

EMN FOCUSED STUDY 2012

Establishing Identity for International Protection

Challenges and Practices

Luxembourg

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The European Migration Network, created by Council Decision no. 2008/381/EC of 14 May 2008, has the objective of supplying up-to-date, objective, reliable and comparable information on migration and asylum in the Community institutions, to the authorities and institutions of the Member States and to the general public with a view to support policy- and decision-making with the European Union.



Establishing Identity for International Protection

Challenges and Practices: Luxembourg

The opinions expressed in this report are those of the authors. They do not necessarily reflect the positions of the Luxembourg Ministry of Family and Integration or the Ministry of Foreign Affairs. The present report was elaborated by Anne Koch and Adolfo Sommarribas, staff members of the National Contact Point Luxembourg within the European Migration Network (EMN NCP LU), under the overall responsibility of Ass.- Prof Dr Christel Baltes-Löhr, University of Luxembourg. Continuous support was provided by the members of the national network of the EMN NCP LU: Sylvain Besch, CEFIS-Centre d'Etude et de Formation Interculturelles et Sociales (Centre for intercultural and social study and training); Germaine Thill (STATEC), Sylvie Prommenschenkel, Ministry of Foreign Affairs, and Marc Hayot, Office luxembourgeois de l'accueil et de l'intégration (Luxembourg reception and integration agency), Ministry of Family and Integration.

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Executive Summary

The main objective of the Geneva Convention and Directive 2004/83/CE is to grant asylum and subsidiary protection (international protection) to persons genuinely in need of protection and to set minimum standards on the benefits to be granted to these persons.

In order to decide whether an applicant qualifies for international protection status, national authorities have to examine all the given elements of the filed application. One crucial element of the application is the identity and nationality of the international protection applicant which may support the authorities in assessing the credibility of the applicant's statements on the reasons for seeking international protection application, and thus avoiding the granting of international protection status to persons not qualifying- or abusing the asylum system for non-protection related reasons.

In Luxembourg, the procedure for identity verification/establishment in the context of international protection is separated from the decision-making procedure as such. While the authority for granting international protection status lies with the Ministry of Immigration, the Judicial Police is in charge of identity verification/establishment (Article 8 of Law of 5 May 2006). For this means, the applicant will be interviewed with regard to his/her travel itinerary, including questions on border crossing and used means of transports to arrive in Luxembourg.

During the last few years, the large majority of international protection applications in Luxembourg have come from persons originating from the Balkan countries. Concerning these applicants, most of them (85% to 90%) have presented valid identity documents to the authorities in Luxembourg.

Nevertheless, national authorities have been confronted with lacking identity documents, predominantly observable among applicants from African countries. In some cases, identity documents were intentionally destroyed or withheld from the authorities in order to avoid being identified. If credible identity documents are lacking, the identification procedure can become complicated and resource consuming, and the responsible authorities, especially the Police, have a limited set of methods and means available (provided for in the Asylum law).

Current national legislation (Article 8 of the Asylum law) only foresees taking photographs and fingerprints of the applicants which are then run against EU or regional databases (e.g. EURODAC, VIS, SIS II, CCPD). This allows the Judicial Police to inquire whether the applicant had entered the European Union using a valid passport and a visa, had been subject to a reentry ban and/ or had already applied for international protection in another Member State prior to applying in Luxembourg (in this case the Dublin Convention applies). The Judicial Police uses the information gained from these databases not only to verify the identity of the applicant but also to verify the veracity of his/her statements.

National legislation does not allow the use of more invasive exams, like DNA testing or Iris scans. In cases where the applicant refuses to collaborate with the authorities or had tampered his/her own fingerprints in order to avoid identification, identity verification/establishment becomes difficult. DNA testing can only be ordered by the public prosecutor in the case of a judicial proceeding, i.e. if the applicant is suspected of having committed a felony or a crime (Article 45 (6) of the Criminal Procedure Code).

In some cases, the police manages to identify an applicant at a later stage in the international protection procedure, either because fingerprints are retaken after the initial attempt, or because an applicant who was granted status (or not) might present identity documents to other authorities in a different context (to fulfill administrative requirements e.g. if the applicant wants to get married, the municipality will demand a valid passport).

The other methods foreseen in national legislation for trying to establish the identity of an applicant or rejected applicant are circumstantial. The Directorate of Immigration can order a linguistic test to determine the origin of the applicant, as well as a medical test (X-rays of wrist, collar bone and pelvic) to determine the age of the applicant. However, these types of exams are not conclusive as to the identity of the person.

Decision-making on status granting for a person that cannot be identified can only take place after a careful evaluation of all the elements of the application and be motivated on the credibility of the statements of the applicant.

Based on the Geneva Convention, national authorities can only contact the diplomatic missions of the (presumed) country of origin once international protection has been refused to the applicant and in the context of return, but not while the application is being examined. In the context of return, national authorities are relying on the collaboration of the concerned diplomatic authorities not only to identify the person but also to issue necessary travel documents for the return of the rejected applicant.

It is important to mention that the authorities are also confronted with the above mentioned problems in the case of return of irregular immigrants without valid documents and who may refuse to collaborate knowing that they can only be withhold in the Detention Centre for a maximum period of 6 months (Article 120 of the Law of 29 August 2008).

Introduction: Aims and background of the Study

The EMN Steering Board approved the selection of the topic “Establishing Identity for International Protection: Challenges and Practices” as the second Focussed Study for the EMN Work Programme 2012.

The aim of the study is to provide an overview of important challenges facing national authorities in their efforts to establish, in the absence of credible documentation, the **identity of applicants for international protection** (i.e. asylum and subsidiary protection) and for the **return of failed applicants**. It also aims to draw together an overview of national practices in handling these challenges. This Study will hence inform the EU Member States, Norway and the Commission about the nature of these challenges and about the extent to which, and how, Member States respond to them, while allowing for the identification of possible steps towards further (joint) actions to improve this work.

The experience in many Member States is that only a small minority of third-country nationals provide documents substantiating their identity when they apply for international protection. Those who flee persecution often do not have the possibility to take their identity documents with them when leaving their country of origin. It also appears that in some cases migrants are advised to destroy their identification documents upon arriving in the EU. Moreover, when third-country nationals do provide identity documents as part of their application for international protection, these documents are sometimes considered false or otherwise invalid by the responsible authorities in the Member States. These issues evidently limit the authorities’ ability to assess the validity of the applicant’s claims and to make decisions in these cases. Indeed, a challenge for progress and sustainability of a future Common European Asylum System (CEAS) is: *“to verify the identity of the applicant in order to produce a legally correct decision based on the facts and circumstances in the individual case.”* This in turn affects one of the CEAS’ primary objectives, i.e. to treat all asylum applicants equally, independently of where in the European Union they (first) lodged their application.

The newly introduced provisions on identity under the second generation¹ asylum legislative instruments reflect increasing recognition of the crucial importance of identity in both asylum decision-making, as well as return decisions. For example, Article 4 paragraph

¹ EU asylum rules are often distinguished between “first generation” legislative instruments, adopted between 1999 and 2005, and “second generation” legislative instruments, which refer to the modifications to the existing *acquis* adopted (or proposed) more recently. The “second generation” instruments aim to resolve the continuing discrepancies among Member States in the treatment of asylum seekers and their applications for international protection. They were agreed by the European Council in the context of the 2009 Stockholm Programme and are currently the subject of a number of legislative proposals.

2 (b) of the *Commission's Proposal for a recast of the Qualification Directive*² introduces a duty for Member States to assess the identity of asylum applicants. In a similar vein, Article 13 of the *Commission's Proposal for a recast of the Asylum Procedures Directive*³ imposes an obligation upon applicants to cooperate with the competent authorities with a view to establishing their identity.

