

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.



OPEN SUMMARY: FOR DISTRIBUTION

NO Ad-Hoc Query on Expulsion Definition Of Manifestly Unfounded As Related To Directive 2008/115/EC

Requested by NO EMN NCP on 28. August 2014

Responses from Austria, Belgium, Czech Republic, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom plus Norway (19 in Total)

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

1. Background Information

This ad hoc query concerns Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (The Returns Directive) (expulsion).

This directive establishes common standards and procedures for Member States, whereby illegally staying third-country nationals may be removed from their territories. It lays down provisions for terminating illegal stays, detaining third-country nationals with the aim of removing them within the framework of procedural safeguards. Member States must ensure that the treatment and level of protection of third-country nationals excluded from the scope of the directive corresponds at least to certain of its provisions on coercive measures, removal, health care and detention. In all cases, Member States must respect the principle of non-refoulement and take into consideration the best interest of children, family life and the health of the person concerned.

As a result of the Directive Article 7 (4) and 11, the Norwegian authorities have passed a legal provision on expulsion in cases where the Norwegian authorities do not give a voluntary departure date and the departure deadline is not adhered to as the Directive requires.

The wording of the Norwegian expulsion rule section 66 second paragraph:

“Unless it would constitute a disproportionate measure, see section 70, a foreign national without a residence permit shall be expelled

(a) when the foreign national has not complied with the obligation to leave the realm within the time limit given pursuant to section 90, sixth paragraph,

(b) when the foreign national has not been given a time limit for voluntary return

- because there is a risk that the foreign national will evade implementation, see section 90, sixth paragraph (a), and section 106 a,
- because an application has been dismissed as manifestly unfounded or as a result of materially false or manifestly misleading information, see section 90, sixth paragraph (b),

or

- because the foreign national has been found to pose a threat to public order or fundamental national interests, see section 90, sixth paragraph (c).”¹

¹ And in section 90 sixth paragraphs (b), Implementation of administrative decisions:

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

At present there are discussions in the Norwegian Immigration Appeals Board (UNE) on how “manifestly unfounded” shall be interpreted. When implementing the Directive in the Norwegian Immigration Act, our legislator states, inter alia, that the legal exclusion provision was not intended to be applied in most cases, but in cases where the application is presumed to be mainly based on false information. There must be a causal link between the incorrect information and the decision to reject the application for a permit. Illustrative examples: (i) if a foreigner alleged problems related to economic conditions and unemployment as the basis for his application or if (ii) the applicant provides false identity, or (iii) the asylum explanation is fabricated, and / or if (iv) the applicant comes from an EU country or another country which is normally considered safe for return.

2. Questions Asked in the AHQ

In some cases, however, the Norwegian Immigration Appeals Board (UNE) experiences that it is difficult to determine what is a «manifestly unfounded” case. In this context, UNE wanted to clarify how other countries, which have a similar exclusion provision, interpret and apply this term.

1. Is the wording “manifestly unfounded” used in the national legislation in your country?
 - If not, is there a working definition in any practice memos or other written guidelines?
 - If yes, in what specific legal reference does it occur?
 - If yes, is a specific definition for “manifestly unfounded” actually provided in the national legislation of your country?
 - If yes, please provide the wording of the article of your national ruling act and legal history/ preparatory work, if it is possible.
2. Has your national legislation, as a result of the Directive, implemented an expulsion rule which authorizes the expulsion of a person who has filed a “manifestly unfounded” application?
 - If yes, please provide the wording (exact definition) of the article of your national ruling act and legal history/ preparatory work, if it is possible.

“An administrative decision entailing that a foreign national must leave the realm shall be implemented by ordering the foreign national to leave within a set time limit. The time limit shall be set at between seven and thirty days. If deemed necessary, a longer time limit may be set. A time limit for voluntary return of less than seven days may be set, or a time limit may be dispensed with when:

b) an application has been rejected as manifestly unfounded or as a result of materially false or manifestly misleading information.”

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

- In this context we are especially interested in information about what standard of proof the authorities need in order to expel a person? For example, is it possible to expel a person only if they actually give blatantly false information, or could a person be expelled just because he/she has presented information that will not fulfill the requirements to be granted protection?

