the UK in order to access, or continue to access, medical treatment through the National Health Service. Immigration decisions, nevertheless must comply with UK's obligations under section 6 of the Human Rights Act 1998. Under the act, it is unlawful for a public authority to act in a way which is incompatible with the 1950 European Convention on Human Rights (ECHR) including Art. 3 or Art 8.[76]

While both, Art. 3 and 8 play a significant role in determining whether a person may be returned or not, it is the Art. 3 and the corresponding case-law by the European Court of Human Rights that provide main guidance. An applicant relying on Article 3 must show that there are substantial grounds to believe that there is a significant risk of inhuman and degrading treatment (to a reasonable degree of likelihood), if they were returned to their country of origin.

The UK common law (or case-law) system is based on law developed by judges through decisions of courts and similar tribunals that decide in individual cases, as opposed to statutes adopted through the legislative process or regulations issued by the executive branch. The UK system thus looks particularly into the case-law. In migration matters the decisions of the Immigration Court, the Supreme Court but also the European Court of Human Rights (ECtHR) are decisive when it comes to the interpretation of how to deal with certain individual cases.

Main guidance for decision-makers on medical cases is thus deriving from the case-law on Art. 3 and Art 8 ECHR. The main guiding case-law and the interpretation at the national, UK, level when it comes to medical cases, certainly come from the two landmark decisions by the (ECtHR), *D vs UK*[77] and *N vs UK*[78].

The case of 'N' was considered by the House of Lords and the European Court of Human Rights. The ECtHR judgment upheld the position taken by the House of Lords that removing 'N' would not breach Art. 3, and confirmed that cases, where the applicant can resist removal and be granted leave to remain on Art. 3 grounds, are exceptional. The UK policy as regards to medical cases as well as the threshold for medical cases is mostly based on this judgment (in connection to the D judgment).

1.2. Organisational Structure/ Responsibilities

The UK Home Office is the responsible authority for border and immigration related issues. Since the abolishment of the UK Border Agency in 2013, two new organisations took over the

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[76] Home Office 2014, Human Rights Claim on medical grounds, p 12.

[77] D. v. United Kingdom, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997.

[78] *N. v. The United Kingdom*, Appl. No. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008.

responsibilities, namely the UK Visas and Immigration, which is focusing on the visa system and the Immigration Enforcement, which is focusing on immigration law enforcement. Additionally as the third branch, the border control is being conducted by the UK Border Force, which is operating since April 2012.

In the UK Visas and Immigration area of the Home Office there are five Directorates: Migration & Customer Contact; Immigration Operations; Asylum; Customer and Change; Visa Operations. Decisions on applications relevant for this study can be made in the Immigration Operations, Asylum or Visa Services Directorates, depending upon how the application is raised. The majority of cases will be claims handled by Asylum Directorate or Immigration Operations for claims on non-asylum grounds and any appeals on any matter.

1.3. Statistics

The UK Home Office does not collect data on Art. 3 ECHR medical cases. No reliable data on medical cases are thus collected.

1.4. Procedure in medical migration cases

When it comes to case handling and decision making the UK's guiding principle generally is to conduct individual assessments rather than applying a systemic approach. The different migration cases are individual and consequently require an individual approach. Particularly in medical cases, the interpretation of "availability" and "accessibility" may vary from case to case. Much of the case handling depends already on the severity of the disease and the prospect of cure. Barriers to the accessibility may come in more dominantly if an applicant would be in the final stage of the disease. The accessibility thus may be looked at much closer the more severe the disease and thereof resulting pain would be.

In general, medical elements may become relevant in all kinds of migration processes. It mainly depends when the issue is raised. If the query is raised as part of an asylum claim, or resulting from the asylum claim, the application is channelled through the asylum claims route. However, if the application is raised on non-asylum grounds it will be sent to the designated address for making applications under the temporary or permanent migration routes in the Immigration Operations Directorate. However, there is also a special process for raising human rights issues under the appeals process under the "one-stop" process; in those cases an application does not need to be completed but instead the application is included as part of the appeals process.

Still, Irrespective of the migration processes, the case owner needs to establish whether the threshold of Art. 3 has been reached in the individual case. The case owner in this respect needs to address this issue in a more global assessment taking all possible elements into consideration.