Crucially, however, prior to the recast Qualification Directive, none of the first generation asylum legislative instruments stipulated any obligation on applicants or duty for Member States to establish the identity of an asylum applicant. As a result, Member States may differ significantly in how they deal with asylum applicants whose statements regarding their identity are not supported by valid documentary evidence. Firstly, differences may exist regarding the methods (e.g. biometric analysis) that the responsible authorities can (or have to) use to obtain other evidence to support (some of) these applicant's statements and, ultimately, their capacity to draw a conclusion on the degree of identity determination. Secondly, differences across the (Member) States may also exist in decisions that the responsible national authorities take regarding applicants for international protection whose identity is determined to a certain degree, and the basis for those decisions.

The study also addresses the challenges associated with **identity determination in the context of the return of failed applicants for international protection**, i.e. those who receive a negative decision, or who have exhausted or abandoned the procedure for international protection. It is widely recognised that an efficient return policy for persons, whose applications for international protection are rejected, is needed in order to safeguard the integrity of the common asylum procedure. However, these returns are often complicated by the fact that only a small minority of applicants for international protection hold (valid) identity documents. In the absence of valid proof of identity, it is not possible to return failed applicants to their country of origin since, for example, the country of origin may not then accept such a person.

With regard to the establishment of identity, national authorities also face challenges in other migration processes, such as applications for family establishment and reunification, for citizenship, for Schengen or national visas, for study or work permits, etc. However, due to the focussed nature of this Study and the limited timescale in which the EMN NCPs have to produce their national contributions, these issues are beyond the scope of the Study. A preference has been made to limit the Study to establishing the identity of third-country nationals when they apply for international protection or have received a negative decision on their application, having exhausted or abandoned the procedure and authorities have to

² SEC (2009) 1374, http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2009/sec_2009_1374_en.pdf

³ SEC (2009) 1376, http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2009/1376/COM_SE C%282009%291376_EN.pdf

execute their return. The latter group will also be referred to in short as “rejected applicants” for international protection. It has to be noted that when referring to international protection, the Study will only consider EU harmonised forms of protection, i.e. asylum and subsidiary protection.

Two other areas will also not be covered in order to limit the scope of this focussed study. The first is the technical aspects of checking the validity of identity documents (e.g. to detect forgery). Since the aim of the study is to compare the practices of Member States when confronted with applicants for international protection who have invalid (or who lack) identity documents; it does not look into the techniques used to establish that the documents are invalid in the first place. The second area that falls outside the scope of the study is the consequences of having difficulties to establish an applicant’s identity for other aspects of the third-country national’s experience in the Member States (e.g. regarding subsequent applications for citizenship, inheritance of doubt by children of the applicant, etc.). Both of these areas have been excluded because the issues they encompass are wide-ranging and would require a separate study to do them justice.

The present study will focus on the Luxembourgish context.

Primary questions to be addressed

- What are the main challenges, scale and scope of the issue in Luxembourg?
- What is the national framework for establishing the identity of applicants for international protection, including legislative framework, organisational structure, methods and processes applied?
- How are decisions made with regard to cases of international protection where identity can at best be only partially determined?
- How do national authorities proceed regarding rejected applicants for international protection with an obligation to return where evidence regarding identity is missing or scarce?

Definitions

EU *acquis* does not give a definition of “*identity*” Whilst, for the purposes of this study, identity is also understood to include a person's nationality, more specific criteria used by the (Member) States are requested in Section 2.1.

In accordance with the EMN Glossary, an “*application for international protection*” is “In the EU context, a request made by a [third-country national](#) or a [stateless person](#) for [protection](#) from a Member State, who can be understood to seek [refugee status](#) or [subsidiary protection status](#), and who does not explicitly request another kind of protection,

outside the scope of Directive 2004/83/EC (Qualification Directive), that can be applied for separately.”

Article 2 (e) of the recast Qualification Directive states that “**refugee status**” means “*the recognition by a Member State of a third-country national or a stateless person as a refugee*”. A “*refugee*” is understood to be “*a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply*”.

Article 2 (g) of the recast Qualification Directive stipulates that “**subsidiary protection status**” means “*the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection*”. Article 2 (f) includes the definition of a “**person eligible for subsidiary protection**”: “*a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of his or her former habitual residence, would face a real risk of suffering serious harm, as defined in Article 15 and to whom Article 17 (1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to unveil himself or herself of the protection of that country*”.

Source: [Article 2 Recast Qualification Directive 2011/95/EU](#)

Furthermore, a “**third-country national**” is “*Any person who is not a citizen of the European Union within the meaning of Article 20(1) of the Treaty on the Functioning of the European Union and who is not a person enjoying the Union right to freedom of movement, as defined in Article 2(5) of the Schengen Borders Code.*” This definition means that nationals of Norway, Iceland, Liechtenstein and Switzerland are **not** considered to be third-country nationals. Source: [EMN Glossary](#)

1. Scale and scope of the issue

There are no statistics allowing clear conclusions on the extent of the issue with regard to procedures of international protection or the forced return of rejected applicants to their (presumed) country of origin.

1.1. Establishing identity in the absence of credible documentation within the framework of applications of international protection

National authorities have been confronted with individual cases where credible documentation was lacking and the identity of the applicant for international protection or forced return had to be established. An overview of relevant case law confirms this.⁴

Lacking identity documentation can pose a problem in the processing of international protection applications, as the identity of the applicant is considered an essential (although not indispensable)⁵ element for the assessment of the international protection claim. The lack of identity documents or the use of false documents make it very difficult to assess the credibility of the applicants' account and can consequently extend the instruction procedure by the Directorate of Immigration.⁶

In cases where the applicant refuses to cooperate with the authorities with respect to establishing his/her identity and/or nationality or, with fraudulent intent⁷, has misled the

⁴ All the case law that is mentioned throughout this study, www.emn.lu

⁵ Not proving or disclaiming one's identity is not a sufficient ground for refusing the status of international protection. Decisions on international protection always need to be based on an analysis of the whole procedure and need to be reasoned (Articles 19(1) and 26(3) of the Law of 5 May 2006), <http://www.legilux.public.lu/leg/a/archives/2006/0078/2006A1402A.html>

⁶ See First instance Administrative Court, 2nd Chamber, n° 27289 of 16 May 2011 The court said: «S'y ajoute que le certificat de naissance versé par le demandeur a été établi le... qui était un dimanche. Malgré les tentatives d'explications confuses du demandeur selon lesquelles il ne serait pas exclu que le calendrier musulman en vigueur en Gambie ne coïncide pas avec le calendrier grégorien ou que ledit certificat aurait pu être émis un dimanche «à titre de faveur par exemple (sic), ou à tout autre titre comme par exemple la connaissance personnelle d'un membre de l'administration (sic)», le tribunal se rallie à l'opinion du ministre qui avait émis de sérieux doutes quant à l'authenticité de ce document en ce que le demandeur n'apporte aucune explication plausible démontrant qu'un tel acte ait pu être établi un dimanche.

Des éléments qui précèdent, il se dégage que le récit incohérent et peu crédible du demandeur n'est pas de nature à établir l'existence d'une persécution ou d'une crainte de persécution susceptible de justifier la reconnaissance du statut de réfugié...»

⁷ This is an evaluation made by the Judicial Police or the public servants that is based on the statements made by the applicant and the provided documents. E.g. the Judicial Police will run the fingerprints and the photographs of the applicant against the EURODAC database and other databases. Once having the results, the applicant will be interviewed on his/her itinerary and identity. If the applicant had already applied for international protection in another Member State and he/she hides this fact or lies about it, the fraudulent intent is proven. Interview with the Judicial Police, 22 August 2012.

authorities by presenting false documents or information, the Minister may decide to rule on the merits of the application for international protection under the accelerated procedure.⁸

National authorities have mainly been confronted with lacking identity documentation. False documents with regard to international protection applications are to be considered exceptional in Luxembourg.⁹ Normally these situations occur when persons are travelling to other Member States with falsified documents and they are controlled by the police. Later then they file an application for international protection.