3. Major Highlights/ Observations relevant to Norway

Definitions:

Certainly a number of MS report that though the concept of “manifestly unfounded” exists and is actively used in a legal context, its actual interpretation in many cases is left to the discretion of the judicial and administrative authorities. The vast majority of MS use this concept solely in reference to decisions on applications for international protection, but there are some exceptions where it applies only in the appeals process and can also apply to other legal issues. In addition to Norway, only Sweden, the UK and SK have a strict practice in terms of expelling anyone based on the grounds of a manifestly unfounded application (the UK does not actually call it expulsion and Sweden calls it refusal of entry). In some cases expulsion only applies when there is a threat to national security.

Analyzing the explanations, definitions, partial definitions, or interpretations the MS have provided for “manifestly unfounded” we find some common threads of thought. Basically there are three lines of logic, the single most common one is that the authorities are in absolutely no doubt that the application, or in some cases, the appeal, will result in a negative decision; another line of logic is that the applicant has not proven the case for well-founded fear of persecution. The third line of logic is that the application is based on outright fraud/fraudulent information and/or clearly is abusing the asylum procedure; false identification and/or implausible explanations fall into this category for some MS. All of these reasons either alone or together are viewed in conclusion as not meeting the criteria for granting international protection.

Italy for example explains that the concept “...refers to something that is more than “unfounded” (being, in fact, manifestly unfounded). It requires the presence of clear elements of untruthfulness of a given matter.” Latvia explains that the concept is considered to mean “clearly unjustified”. “Unjustified” being a degree of “unfoundedness”. Or from The Netherlands, “...if according to objective criteria there can reasonably be no doubt beforehand that the appeals will not lead to another decision (than issued in first instance)...it is manifestly unfounded”. Though Sweden’s legislation does not actually use this term (though preparatory legal works do), they do have cases where it is

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

obvious that there are no grounds for asylum nor for granting a residence permit on any other grounds and that such cases do fall into the scope of their legislation.

The UK definition sums up these intentions: "To be 'clearly unfounded', a caseworker must first be satisfied that the claim cannot, on any legitimate view, succeed." This has been expanded and more closely defined in judgments by the UK Courts (2002). It made the following two points in respect of "manifestly unfounded" claims (this is applied equally to "clearly unfounded" adopted since April 2003):

A "manifestly unfounded" claim is a claim, which is so clearly without substance, that it is bound to fail. In the UK it is possible for a claim to be manifestly unfounded even if it takes more than a cursory look at the evidence to come to a view that there is nothing of substance in it.

Lithuania is at present considering the following definition: "manifestly unfounded application for asylum" is an asylum application in which there is clearly no justification of persecution in the country of origin, or which is based on fraud, or with which it is intended to abuse the asylum procedure, and which due to the mentioned reasons clearly/manifestly does not meet the criteria established in this Law for the granting of asylum.

Hungary stipulates a manifestly unfounded application is one that "a) communicates only irrelevant or poorly relevant information in connection with his/her recognition both as a refugee and beneficiary of subsidiary protection; and b) is not able to verify or substantiate his/her country of origin as a result of his/her conduct in bad faith...."

Finland provided the most extensive, thorough response and has perhaps the most explicit definition:

1) *no grounds as mentioned in "Granting asylum" section 87(1)² or "Subsidiary Protection" section 88(1)³ or other grounds that are related to non-refoulement have been presented, or if the claims presented are clearly implausible;*

² Granting asylum: *Aliens residing in the country are granted asylum if they reside outside their home country or country of permanent residence owing to a well-founded fear of being persecuted for reasons of ethnic origin, religion, nationality, membership in a particular social group or political opinion and if they, because of this fear, are unwilling to avail themselves of the protection of that country. (Aliens Act, section 87, subsection 1)*

³ Subsidiary protection: *An alien residing in Finland is issued with a residence permit on grounds of subsidiary protection if the requirements for granting asylum under section 87 are not met, but substantial grounds have been shown for believing that the person, if returned to his or her country of origin or country of former habitual residence, would face a real risk of being subjected to serious harm, and he or she is unable, or owing to such risk, unwilling to avail him or herself of the protection of that country. Serious harm means:*

1) the death penalty or execution;

2) torture or other inhuman or degrading treatment or punishment;

3) serious and individual threat as a result of indiscriminate violence in situations of international or internal armed conflicts. (Aliens Act, section 88, subsection 1)

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

- 2) *the applicant obviously intends to abuse the asylum procedure: a) by deliberately giving false, misleading or deficient information on matters that are essential to the decision on the application; b) by presenting forged documents without an acceptable reason; c) by impeding the establishment of the grounds for his or her application in another fraudulent manner; or d) by filing an application after a procedure for removing him or her from the country has begun, to prolong his or her unfounded residence in the country; or*
- 3) *the applicant comes from a safe country of asylum or origin where he or she may be returned, and the Finnish Immigration Service has, for weighty reasons, not been able to issue a decision on the application within the time limit laid down in section 104.*