Applicants can claim leave on article 3 or article 8 medical grounds by submitting specific application forms for discretionary leave or indefinite leave to remain. In the absence of a clear Art. 3 or Art 8 claim, those may also just be implied. The guidance on "Human Rights claims on medical grounds" provides some indicators which a case owner should check to identify

whether a claims implies an Art. 3 or 8 claim as well. The indicators[79] proposed are among others:

- The applicant expresses fear of return, is unwilling to return or has stated their intention to remain in the UK because medical facilities in their home country are not:
  - ✓ available
  - ✓ affordable
  - ✓ accessible, or
  - ✓ of the same standard as medical treatment in the UK.
- The applicant refers to death without dignity abroad because medical treatment in the home country is not:
  - ✓ available
  - ✓ affordable
  - ✓ accessible, or
  - ✓ to the same standard as treatment in the UK.
- The applicant refers to either:
  - ✓ inhuman and degrading treatment (on medical grounds), or
  - ✓ article 3 and/ or article 8 (medical) case-law

Article 3 (medical) rights would, however, be breached by removal to their country of origin only if their illness has reached such a critical stage (the applicant is dying), and the conditions to which they will be returned are such that it would be inhuman or degrading treatment to deprive them of the care they are currently receiving, and send them home to an early death (unless there is care available in the country of origin to allow them to die with dignity).[80]

The guidance for human rights claims refer to the N judgment when confirming that cases where the applicant can resist removal and be granted leave to remain according to Art. 3 grounds are exceptional.[81] As of October 2012 no Art. 3 has been granted exclusively on medical grounds in the UK courts or the ECtHR.[82]

2. Threshold for considering a migrant's health conditions with respect to impediment of return

2.1. Threshold for "severity" of a disease

The general principle in determining the threshold for the severity of disease is that a person cannot avoid return on the basis that they require medical, social or other forms of assistance

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[79] Home Office 2014, Human rights claims on medical grounds, p 8.
[80] Home Office 2014, Human Rights Claim on medical grounds, p 14.
[81] Home Office 2014, Human Rights Claim on medical grounds, p 14.
[82] Home Office 2014, Human Rights Claim on medical grounds, p 16.

being provided in the UK. The improvement or stabilisation in an applicant's medical condition resulting from treatment in the UK and the prospect of serious or fatal relapse on expulsion will not in themselves render expulsion inhuman treatment contrary to Article 3.[83]

The threshold set by Article 3 is therefore a high one. It is "whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him/ her of the care which she/ he is currently receiving and send him/ her home to an early death unless there is care available there to enable him/ her to meet that fate with dignity".[84] To meet the very high Article 3 threshold an applicant will need to show exceptional circumstances that prevent return, namely that there are compelling humanitarian considerations, such as the applicant being in the final stages of a terminal illness without prospect of medical care or family support on return.

2.2. Severity of a disease in practice

In the assessment, it is required from the decision-maker to apply a holistic approach. No one factor is necessarily crucial or determinative in the dispassionate judicial assessment of those circumstances.

It is the applicant's responsibility to supply acceptable, accurate and up-to-date medical evidence in support of their application. The focus of the evidence they provide must be on their current state of health. The need for the treatment and diagnosis itself must be clearly understandable from the evidence provided.

For the purpose of article 3 and/ or article 8 (medical) claims, according to the Guidance on Human Rights Claims on Medical Grounds, medical report must be:

- Printed on letter-headed paper showing:
  - ✓ the address and contact details of the hospital or National Health Service (NHS) trust, and
  - ✓ The name, telephone number and fax number of the consultant;
- An original document (not a photocopy or a faxed document);
- Dated within three months of the date when it is received by the Home Office; and
- Written and signed by a qualified health professional who must have seen the claimant in person. For this purpose, the definition of a qualified health professional is a consultant working in the NHS in the relevant specialist subject. This person must be registered with the General Medical Council.[85]

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[83] Home Office, Instruction on "discretionary leave", accessed at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312346/discretionaryleave.pdf on 21.01.2015, p 4. It needs to be well noted in this respect, that the assessment necessarily takes into account a global assessment of the impact a condition has on a person rather than a simple award solely based upon suffering from that condition.
[84] See N (FC) v SSHD [2005] UKHL31
[85] UK Home Office 2014, Guidance on Human Rights Claims on Medical Grounds, p 19.