With regard to identity documentation, tendencies can be observed depending on the (presumed) countries of origin of the applicants, i.e. lacking identity documents are most commonly observed among applicants from African countries¹⁰ i.e. Gambia, Nigeria, Sierra Leone, Somalia, while applicants from the Balkan countries (biggest proportion of applicants in Luxembourg) generally present documents and valid passports.¹¹

However, in the cases where the applicants does not provide any credible documentation, the procedure of identity verification of the applicant must begin with the fingerprints and photographs, followed by an interview on the travel itinerary of the applicant in order to find any elements that will allow determining if another Member State is competent to examine the application. Additionally, the EURODAC database is consulted to verify if the same person had already submitted an application for international protection in another Member State. If these measures do not yield a result, the Ministry can order a linguistic test. Given the small size of Luxembourg and the limitation in specialized people to

⁸ Article 20(1) d, f of the law of 5 May 2006. As also mention the Minister can decide to place the applicant in a closed detention centre for a maximum period of three months according to Article 10 (1) c of the Law of 5 May 2006. However, in the case of 20 (1) f): the maximum detention period can go up to 12 months.

⁹ Normally these situations occur when persons are travelling to other Member States with falsified documents and they are controlled by the police and later they file an application for international protection. See Judgment n°30008 of 23 March 2012. First instance Administrative Court, 3rd Chamber and n° 28620C of 24 May 2011 of the Administrative Court.

¹⁰ See judgments n°28621 of 26 May 2011, First instance Administrative Court, 2nd Chamber (Nigerian national); n°28671 of 6 June 2011, First instance Administrative Court, 2nd Chamber (Algerian national); n°28767 of 30 June 2011, First instance Administrative Court, 2nd Chamber (Nigerian national), n°28769C of 30 June 2011, Administrative Court (Somalia national)

¹¹ See judgments n°30447 of 13 June 2012, First instance Administrative Court, 3rd Chamber (Serbian national in possession of a Serbian passport issued on 9 March 2010), n°30358 of 7 June 2012, First instance Administrative Court, 2nd chamber (Serbian national in possession of a Serbian passport issued on 13 November 2008), n°30335, First instance Administrative Court, 2nd Chamber (Serbian nationals in possession of a Serbian passport issued on 17 December 2011), n°30381 of 27 June 2012, First instance Administrative Court, 3rd Chamber (Montenegrin national in possession of a valid passport issued on 25 June 2008), n°30168 of 26 June 2012, First instance Administrative Court, 3rd Chamber (Montenegrin national with valid passport); n°29801 of 30 March 2012, First instance Administrative Court, 3rd Chamber (Albanian national with valid passport), n° 30557 of 9 July 2012, First instance Administrative Court (Macedonian national with a valid passport issued on 30 August 2010)

conduct these linguistic tests, the Directorate of Immigration must second external from other Member States (especially from Germany and France¹²) to do these tests.

1.2. Establishing identity in the absence of credible documentation within the framework of the procedure for the forced return of a rejected applicant to the (presumed) country of origin

For rejected applicants and their subsequent return to the (presumed) country of origin, the lack of identity documents certainly complicates the return procedure, especially given that rejected applicants generally do not cooperate with the authorities with regard to identity establishment.¹³ In these cases, Article 120 of the Law of 29 August 2008 on the free movement of persons and immigration establishes that an undocumented person can be held in a detention facility for one month, while the return is being prepared.¹⁴ In the case of lacking documents¹⁵ and refusal of cooperation from the person¹⁶ or because of delays that resulted from obtaining the needed documentation from third countries¹⁷, this detention period can be extended up to six months.¹⁸

¹² Interview with the Directorate of Immigration, 20 June 2012

¹³ Ministry of Foreign Affairs, Directorate of Immigration, European Return Fund, Pluriannual programme 2008-2013, p 18, <http://www.mae.lu/en/content/view/full/25548>

¹⁴ Article 120 of the Law of 29 August 2008 Mémorial A n°151 of 25 June 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

¹⁵ See First instance Administrative Court, 3rd Chamber, n° 30713 of 29 June 2012

¹⁶ See Administrative Court, n°28769C of 30 June 2011 that said : «En outre, la Cour partage entièrement la conclusion retenue par le tribunal, au vu des éléments du dossier retenus ci-avant, qu'en manipulant les pointes de ses doigts en rendant volontairement impossible l'identification utile de celles-ci en vue d'une recherche dans le système EURODAC, l'appelant doit être considéré comme n'ayant pas produit les informations nécessaires pour permettre, avec une certitude suffisante, d'établir son identité et qu'il rentre ainsi dans le cas visé à l'article 20(1)f) de la loi du 5 mai 2006, de manière que le ministre pouvait valablement reconduire la mesure de placement»

¹⁷ See First instance Administrative Court, 2nd Chamber, n°30636, of 7 June 2012. The court said: «En ce qui concerne les démarches concrètement entreprises en l'espèce par le ministre pour organiser l'éloignement du demandeur, il se dégage des éléments du dossier et des explications fournies par la partie étatique que si l'autorité ministérielle a dès le 2 mai 2012 tenté d'organiser un test linguistique en vue de déterminer l'origine du demandeur au vu de ses différents alias et de son absence totale de coopération, lequel test n'ayant par ailleurs pas pu avoir lieu suite au refus du demandeur de s'y livrer, il n'en reste pas moins que la seule autre démarche entreprise par l'autorité ministérielle est l'envoi du dossier du demandeur en date du 15 mai 2012 aux autorités consulaires gambiennes en vue de son identification pour permettre l'émission de documents de voyage»

¹⁸ See First instance Administrative Court, 3rd Chamber, n°30713 of 29 June 2012. The court said: «Il convient encore d'ajouter qu'il se dégage des explications fournies par le délégué du gouvernement à l'audience des plaidoiries qu'une relance avait été adressée le jour même aux autorités irakiennes, de sorte que le tribunal est amené à conclure que toutes les démarches sus décrites sont à considérer comme suffisantes, de manière que l'organisation de l'éloignement est exécutée en l'espèce avec toute la diligence requise au regard des exigences de l'article 120, paragraphe (3), de la loi du 29 août 2008»

1.3. National case law on the identification of third country nationals in international protection and expulsion procedures

Although there are no statistics allowing to conclude on the extent of lacking identity documentation in the context of international protection applications, or forced return, a case law analysis relating to the identification of international protection applicants and rejected applicants can shed light on the extent of the issue and can serve to illustrate some of the difficulties involved.

National jurisprudence on the identification of third country nationals in international protection and expulsion procedures is abundant. Over 200 judgments (of approximately 3100 decisions) from the EMN jurisprudence database on immigration and international protection for the period May 2006-July 2012 relate to identification questions.¹⁹

The main source of relevant jurisprudence comes from judgments in return procedure cases, during which rejected international protection applicants or irregular migrants are held in the Detention Centre. Given that the identification process can take several months, rejected applicants try to be liberated based on the ground that detention seems arbitrary²⁰, especially in cases where the Ministry of Immigration decides to extend the detention period and arguing that the Luxemburgish authorities do not try treat the return procedure with due diligence.²¹ However, other judgments on determining the identity are found on international protection cases.²²

1.3.1. Problems with the identification of a person who has made use of several identities

There are cases where a person first states being national of a certain third country, then declares another country as his/her country of origin.²³

¹⁹ Jurisprudence administrative du Grand-Duché de Luxembourg en matière d'immigration et de protection internationale, <http://www.emn.lu>

These judgements include both decisions on rejected international protection seekers and irregularly staying persons.

²⁰ See First instance Administrative Court, 3rd chamber, n°30009 of 14 March 2012

²¹ See First instance Administrative Court, 3rd Chamber, n°30713 of 29 June 2012

²² In example, See First instance Administrative Court, 2nd Chamber, n°28677 of 6 June 2011

²³ A third country national came to Luxembourg and applied for international protection claiming to be an Iraqi national. After being rejected he went to the UK where he applied for international protection claiming to be an Iranian national. Falling under the Dublin regulation, he is returned to Luxembourg. In this case the Ministry did not try any diligence with the Iranian or Iraqi Embassies. In the end, the court ordered the release of the person from the detention centre. See First instance Administrative Court, 2nd Chamber, n°28677 of 6 June 2011.

