

Open Summary of EMN Ad-Hoc Query No. [2019.58]

AHQ regarding legal representation for the government in court cases against rejected applications

4 July 2019, prepared by NL NCP

1. KEY POINTS TO NOTE

- ★ In 19 Member States¹, the organisation that takes decisions on applications for residence permits is also responsible for the legal representation of this organisations in case an applicant appeals to court. In most Member States, a special department is responsible for legal representation. In **Finland**, the employee who handles the case is also responsible for legal representation.
- ★ In other Member States legal representation is organized differently. For example, in **Italy** there is a general legal body which represents the state. In **Cyprus** a lawyer of the Law Office is responsible.
- ★ Some additional information that was provided is that the legal representative depends on the type of residence permit (**HR**), decision (**UK**) or the authority which decides on the appeal (**NO, MT**).

2. BACKGROUND AND CONTEXT

In the Netherlands, the Immigration and Naturalisation Service (IND) is responsible for applications for residence permits. When an application is rejected, it is possible for the applicant to appeal to the Dutch courts. In these cases, legal representatives working at the Legal Affairs Department of the IND defend the position of the IND.

In order to exchange experiences and good practices, the Legal Affairs Department of the IND wanted to know whether similar departments or organisations exist in other Member States and, more specifically, if there are any special departments within the relevant ministries and/or migration-related organisations (legal

and/or litigation department) taking care of the legal representation of the government. Therefore, EMN Netherlands drafted an ad hoc query on this subject, on which this summary is based.

3. MAIN FINDINGS

Questions 1 and 2. (1) How is the legal representation for the government arranged in court cases against the decisions made by the competent authority on applications for residence permits in your Member State? (2) Does the organisation responsible for deciding on applications for residence permits also provide its own legal representatives in court cases about rejected applications? Yes/No. If yes, please explain the organisation and department. If not, please explain who is responsible for legal representation of the government in these court cases.

In general

Different types of organisations and legal representation exist amongst Member States. In the majority of Member States the organisation that decides on applications for residence permits is also responsible for the legal representation in court. In other Member States external lawyers, for example from another government body, are responsible for legal representation. In some Member States more than one organisation is responsible for legal representation. Here responsibility depends on, for instance, the type of residence permit, the authority which decides on the appeal or the type of case.

¹ BE, BG, CZ, DE, EE, FI, FR, HR, HU, LV, LT, LU, MT, NL, PL, SE, SK, UK, NO

One organization

19 Member States (**BE, BG, CZ, DE, EE, FI, FR, HR, HU, LV, LT, LU, MT, NL, PL, SE, SK, UK and NO**) answered that the organisation that decides on the applications for residence permits is also responsible for the legal representation of this organisation in case an applicant appeals to the court. In most Member States, a special department is responsible for this task. For example, in the Netherlands, the Legal Affairs Department takes on this task on behalf of the Dutch Immigration and Naturalization Service.

Several Member States provided some additional information on specific characteristics of their national situation.

- In **Germany**, each state (Länder) has several local "foreigner authorities", which decide on applications for residence permits (over 600 in all).
- In **France**, the 'prefecture' of the place of residence of the third-country national decides on the application for a residence permit. During court cases, the state is represented by the prefect.
- In **Luxembourg**, legal representation for the government in court cases is arranged by governmental delegates, who are legal advisers within either the Ministry of Justice or within the Directorate of Immigration, nominated by the Government in Council on proposal of the Minister of Justice.
- In **Finland**, the responsible case officer represents the government and the Finnish Immigration Service in court. If the person who has handled the case no longer works for the Finnish Immigration Service, someone else from the same team or unit defends the case in court.

Lawyers

In the other Member States, the legal representatives are not part of the organisation that decides on applications for residence permits. A common alternative is that a lawyer is responsible.

- In **Cyprus**, a lawyer appointed by the Attorney-General of the Republic (Law Office) represents the authority responsible for deciding on applications. In almost all cases this lawyer belongs to the staff of the Law Office. The Law Office is an independent Office of the Republic.

- In **Italy**, state administrations are represented by the general legal body 'Advocacy of the State' (Avvocatura dello Stato). Therefore, the Advocacy of the State is also responsible for representing the government in cases about residence permits.
- In **Belgium**, in principal the Litigations Bureau, a special department of the organisation that decides on applications for residence permits, is responsible for legal representation. However, this special department often appoints a lawyer to defend the appealed decisions. Reasons are staff shortages, a high number of appeals and highly complex cases.