The instructions on medical evidence for medical claims in asylum procedures state that confirmation of a medical condition would not, in most cases, result in a grant of leave but should be considered as a Human Rights claim even if the medical condition is not explicitly raised in association with Article 3 or 8 ECHR.[86]

3. Availability of medical treatment/ medication in countries of origin

3.1. Definition of availability in the national context

The UK looks whether a certain medication or treatment exists in the country of origin. There is no particularly applied definition, although several orientation notes for caseworkers refer to the availability.[87]

The UK would not look into the details of the disease but would rather look at an "overall assessment of the treatment possibilities" in the country of origin. The diseases may verify significantly and it may not ultimately be clear which disease requires which specific treatment or medication. There may be so many nuances of diseases or the treatment possibilities, which may make an in depth assessment on the availability of the treatment/ medication for the very individual disease very cumbersome and difficult.

3.2. Availability in practice

If an applicant claims there is inadequate or no medical treatment available in their own country, or proposed country of return, the burden of proof is on the applicant. Based on the claims, the decision-maker may approach the Country, Policy and Information Team (CPIT) to verify what medical treatment is available in the country concerned.[88] Should the medical attestation submitted not comply with these requirements, the decision-maker needs to give the applicant (once) the possibility to provide with the necessary documents before making the decision.

As a general rule the applicant concerned should have the same possibility to get hold of the medication/ treatment as local fellows in the country of origin. The level and ways of availability should not differ to the average citizen.

Questions as to whether or not the availability of medication on the black market or in internet pharmacy may be sufficient have not yet been brought to the courts. Consequently, no particular case-law has developed yet.

4. Accessibility of medical treatment/ medication in countries of origin

4.1. Definition of accessibility in the national context

While generally the UK does not consider the accessibility relevant but only looks whether treatment and/ or medication is available, the accessibility may become relevant in certain cases. Similar to the ruling in D vs UK, many elements may additionally be relevant in an individual case beside the availability of treatment in the country of origin. For example, a

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[86] Medical Evidence (Non-Medical Foundation Cases), p 10.
[87] See UK Home Office, Guidance on Human Rights Claims on Medical Grounds, p 8.
[88] Home Office 2014, Human Rights Claim on medical grounds, p9.

person may be seriously ill and not far from death, there may be no care and no support by family members or relatives in the country of origin and additional the costs may be exorbitant high and only in another part of the country available. If many such elements would accumulate, they may, altogether reach the threshold described in the relevant Art. 3 ECHR jurisprudence.

Also when analysing the judgment of the Upper Tribunal, it seems that the thought of the applicability of the accessibility may also in the UK context potentially be of relevance, when the court determined:

> *"It will be for the individual to prove that medical treatment and care will not be available to them in the receiving country. That may arise because it is simply not available or, if available in theory, it is not accessible in practice because the individual does not have the financial resources to pay for that treatment or care, or, alternatively, it is as a practical matter beyond their reach for example because they would have to travel a long distance which is prohibited by their health or personal circumstances."*[89]

While it was not applicable in the case that has been decided, the statement clearly pays attention to economic and geographic accessibility. Evidently, such considerations may become more relevant, the more serious a medical stage of an applicant is.

4.2. Accessibility in practice

4.2.1. Economic Accessibility

Generally the costs of the treatment and medication are not researched in medical claims. This mainly derives from N vs UK ruling and the statement of the UK Supreme Court, that if the treatment is available but probably not affordable, this would not derive to the high threshold set with D vs UK.[90]

While in first instance decision such considerations would not come up, they might get relevant in the appeals process when the appellant claims that, a treatment and/or medication may, in theory, be available but is not affordable. In such cases the costs may have to be reviewed. While there is no specific case-law, exorbitant costs, which would, for example, take most of the savings or income may – together with other elements – be overall assessed as relevant. If such barriers would then cumulate to the threshold required by Art. 3, this may become relevant. However, the standard in the UK is to not apply the economic accessibility.