1.3.2. Problems with the identification of a person due to use of false documents

The administrative courts have been confronted with situations in which third country nationals were arrested using false documents.

For example, in the case n° 30008 of 23 March 2012, the First instance administrative court was confronted with a Somalia national who was arrested during a transit stop at the International Airport of Luxembourg with a false British passport. When questioned by the police, he recognized being a Somalia national. He was placed into the Detention Centre awaiting expulsion. However, the person then applied for international protection to avoid the expulsion, arguing to be a minor. The report of the radiology service of the hospital (wrist, pelvic and collar bones) concluded the person to be 19 years old. The court considered that the lies advanced by the person at the moment of his arrest together with the result from the radiological test would be sufficient to doubt the credibility of the story and good faith and thus refused to liberate him.

1.3.3. Problems with the identification of a person without proof of identity or nationality and without cooperation with the authorities

Cases where persons are going to be returned and do not cooperate with the authorities with regard to identification are common. As mentioned, the period of detention in the Detention Centre cannot exceed 6 months (awaiting forced return) in accordance with Article 120 of the Law of 29 August 2008 and cannot exceed of 12 months under the disposition of Article 10 of the Law of 5 May 2006 in the case of the instruction of the international protection application as we mentioned above. There are cases in which the authorities arranged meetings with the diplomatic missions to identify the person and the person refused to assist.²⁴ It is important to mention that this procedure had been questioned by the «Collectif Réfugiés Luxembourg»²⁵ especially when the person that they are trying to expel is a rejected international protection applicant. The main concern is the eventual sanctions that the third country national can be subjected in his/her country of origin.²⁶

²⁴ See First instance Administrative Court, 2nd chamber, n°29933 of 5 March 2012. In this case an Ivory Coast national refused to meet with the diplomatic officials from his country of origin on several occasions. It is important to mention that in this case the person had already escaped to Denmark before in order to avoid the expulsion by the Luxemburgish authorities.

²⁵ Letzebuenger Flüchtlingsrot (LFR)

²⁶ « Le LFR rappelle que la confidentialité doit être une règle absolue pour les autorités lors de l'examen d'une demande de protection internationale et pendant les démarches en vue de l'éloignement du demandeur débouté vers son pays d'origine. Le LFR a eu connaissance des cas de divulgation d'information par les fonctionnaires des services compétents aux ambassades concernant une demande de protection internationale déposée par l'un de leurs ressortissants, aux fins d'obtenir son expulsion et est extrêmement préoccupé de ces pratiques. » See,

The courts furthermore have been confronted with cases where the diplomatic officials are willing to cooperate with Luxembourgish authorities but the person then refuses to recognize his/her nationality.²⁷

The courts recognized the utility of using EURODAC and CCPD systems²⁸ for identification purposes. It is important to mention that there are cases which deal with persons who tampered their fingerprints to avoid being recognized through EURODAC files.²⁹

1.3.4. Difficult cooperation with diplomatic authorities of third countries in order to identify a person and obtain identity- or travel documents

When trying to return a third country national who could not be identified, the Directorate of Immigration tries to cooperate with the diplomatic authorities of the presumed country of origin. This cooperation is needed not only for the identification process but also for obtaining the necessary travel documents, i.e. a “laissez-passer”.³⁰

LFR, Déclaration politique du Collectif Réfugiés Luxembourg à l’occasion de la journée mondiale du réfugié, 20 June 2011, http://www.clae.lu/pdf/migrations/asile/lfr/declaration_politique_LFR_2011.pdf

Nonetheless, the courts have ruled otherwise, saying : «Par ailleurs, il ressort des pièces versées en cause, et notamment d’un courrier du 5 août 2010 du ministre aux autorités de l’ambassade de la République de Gambie, que le ministre a révélé auxdites autorités, que les personnes que le Luxembourg entendait rapatrier en Gambie et dont faisait partie le demandeur, étaient des demandeurs d’asile déboutés, sans préciser davantage les motifs à la base des demandes de protection internationale. Dès lors, c’est à juste titre que le demandeur affirme que les autorités gambiennes sont libres de s’imaginer toutes sortes de raisons, telles que des raisons politiques, pour lesquelles le demandeur a sollicité une protection internationale à l’étranger.» See First instance Administrative Court, 2nd Chamber, n° 27484 of 14 December 2010.

²⁷ See First instance Administrative Court, 2nd chamber n° 29068 of 16 September 2011. In this case, the person rejected his/her Sierra Leonean origins but recognised being “African” without indicating the nationality.

²⁸ See Administrative Court, n°28620C of 24 May 2011.

²⁹ See Administrative Court n°28769C of 20 June 2011. The court stated : «Relativement au reproche au fond fait à l’appelant d’avoir constamment manipulé ses doigts afin d’empêcher une prise d’empreintes digitales utilisables pour une vérification dans le système EURODAC, le tribunal a justement relevé qu’il ressort des pièces du dossier qu’avant la prise de la décision déférée, il a été procédé à dix relevés d’empreintes en dates des 22 février, 11 mai, 24 août, 25 novembre et 21 décembre 2010 ainsi qu’en dates des 10 janvier, 16 février, 10 mars, 29 avril et 13 mai 2011, qui se sont tous révélés inexploitable par le système EURODAC en raison du mauvais état de l’épiderme des doigts de l’appelant. Depuis la prise de la décision litigieuse, il a encore été procédé à une prise des empreintes digitales en date du 27 mai 2011, également sans succès... Il se dégage par ailleurs des rapports de la police judiciaire des 7 mars 2011 et 13 mai 2011 que l’état des extrémités des doigts de l’appelant varie d’un relevé à l’autre, les lignes papillaires étant des fois plus illisibles que d’autres, tandis que les paumes des mains ne sont pas manipulées.» It is important to mention that in this case the court decided that the detainee’s to submit himself to a DNA test was not relevant because for EURODAC file identification only fingerprints are valid information.

³⁰ See First instance Administrative Court n°29868 of 15 February 2012. In this case the Angolan diplomatic agents met with the person but one and a half month had not sent the report to the Angola ambassador for issuing the passport.

However, this process can be long and tedious for the authorities given that most of the diplomatic missions are located in Brussels and thus the diplomatic officials have to travel to Luxembourg for identification related purposes. In many cases, the necessary arrangements cannot be made³¹ or the diplomatic authorities do not cooperate with the Luxembourgish authorities³². Another possible issue to mention is the case of third country national minors, born in Luxembourg to irregularly staying persons. Several problems arise: 1) the child does not have a passport; 2) the parents have to obtain a “laissez-passer” to go to the diplomatic mission of their country of origin to declare the child and to obtain a passport for the child who has to be physically present at the diplomatic mission.³³

As a result of delays, the Ministry has to extend the administrative detention³⁴ every month up to a maximum of six months³⁵, based on the fact that the person held at the Centre does not have any documents and flight risk prevails.³⁶ At the end of the six months the Ministry will have to free the person.

In some cases the diplomatic missions ask for more information on the person³⁷, ask an identity document for issuing a “laissez-passer”³⁸ or require the physical presence of the person at the embassy.

Some diplomatic missions (like the Embassy of Algeria in Brussels³⁹ or the Embassy of the Federal Republic of Nigeria⁴⁰) tend to take a lot of time to respond to Luxembourgish

³¹ For example, in judgment n°30009 the First instance Administrative Court recognized that even though the officials of the Directorate of Immigration had been in close contact with the Embassy of Mali, the foreseen interview to identify the person had not been possible (after almost five months) because of the impairment of the diplomatic officials to do so.