Standard of proof/ Expulsion

The majority of responses did not address the question about standard of proof leading to expulsion, or at least not directly. The majority of those who referred to it, referred back to their definitions of manifestly unfounded. Very few of those who directly addressed this question related it to expulsion (Norway and the UK & SK). The SK reports “In relation to lodging an application for a residence permit, it is possible to expel a person who provided false, incomplete or misleading data or presented falsified or counterfeited documents or a document of another person during the proceedings.” While, if the applicant has used false identity in Sweden, it is generally not sufficient grounds to consider the application as manifestly unfounded. However, if the applicant solely alleges economic problems or unemployment as the basis of their application, the application can be considered as manifestly unfounded. Also, if the applicant comes from any country where it is obvious that there is no persecution or treatment contrary to human rights, the application can be considered as manifestly unfounded. When it comes to dealing with false information, in Sweden, it is required that a person gives blatantly false information on all relevant circumstances to be considered manifestly unfounded. While the UK only uses the term in relation to appeals, a claim is rejected and certified not because blatantly false information is provided, or because it lacks credibility, but because the claim, even if accepted as true and taken at its highest, could not succeed.

Estonia provided a more detailed definition of standard of proof of “manifestly unfounded” applications, but they only use this term in the context of justification of a return decision and in case of refusal to review an application for temporary residence permit.:

- 1) an alien has been refused a residence permit on the basis of the Administrative Procedure Act and has not produced any genuinely new essential evidence during the proceedings regarding the previous application;
- 2) an alien has lodged an application for a temporary residence permit in order to avoid the enforcement of return, expulsion or extradition procedure and it has been possible for him or her to lodge an application for a temporary residence permit earlier;
- 3) an alien has not provided credible evidence regarding the reason for application for a temporary residence permit;

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

- 4) the explanations of an alien or a person obliged to give explanations are inconsistent, conflicting, improbable or lacking in circumstantial or personal details;
- 5) a basis for the refusal to review an application provided for in the Administrative Procedure Act has become evident or;
- 6) an alien is not required to hold a temporary residence permit in Estonia.⁴

Regarding time period/expulsion/detention

Most of the MS who responded to this question referred to the usual requirements for expulsion due to unauthorized stay. For example, Hungary states that upon receipt of a “manifestly unfounded” application filed by an asylum seeker, the general expulsion regime regulating the expulsion of illegally staying third-country nationals apply: i.e. there is no separate legal regime for the expulsion of an illegally staying third country national who has filed a manifestly unfounded application for refugee status.

Belgium stipulates that the possibility of not granting a period for voluntary departure or a period shorter than 7 days has not been used for third-country nationals whose application for legal stay has been dismissed as manifestly unfounded. This possibility has been used if there is a risk of absconding, or if an application for a legal stay has been dismissed as fraudulent, or if the third-country national poses a risk to public policy or national security. While Belgium provides a brief period to effectuate voluntary return, Luxembourg on the other hand, actually expels or detains TCN under certain circumstances. Applicants are obliged to leave the territory without delay when an application for a legal stay or for a residence permit has been rejected as manifestly unfounded. However, article 116.1 foresees that the *expulsion* only applies in case the concerned person poses a risk to public policy, public security or national security. In case the TCN cannot be removed immediately as required by article 111 (3) b), the Minister in charge of immigration can place the TCN in detention according to article 120.

Germany has a similar practice though does not report on detention. In Germany, a shorter time limit may be allowed or the granting of such a period may be waived altogether if, in individual cases, it is mandatory to safeguard overriding public interests, in particular where 1. a well-founded suspicion prevails that the foreigner intends to evade refoulement, or 2. the foreigner poses a serious danger to public safety or law and order. The Slovak Republic stipulates that expulsion can be implemented when an applicant for a residence permit provided false, incomplete or misleading data or presented falsified or counterfeited documents or a document of another person during the proceedings. Sweden operates with “refuse entry” rather than “expulsion”. They explain that refusal of entry with immediate enforcement may be used even though the application has not received a final and non-appealable decision,, as long as it is obvious that there are no grounds for asylum and that a residence permit is not to be granted on any other grounds. “Manifestly unfounded” cases may fall in the scope of this section

⁴ According to Aliens Act § 219

Disclaimer: The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is 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.

b), the Minister in charge of immigration can place the TCN in detention according to article 120.