4.2.2. Geographic accessibility:

While, in principle, not necessarily applicable, the geographic accessibility may become relevant in a particular case – see above the ruling of the Upper Tribunal.

[89] Upper Tribunal GS and EO (Article 3 – health cases) India [2012] UKUT 00397(IAC), accessible at: http://www.bailii.org/uk/cases/UKUT/IAC/2012/00397_ukut_iac_2012_gs_eo_india_ghana.html (accessed on 22.01.2015).

[90] Upper Tribunal GS and EO (Article 3 – health cases) India [2012] UKUT 00397(IAC), accessible at: http://www.bailii.org/uk/cases/UKUT/IAC/2012/00397_ukut_iac_2012_gs_eo_india_ghana.html (accessed on 22.01.2015)

4.2.3. Political accessibility

Usually political accessibility will mainly be addressed during the refugee status determination in the asylum procedure. As such the "political accessibility" is of low importance.

However, the UK had a big number of asylum applicants from Zimbabwe some years ago. While many did not show a valid persecution ground, they had a high percentage of HIV infection. Returnees to Zimbabwe might have witnessed discrimination and imprisonment upon return. As such, returnees with the need of treatment and/ or medication would be practically denied access to such facilities, which ultimately may arise to a life threatening situation. In such cases, each of the grounds for non-return may have been not strong enough, but cumulating these facts may reach up to the threshold required by Art. 3 ECHR. As such questions of accessibility (not necessarily political but may also correspond to geographic accessibility) may become relevant.

5. Residence and Return

5.1. Residence granted

The guidance on human rights claims on medical grounds admits that the test for granting discretionary leave to remain on human rights (medical) claims is very high. The rate for granting discretionary leave to remain on those grounds is thus rare.

The discretionary leave to remain is granted to a maximum of 30 months (2.5 years), and life expectancy by more than three months.

After 10 years of discretionary leave, the applicant can be issued an indefinite leave to remain.[91] For the indefinite leave to remain, the conditions for discretionary leave to remain must still be valid. Any prolongation also needs to determine whether there are any grounds for excluding an applicant from the discretionary leave to remain.

5.2. Residence denied

If a person is not granted leave to remain due to Art. 3, the person must return to the country of origin. The UK conducts a number of return programmes with different countries. While it is not a rule, in some return programmes also the provision of cash to buy certain goods (such as medication) may be part. As a general standard however, the provision of cash or in-kind (medication) is not foreseen in the UK.

[91] The 10 years waiting period before being in the position to apply for indefinite leave to remain, apply if the first discretionary leave to remain has been issued on or after 9 July 2012. If it has been issued before, the waiting time is 6 years.

6. Summary

	Definition/ applied practice	Basis for used definition
Severity of the disease (threshold for admission of a medical claim)	Whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him/her of the care which s/he is currently receiving and send him/her home to an early death unless there is care available there to enable him/her to meet that fate with dignity	Case-law; Policy as outlined in guidance notes for case owners
Availability	Mere existence in the country of origin	Case-law
Accessibility	Usually not determined but court left room for discretion should it get relevant in a future case	Case-law
Residence permit	Discretionary Leave to remain 2,5 years; after 10 years indefinite leave to remain. Issues by the UK Home Offifce	Immigration Rules
Return	No general practice; depending on the return programme with the different countries of origin.	Return programmes

7. Sources

Interviews

If not otherwise quoted in the case study, the information contained is based on interviews with senior caseworkers from the UK Home Office.

Other Sources

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Comparative Research on the State Practices on the Accessibility of Medical Treatment and/or Medication in Countries of Origin

International Centre for Migration Policy Development, 2015

Summary of publication:

In recent years, there has been an increasing trend of claims by foreigners based on the medical condition with the prospect of being granted the leave to remain in the host country. Such claims are mainly connected with the asylum process or come up during the return of a foreigner to his/her county of origin. In dealing with such medical migration cases, EU countries developed different practices, which are partly based on specific international or national legal provisions, international and/or national case-law or country specific policies. As a result of such policies, the national practices widely differ from each other. The present study researched the state practice in dealing with medical migration cases in five selected EU countries: Belgium, Finland, German, Sweden and the United Kingdom

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