³² The diplomatic mission of Algeria in Brussels is the best example. See Administrative Court n° 28790C of 24 June 2011. The court stated: «Or, l'ensemble de ces démarches entreprises par les autorités luxembourgeoises ne permet pas de suivre les reproches de l'intimé en rapport avec un défaut de diligences de leur part, étant insisté sur ce qu'il ne saurait leur être reproché d'avoir attendu dans une première phase 20 jours avant de relancer téléphoniquement le consulat algérien et ensuite 16 jours pour adresser une lettre de rappel aux autorités algériennes afin d'obtenir la confirmation de l'identité de l'appelant et par la suite l'émission d'un laissez-passer, étant donné dans ce contexte que les autorités luxembourgeoises sont essentiellement tributaires de la collaboration et de l'efficacité des autorités étrangères.»

³³ This issue will not be analysed in this paper because it is out of the scope.

³⁴ The administrative detention is foreseen by Article 120 (1) of the Law of 29 August 2008 on the free movement of persons and immigration to prepare and execute the expulsion.

³⁵ Article 120 (3) of the Law of 29 August 2008, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

³⁶ It is important to mention that Article 125 (1) of the Law of 29 August 2008 foresees the possibility of house arrest but the Administrative Court had ruled that in order to apply for this option, the person must fulfill the two conditions imposed by Article 125 and that detention does not fulfill the requirement of proportionality and subsidiarity. See judgment n°29628C of 23 December 2011. The courts have considered that the fact that the person does not have any travel documents and that the person is an irregular migrant is sufficient to presume the existing flight risk. See First instance Administrative Court, 2nd Chamber, n° 29677 of 3 January 2012.

³⁷ The Indian Embassy had required the person to fill in a specific form (National Verification Form). See First instance Administrative Court, 1st Chamber, n°29534 of 5 December 2011

³⁸ See First instance Administrative Court, 1st Chamber n°29411 of 27 October 2011.

³⁹ See Administrative Court n°28790C of 24 June 2011. See also First instance Administrative Court, 2nd Chamber, n°28671 of 6 June 2011.

authorities. In consequence, the courts considered that the extended delays are reasonable in relation with the time the person stays in detention.

In this last case the requirement is hard to fulfill because it is impossible to transfer a detained person to Brussels.⁴¹

Also there have been cases where the diplomatic authorities came to Luxembourg and recognized the person as a national of their country but later refused or delayed the issuance of a “laissez-passer”.⁴²

1.3.5. Problems with identifying a person when the authorities have doubts on the real identity

In certain cases the courts have recognized the usefulness of taking photographs and fingerprints in order to verify the identity of the person to be returned.⁴³ Also the use of a linguistic test⁴⁴ is considered as an important instrument in that regard.

The Administrative court found that the linguistic test was important to corroborate the reaction of the Belarus embassy in Brussels to refuse to issue a travel document to a woman who pretended to be a Belarus national.⁴⁵

⁴⁰ See First instance Administrative Court, 2nd Chamber, n°28767 of 30 June 2011. The court said: «Au vu des diligences ainsi déployées par l'autorité ministérielle, le tribunal est amené à constater qu'au moment où il statue, des démarches suffisantes ont été entreprises afin d'organiser l'éloignement du demandeur du territoire et que confrontées aux hésitations des autorités nigérianes à délivrer des documents de voyage au demandeur, les autorités»

⁴¹ See First instance Administrative Court, Vacation Chamber, n° 28987 of 30 August 2011. « Par ailleurs, une anticipation des démarches n'aurait pas été possible, puisque l'ambassade de Sierra Leone à Bruxelles exigerait toujours une présentation physique des personnes pour lesquelles un laissez-passer est sollicité, dans les locaux de l'ambassade. Or, le transport d'un détenu à Bruxelles serait impossible. Par ailleurs, au vu des diligences détaillées ci-avant, il convient de constater qu'au moment où le tribunal statue, des démarches suffisantes ont été entreprises afin de pouvoir procéder à l'éloignement du demandeur du territoire, de sorte que le moyen fondé sur une absence de diligences suffisantes, voire de l'inertie des autorités laisse d'être fondé. »

⁴² See First instance Administrative Court, 2nd Chamber, n°28621 of 16 May 2011.

⁴³ See First instance Administrative Court, 2nd Chamber, n°29677 of 3 January 2012. Also First instance Administrative Court, 1st Chamber, n° 29534 of 5 December 2011. The consultation of the EURODAC files is also considered to be very important.

⁴⁴ See Administrative Court n°29659C of 14 February 2012.

⁴⁵ See Administrative Court n°29659C. The court said: « En effet, il ressort du rapport d'expertise du 12 décembre 2010, rédigé à la suite du test linguistique auquel Madame... s'était soumise, que: “Die Probandin wurde mit Sicherheit in rein-russisch-slawischem Sprachraum geformt, mit hoher Wahrscheinlichkeit ist sie eine Städterin Zentralrusslands”. Il s'agit d'un indice très fort que l'origine - simplement affirmée et non autrement documentée - de l'intéressée ne correspond pas à la réalité des choses. Il convient d'ajouter que les premiers juges ont à bon escient insisté sur ce que le résultat du test linguistique est non équivoque dans sa conclusion que l'intéressée est originaire avec certitude (« mit Sicherheit ») d'une région linguistique slave de l'Est (“ostslawisches Sprachgebiet”), ce qui exclut la Biélorussie ».

2. Legal and institutional framework in Luxembourg

2.1. Legal framework for identity establishment

Luxembourg law provides a mechanism for identity verification/establishment through a) Article 45 of the Code of Criminal Procedure⁴⁶ (Code d'instruction criminelle modifié par la loi du 16 juin 1989) and b) Articles 133, 135 and 136 of the Law of 29 August 2008 on the free movement of persons and immigration.⁴⁷ However, the dispositions for identity establishment vary according to the procedure involved, differentiating between **1. judicial proceedings** (Code of Criminal Procedure) and **2. administrative procedures** (Law of 29 August 2008 and Law of 5 May 2006⁴⁸).

1. The police can apply the dispositions in the CIC concerning people for which there is evidence:

- *that they have committed or attempt to commit an infraction;*
- *that they are preparing to commit a crime;*
- *that they can offer further useful information to the investigation in case of a crime*
- *that they are subject to an arrest warrant by a judicial or administrative authority*

The police can apply these dispositions when the controlled person refuses to disclose or is unable to prove his/her identity⁴⁹ and the police can demand a foreigner to identify himself/herself at any time.⁵⁰ If necessary, the person can then be detained on site and transferred to a detention facility.⁵¹ In all cases, the person is immediately presented to a Judicial Police officer who will conduct the identity verification.⁵² The person can only be detained while his/her identity is being established (verification through fingerprinting and photographs). The detention is, in any event, limited to a maximum

⁴⁶ Code of Criminal Procedure (CIC) modified by the Law of 16 June 1989, Mémorial A n° 41 of 26 June 1986, <http://www.legilux.public.lu/leg/a/archives/1989/0041/1989A07741.html>

⁴⁷ Mémorial A n° 151 of 25 July 2011, www.legilux.public.lu

⁴⁸ Mémorial A n° 151 of 25 July 2011, www.legilux.public.lu

⁴⁹ Article 45 (1) du CIC

⁵⁰ Article 135 of the Law of 29 August 2008, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

⁵¹ Article 45 (2) of the CIC and 104 in relation with Article 119 of the Law of 29 August 2008 when the detainee cannot be expelled within the following 48 hours, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/2011A2180A.html>

⁵² Article 45 (3) CIC

of four hours from the initial identity check. The detainee has rights (to notify the public prosecutor, the family, etc. For this purpose a telephone has to be put at his/her disposal) and the entire procedure has to be recorded (a minute has to be drawn up). It is important to mention that according to Article 7(1) of the Law of 5 May 2006, the applicant has the right to be assisted by a translator of a language that he/she understands. The minutes have to be presented to the detained person for signature (in cases where the applicant does not know how to read, the translator will read out the documents to him/her). In case of refusal to sign, the circumstances have to figure within the minutes.⁵³ The public prosecutor can end the detention at any time⁵⁴ if he/she considers that there is not enough evidence to keep the person in detention. It is also important to mention that Article 133 of the Law of 29 August 2008 establishes the possibility for the Grand-Ducal police to control any foreigner on Luxembourgish territory.