Shared responsibility for legal representation

In some Member States, more than one organisation is responsible for legal representation of the State. Responsibility depends on, for instance, the type of residence permit, the authority which decides on the appeal or the type of case.

- In **Croatia**, the legal representative, which is also responsible for deciding on the application, depends on the type of residence permit. In case of temporary residence permits, the competent police administration or police station is responsible (public officers, not police officers, on regional and local level). In case of permanent residence permits, the Ministry of Interior is responsible.
- In **Norway** the State shall be represented by the authority that has decided on the application. This can be the Immigration Appeals Board or the Norwegian Directorate of Immigration.
- In **Malta**, the authority that acts as the legal representative depends on the type of case. If it concerns a case that is challenged by means of recourse to the Immigration Appeals Board, legal officers of the Identity Malta Agency carry out the legal representation in such instances, after consulting with legal officers from the Attorney General. In the case of court challenges, this works the other way around. Legal officers from the Attorney General represent the Identity Malta Agency and are assisted by the legal officers of this Agency.
- In the **United Kingdom**, the legal representative depends on the type of decision that has been brought to court. Certain decisions carry a right of statutory appeal.

In that case, the Home Office will send a 'presenting officer' who is a member of staff employed by the Home Office. If a challenge is made to a decision that does not give rise to a statutory right of appeal, a challenge may be made by way of judicial review. In that case the Home Office is represented by the Government Legal Department.

Authorities deciding on residence permits

Most Member States reported which authority is responsible for deciding on applications for a residence permit. The answers can be found in table 1.

Table 1: Responsible authorities for decisions on residence permits

Responsible authority	Member State
Ministry of Interior	BG, CY, HR, LT, UK
Police	EE, SK
Regional authorities	DE, FR
Specialised organisation	BE², FI, HU, LU³, LV, MT, NL, PL, SE, NO

Authorities handling appeals

Some Member States provided information about where applicants could go if they want to appeal the decision on their application. Almost all Member States that provided information on this topic, stated that applicants who want to appeal the decision could go to court. **BE, EE, FR, HR, IT, LT, PL** and **UK** specified that this is an administrative court. **Norway**, who specified that it does not have a separate administrative court, does have an administratively independent Immigration Appeals Board (UNE). In Norway cases concerning administrative immigration matters are heard by one specific ordinary court: the Oslo District Court. **Malta** also has an immigration appeals board and **Sweden** has a special Migration Court. In **Slovakia**, in case an application for residence is rejected, the third-country national may appeal to the nearest competent appellate body - the Directorate of the Border and Foreign Police. No appeal may be brought against the decision of this second-instance administrative appeal body, but the third-country national could go to court to review a final decision.

² The 'Dienst Vreemdelingenzaken' is a specialised organisation. But it is also a General Directorate within the Belgian Federal Public Service Interior.

³ Directorate of Immigration

In **Croatia**, the situation is different than in other Member States. According to the Act on nationals European Economic Area member states and their family members ("OG, No: 66/2019), which entered into force on July 18, 2019, against the decision of the police administration or police station it is not possible to make an appeal, but an administrative dispute may be initiated. In **France**, if the residence permit application was rejected by the 'prefecture' of the place of residence of the third-country national, an appeal could be made to the Ministry of Interior. If the Minister confirms the rejection, the third-country national could make an appeal to the administrative court of the region of the concerned prefecture. It is also possible to go to court without making an appeal to the Ministry of Interior. In **Belgium**, in general, appeals have to be made to the Council for Alien Law Litigation. In the **Czech Republic**, administrative proceeding in the Czech Republic has two levels. In the first level is the decision maker Department of Asylum and Migration Policy of the Ministry of the Interior of the Czech Republic (DAMP). After the negative decision of the DAMP the applicant may appeal to the Commission on Residence of Foreign Nationals which is an independent part of the MoI.

A judicial appeal to the Administrative Court of the **Czech Republic** can be lodged after the final negative decision of the above mentioned Commission. The final judicial appeal is a cassation complaint to the Supreme Administrative Court in Brno (the cassation complaint is defined as a (extraordinary) remedy against the final decision of a regional court in administrative justice).

EMN NCPs participating: Responses from Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Slovakia, Sweden, United Kingdom and Norway (22 in total). Austria and Ireland have requested that their answers are not disseminated further. Therefore, their answers are not included in this summary.

Disclaimer The responses of the Member States regarding this ad-hoc query have been provided primarily for the purpose of information exchange among the EMN National Contact Points (NCPs) in the framework of the EMN. The contributing EMN NCPs have provided information that is (to the best of their knowledge) up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State. The responses are interpreted by the EMN to write this summary.