The verification procedure through fingerprinting and taking photographs outlined above is only applicable in a judicial procedure and it has to be ordered or authorized by the public prosecutor or an instruction judge.⁵⁵ The public prosecutor can order the collection of human cells to be submitted to DNA testing for the purpose of identifying the person.⁵⁶ The person who was subject to this procedure can seize the judicial judge who will establish the nullity of the procedure if it appears that the rules imposed by the Code of Criminal Procedure were not followed. It is important to mention that the fingerprints and photographs taken can be used for the prevention, research and verification of a criminal action. However, if the person controlled is not subject to a criminal investigation or execution measure, the fingerprints and photographs must be destroyed within the six months following the drawn up of the minutes.⁵⁷ All this applies to a judicial investigation and it is regulated by article 45 of the CIC.

2. Different from the above mentioned procedure is the identification provisions foreseen in the Law of 29 August 2008 on the free movement of persons and immigration and the Law of 5 May 2006 (Asylum Law). These are administrative procedures that allow the Judicial Police to take photographs and fingerprints without the need of authorisation of the instruction judge or the public prosecutor.⁵⁸

⁵³ Article 45 (7) CIC

⁵⁴ Articles 45 (4) and (5) CIC

⁵⁵ Article 45 (6) § 1 and 2 CIC

⁵⁶ Article 45 (6) § 3 CIC

⁵⁷ Article 45 (8) CIC

⁵⁸ Article 8 of the Law of 5 May 2006

According to Article 120 (4) of the Law of 29 August 2008, the authorities may take photographs (pictures) of a person who is brought to the detention facility, because he/she is an irregular migrant or rejected international protection applicant who is to be returned. The collection of fingerprints is allowed only if it is strictly necessary to establish the identity of the detained foreigner or for the issuance of the travel document. However, this is declared as an administrative procedure and a judicial authorization is not required (Articles 135 and 136 of the Law of 29 August 2008).

In the case of international protection applications it is important to note that the Law of 5 May 2006 (Asylum Law) establishes that the applicant must submit his/her identification documents when he/she submits the application⁵⁹ as well as any other proof useful for the examination of the application. These documents will be preserved at the Directorate of Immigration of the Ministry of Foreign Affairs and they will be returned the moment the international protection status is granted, or in case of refusal, at the moment the person will be returned.

The Directorate of Immigration will open a file for any international protection application. All the relevant information, including obtained identification documents will directly be transferred to the Judicial Police (Foreigners Service)⁶⁰ in order for them to proceed to all necessary measures needed for the establishment of the identity or verification of the documents.⁶¹ The Judicial Police proceeds to a hearing/interview with the person in order to verify the identity and the itinerary of his/her journey. The police can make a bodily search of the person in the respect of human dignity. Also, in this case, the Judicial Police will proceed to the fingerprinting of the applicant as well as take his/her photographs (all this in the context of EURODAC⁶²). Once everything is finalized, the Judicial Police will draw up its report and send it to the Directorate of Immigration.

For identification purposes, the Minister of Immigration, through the Directorate of Immigration, can conduct linguistic tests in order to determine the origin of the applicant⁶³ and medical tests in order to determine the age of the applicant, especially

⁵⁹ Article 6 (4) of the Law of 5 May 2006, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

⁶⁰ Judicial Police, Foreigner's Service

⁶¹ Article 8 of the Law of 5 May of 2006, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

⁶² Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of the Dublin Convention <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2725:EN:NOT>

⁶³ Article 9 (1) of the Law of 5 May 2006 See First instance Administrative Court, 3rd Chamber, n° 30606 of 21 June 2012. The court states: "...Le fait que vous ne seriez pas originaire du Cameroun est d'autant plus appuyé par le test linguistique du 11 février 2010 qui retient comme étant plus que probable le fait

when there is doubt on his/her age and there are no or no credible identification papers.⁶⁴

If the applicant refuses to collaborate with the authorities to establish his/her identity, by presenting false information or documents or has supposedly destroyed existing identity documents, the Law allows for the placement of the applicant in a closed Detention facility (the Detention Centre)⁶⁵ for a maximum duration of three months.⁶⁶ In this case, the Ministry can decide to process the application under accelerated procedure in application of Articles 20(1) d) and f) of the Law of 5 May 2006. Based on the dispositions of Article 20 (1) f), the detention of the applicant can be extended to a maximum duration period of one year.

The Law of 5 May 2006 (Asylum law)⁶⁷ establishes the steps that the Judicial Police and the Directorate of Immigration must follow in order to establish the identity of the international protection applicant during the international protection proceedings.

que vous soyez nigérian. Par conséquent, les motifs à la base de votre première et actuelle demande, à savoir que vous seriez recherché au Cameroun ne sont pas du tout crédibles, de sorte qu'une crainte de persécution est dénuée de tout fondement... et eu égard à la très haute probabilité que le demandeur provient du Nigéria mettant ainsi en doute la crédibilité de son récit dans son ensemble, le tribunal est amené à retenir que le demandeur n'a pas fourni des éléments ou des faits qui sont nouveaux et qui augmentent de manière significative la probabilité qu'il remplisse les conditions requises pour prétendre au statut de réfugié ou au statut conféré par la protection subsidiaire au sens de l'article 23 de la loi du 5 mai 2006⁶⁷. See also First instance Administrative Court, 3rd Chamber, n° 27727 of 29 June 2011. See also First instance Administrative Court, 1st Chamber, n° 27341 of 17 October 2011 «...a fait réaliser un deuxième test linguistique le 26 novembre 2010. Les résultats de ce deuxième test linguistique ont permis d'établir que le demandeur proviendrait d'un pays ouest-africain, en l'occurrence le Nigéria, le Cameroun, voire le Ghana, et non pas du Soudan... Dans ces circonstances, il y a lieu d'admettre que le ministre a valablement motivé sa décision de refus en prenant appui sur le résultat du test linguistique versé au dossier ; les seules contestations du demandeur sont en effet insuffisantes pour renverser la valeur probante de ce test».

⁶⁴ Article 12 (3) of the Law of 5 May 2006. See First instance Administrative Court, 2nd Chamber, n° 27293 of 26 May 2011.

⁶⁵ Article 10 (1) b) of the Law of 5 May 2006. If the minor refuses to submit to the medical examination this does not mean that the application will be rejected ex-officio.

⁶⁶ In this sense the First instance Administrative Court, 1st Chamber, n° 30723 of 2 July 2012 stated : «A titre superfétatoire, il convient de souligner que l'article 111, paragraphe 3 c) de la loi du 29 août 2008 précitée, telle que modifiée par la loi du 1er juillet 2011, prévoit qu'un risque de fuite est légalement présumé notamment lorsque l'étranger se trouve en séjour irrégulier ou lorsque qu'il a contrefait, falsifié ou établi sous un autre nom que le sien un titre de séjour ou un document d'identité ou de voyage, ou encore lorsque l'étranger ne peut justifier de la possession de documents d'identité ou de voyage en cours de validité, ou qu'il a notamment dissimulé des éléments de son identité»

⁶⁷ Articles 8 and 9(1) of law of 5 May 2006, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

2.1.1. Legal framework for identity establishment within the procedure of international protection

Article 6 of the Law of 5 May 2006⁶⁸ on the right to asylum and complementary forms of protection lays down the procedure for an application for international protection. The obligation of the applicant to submit *all relevant documents*, including identity documents, for examining the application for international protection needs to be underlined in particular (Article 6 (4)).⁶⁹ This obligation is reinforced by Article 9 (2)⁷⁰ stating the applicant's obligation to submit all necessary elements and information (including identity and nationality papers, but also information on the situation of the

⁶⁸ Law of 5 May 2006, Mémorial A n°151 of 25 July 2011,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

Article 6(1) : «Tout demandeur de protection internationale, ci-après «le demandeur», peut présenter sa demande, soit à la frontière, soit à l'intérieur du pays. La demande de protection internationale doit être déposée par le demandeur en personne sous peine d'irrecevabilité. Le ministre fait en sorte que les autorités auxquelles est susceptible de s'adresser une personne souhaitant présenter une demande de protection internationale soient en mesure de lui indiquer où et comment elle peut présenter une telle demande.

(2) Toute personne adulte a le droit de déposer une demande de protection internationale distincte de celle du membre de famille dont il dépend.

(3) Le demandeur est informé par écrit et, dans la mesure du possible, dans une langue dont il est raisonnable de supposer qu'il la comprend, du contenu de la procédure de protection internationale, de ses droits et obligations pendant cette procédure et des conséquences possibles en cas de non-respect de ses obligations et de non-coopération avec le ministre.

(4) Le demandeur a l'obligation de remettre ses documents d'identité, ainsi que toute autre pièce utile à l'examen de la demande de protection internationale. Ces pièces sont conservées, contre récépissé, auprès du ministre. Les pièces sont restituées au demandeur si le statut de réfugié ou le statut conféré par la protection subsidiaire lui est accordé...», <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

Law on 5 May 2006 transposed into national law 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, Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof and Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

⁶⁹ Law of 5 May 2006, Mémorial A n°151 of 25 July 2011,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

Article 6(4) transposed Article 4(2) of the 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

⁷⁰ (2) Le demandeur a l'obligation de soumettre dans les meilleurs délais tous les éléments nécessaires pour établir le bien-fondé de sa demande. Le demandeur est réputé avoir présenté tous les éléments nécessaires s'il a fourni des déclarations ainsi que tous les documents en sa possession concernant son âge, sa situation, y compris celle de sa famille, son identité, sa nationalité, ses pays et lieux de résidence antérieurs, ses demandes d'asile précédentes, son itinéraire de voyage, ses documents de voyage et les motifs à la base de sa demande de protection internationale.

applicant and reasons for the application, age,) travel itinerary, etc.) in order to assess the merits of the application.

Article 8 defines the procedure for the establishment of the applicant's identity.

The Judicial Police/ Foreigner Service proceeds to all kinds of verifications needed in order to establish the applicant's identity and travel itinerary. It may proceed (in case of necessity) to a bodily search of the applicant and a search of his belongings, provided that the search fully respects human dignity and may retain, against receipt, any object relevant to the investigation. Once the application for international protection has been submitted, the Judicial Police is in charge in determining the identity of the person and validity of the presented identity documents. Both the fingerprints and the photograph of the applicant are taken. A report stating the procedural steps is drafted.⁷¹ In case of doubts on the validity of the documents, the Judicial Police transfers the documents to the Expertise Document Section of the Airport Control Service⁷² for verification.

Article 9 (1) provides for the hearing of the applicant for international protection. The applicant has the right to be heard by an official of the Directorate of Immigration and has an obligation to respond when summoned by the Minister. Oral statements made by the applicant may be registered by appropriate technical means, provided that the latter has been informed prior to the registration. If the applicant is accompanied by a lawyer, he/she must nevertheless respond personally to questions (Article 9(1)).⁷³

A written report is made of every personal interview and the statements made (Article 9 (3)).⁷⁴ The absence of the applicant or his lawyer at the interview, or the refusal of the applicant to sign the written report do not prevent the responsible officials from taking a decision on the international protection application. In case of refusal to sign the report, the reasons for refusal need to stand out in the application file.

Article 10 (1) b states that an applicant can be placed in administrative detention for a maximum period of three months if he/she does not cooperate with the authorities for

⁷¹ Article 8 of the Law of 5 May 2006 on the right to asylum and complementary forms of protection, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

⁷² Section Expertise Documents du Service de Contrôle à l'Aéroport, Unité Centrale de Police à l'Aéroport (SCA-SED-U CPA)

⁷³ Law of 5 May 2006 on the right to asylum and complementary forms of protection, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

⁷⁴ «Le ministre veille à ce que chaque entretien fasse l'objet d'un rapport écrit contenant au moins les informations essentielles relatives à la demande. L'absence du demandeur ou de son avocat lors de l'entretien fixé par l'agent du ministère, ainsi que le refus de ces derniers de signer le rapport de l'entretien n'empêchent pas le ministre de statuer sur la demande de protection internationale. En cas de refus de signer le rapport de l'entretien, les motifs du refus doivent ressortir du dossier».

establishing its identity with regard to his/her application.⁷⁵ This measure can be extended three additional times to a maximum of one year in the case foreseen by Article 20 (1) f) of the Law of 5 May 2006.

Article 12 provides for the international protection application procedure with regard to (presumed) unaccompanied minors.⁷⁶ It is important to mention that Article 12 (3) allows the Minister to order medical test to determine the age of the child in case there is a doubt about it.

2.1.2. Legal framework for identity establishment within the return procedure of rejected international protection applicants

It is important to mention that the procedure for the forced return of irregular migrants not only applies to rejected international protection applicants but to any other third country national who is an irregular migrant on Luxemburgish territory.

As mentioned above, Article 10 (1) b) of the Asylum Law, establishes that in case that the persons refuses to collaborate to establish his/her identity, hide the truth or use false documents⁷⁷, the Minister of Immigration will take the decision to submit the person to

⁷⁵ Article 10(1) Le demandeur peut, sur décision du ministre, être placé dans une structure fermée pour une durée maximale de trois mois dans les cas suivants: a) la demande de protection internationale a été déposée dans le but de prévenir un éloignement de la personne concernée alors que celle-ci se trouve en séjour irrégulier au Luxembourg; b) le demandeur refuse de coopérer avec les autorités dans l'établissement de son identité ou de son itinéraire de voyage.

⁷⁶ Article 12(1) Un demandeur mineur non accompagné se voit désigner, dès que possible, un tuteur qui l'assiste dans le cadre de l'examen de sa demande. Le tuteur a la possibilité d'informer le mineur non accompagné du sens et des éventuelles conséquences de l'entretien et, le cas échéant, de lui indiquer comment se préparer à celui-ci. Le tuteur est autorisé à assister à cet entretien et à poser des questions ou formuler des observations dans le cadre fixé par l'agent chargé de mener l'entretien. Le mineur non accompagné doit être personnellement présent lors de l'entretien même si le tuteur est présent.

(2) L'entretien du mineur non accompagné est mené par un agent possédant les connaissances nécessaires sur les besoins particuliers des mineurs.

(3) Le ministre peut ordonner des examens médicaux afin de déterminer l'âge du demandeur. Dans ce cas, le

demandeur est informé, préalablement à l'examen de sa demande de protection internationale et dans une langue dont il est raisonnable de supposer qu'il la comprend, de la possibilité qu'il ait à subir un examen médical visant à déterminer son âge; il s'agit notamment d'informations sur la méthode d'examen et les conséquences possibles des résultats de cet examen médical pour l'examen de la demande de protection internationale, ainsi que sur les conséquences

⁷⁷ Transposition of Article 23(4) of 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

the accelerated procedure according to Article 20 (1) d) and f)⁷⁸ and the Minister can take a negative decision with the decision of return to his/her country of origin.⁷⁹

Article 22 foresees a period of 30 days to accept voluntary return, provided that it the person is not a threat to public safety or national security.

In case that the person refuses to leave the country the Minister can order the placement of the person in the detention centre to prepare his/her expulsion to the country of origin (Article 120 of the Law of 29 August 2008).⁸⁰

It is important to mention that the Law of 5 May 2006 foresees the possibility that the person can accept a voluntary return.⁸¹ In order to facilitate voluntary returns, the Ministry of Immigration had signed a cooperation project relating to assistance with voluntary return for third-country nationals and with their reintegration into their country of origin with the IOM.⁸²

⁷⁸ Article 20 d) « Le demandeur a induit en erreur les autorités en présentant de fausses indications ou de faux documents ou en dissimulant des informations ou documents concernant son identité ou sa nationalité qui auraient pu influencer la décision dans un sens défavorable...»

⁷⁹ Article 20(2) of the Law of 5 May 2006.

⁸⁰ Article 120 of the Law of 29 August 2008. The Law of 29 August transposed into national law Directive 2008/115/CE of the European Parliament and the European Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁸¹ Article 22 (1) and (2) of the Law of 5 May 2006. A period of 30 days for voluntary return is granted. In exceptional cases, this period can be extended. See also convention between the Directorate of Immigration and the International Organization for Migrations

⁸² IOM, Assistance with Voluntary Return from the Grand Duchy of Luxembourg 2011, Information Session, 13/09/2011

2.2. The institutional framework for identity establishment

In Luxembourg, several national authorities share operational responsibility for establishing the identity of applicants for international protection/ rejected applicants that need to be returned

2.2.1. Authorities responsible for identity establishment of applicants of international protection

a) Directorate of Immigration

Every applicant for international protection must file an application at the Refugee Service of the Directorate of Immigration. The applicant is required to submit as soon as possible all elements needed to establish the merits of his claim, including all documents informing about the applicant's age, situation and that of his/her family, identity, nationality, previous countries of residence, previous applications for international protection, travel itinerary, travel documents and the reasons underlying the application for international protection.

The Directorate of Immigration directly transfers the received documents to the Judicial Police/ Foreigners Service for verification.⁸³ The establishment of identity of the international protection seeker is the first step in the instruction procedure. The Directorate of Immigration will ask the Judicial Police to verify the identity of the applicant as well as his/her itinerary. This will be done in a detailed interview.

b) Judicial Police

The Judicial Police/Foreigners Service proceeds to all kinds of verifications needed in order to establish the applicant's identity and travel itinerary. After receiving the documents, the Judicial Police will verify the documents and consult EURODAC to see whether a previous application for international protection had already been filed in another Member State.

The Service may proceed (in case of necessity) to a bodily search of the applicant and a search of his belongings, provided that the search fully respects human dignity and

⁸³Article 6 (4) of the Law of 5 May 2006, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

may retain, against receipt, any object relevant to the investigation. Both the fingerprints and the photograph of the applicant are taken as a standard procedure. The Judicial Police then proceeds to an interview with the applicant in order to determine identity and travel itinerary (questions on used transport means, border crossing, used travel documents).

In case of doubts on the validity of the presented documents only, the Judicial Police transfers them the documents to the Expertise Document Section of the Airport Control Service for verification of documents. This latter step is not a standard procedure but is only done on a case by case basis, if doubts on the document validity prevail.⁸⁴

A report, stating all procedural steps, is drafted.

The applicant for international protection has the right to be heard by an official of the directorate and has an obligation to respond when summoned by the Minister. Oral statements made by the applicant may be registered by appropriate technical means, provided that the latter has been informed prior to the registration. The applicant may be submitted to a language test. If the applicant is accompanied by a lawyer, he/she must nevertheless respond personally to questions. (Article 9(1)).⁸⁵ In case of doubts on the identity, the Directorate of Immigration can order different types of tests (linguistic tests, medical tests such as collar bone-, wrist-, pelvic radiography). External experts are seconded to conduct the linguistics tests.

c) Airport Police Unit (UCPA)

If a person applies for international protection at the external border, namely the airport of Luxembourg⁸⁶, the Service de Contrôle à l'Aéroport Section-Expertise Documents (SCA-SED) of the 'UCPA, responsible for border control matters, can proceed to a bodily search of the person in order to find any document or object that could inform about the origin or nationality of the person.

The person will then be directed to the Directorate of Immigration to file his/her application, while the Judicial Police/Foreigners Service is responsible for checking identity documents at a later stage.⁸⁷

⁸⁴ Governmental position, Interview, 20 June 2012

⁸⁵ Law of 5 May 2006, Mémorial A n°151 of 25 July 2011,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

⁸⁶ Cases where persons apply for international protection at the external border (airport) are rare. Most applications are done directly at the competent service of the Directorate of Immigration. Article 6 (1) of the Law of 5 May 2006.

⁸⁷ Article 8 of the Law of 5 May 2006, Mémorial A n°151 of 25 July 2011,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

2.2.2. Authorities responsible for identity establishment of rejected applicants of international protection who need to be returned

In cases where international protection status has been rejected and the persons have to be returned to their (presumed) country of origin, identity establishment and the procurement of travel documents falls under the competence of the Directorate of Immigration and the Judicial Police/ Foreigners Service.

As mentioned, the competence for the verification of identity documents is the Judicial Police/ Foreigners Service, no matter whether these documents are presented within the examination procedure of international protection or in the context of a return procedure.

The Directorate of Immigration, however, can order additional tests in order to identify the person to be returned, i.e. linguistic tests, medical tests. In this case, external experts and services (CHL)⁸⁸ become involved.⁸⁹

⁸⁸ Centre Hospitalier Luxembourg

⁸⁹ See Annual Rapport 2010, Centre Hospitalier de Luxembourg, page 45 : «le CHL réalise par ailleurs diverses prestations à la demande du gouvernement: recensement pollens, analyses HIV, mise à disposition d'experts dans l'intérêt du Ministère des Affaires étrangères, etc», <http://www.chl.lu/files/file/PDF/Rapport-Annuel-CHL/CHL-rapport-annuel-2010.pdf>. See also http://www.chl.lu/medecine_sport_prevention/examens

3. Methods for Establishing Identity

3.1. Definition and documents required for establishing identity

3.1.1. Definition of Identity

There is no national legal definition of identity. The competent authorities use the following definition of identity⁹⁰: “Identity” means ‘any name, number, or data transmission that may be used, alone or in conjunction with any other information, to identify a specific individual, including any of the following: 1. a name, Social Security number, date of birth, official government issued driver's license or identification number, government passport number, or employer or taxpayer identification number; 2. unique electronic identification number, address, account number, or routing code; or 3. telecommunication identification information or access device’.⁹¹

3.1.2. Documents and information accepted as contributing to identity establishment

Article 34 of the Law of 29 August 2008 establishes that the only valid identification document for a third country national to enter the country is a valid passport.⁹²

Thus, the Judicial Police can only use travel documents (Passports or ID Cards) for verifying the identity of applicants.

⁹⁰ Governmental point of view, Interview 20 June 2012.

⁹¹ <http://definitions.uslegal.com/i/identity-theft/> «Identité» désigne n'importe quel nom, le numéro ou la transmission de données qui peut être utilisé, seul ou en conjonction avec toute autre information, d'identifier une personne en particulier, y compris les éléments suivants:

1. un nom, numéro de sécurité sociale, date de naissance, officielle émise par le gouvernement le numéro de permis de conduire ou d'identification, numéro de passeport du gouvernement, ou de l'employeur ou le numéro d'identification du contribuable;
2. numéro unique d'identification électronique, adresse, numéro de compte, ou le code de routage, ou
3. des informations d'identification de télécommunication ou dispositif d'accès

⁹²Law of 29 August 2008, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/2011A2180A.html>

Nevertheless, within the examination procedure of an international protection claim, the Directorate of Immigration accepts, in principle, all types of documents that can serve to establish the identity and/or nationality of an applicant of international protection and/ or that can prove the veracity of the applicant's statements. I.e. official travel documents such as passport and identity cards, birth certificates, marriage licenses, birth and divorce certificates, driver's license, military record, *carte communale*, qualification certificates, journal extracts (articles or photos claiming the identity of the applicant ...).

In principle, official identity documents and travel documents prevail over other administrative documents, i.e drivers license.⁹³

In the case of discrepancies between several identity documents, the validity is always examined on a case by case basis. For example, a more recent example cannot always be considered more reliable than an older document because it is quite possible that in certain circumstances in the past, the applicant has sought to hide his identity or nationality through a new identity document in order to leave the country of origin e.g. However, it is to mention that divergent documents tend to raise doubts on the statements of the application and thus need to be explained.⁹⁴

It is to be noted that according to Article 9 (2) of the Asylum Law the applicant must collaborate fully with the authorities in determining its identity as well as the facts on which he/she based the need for international protection. The refusal of collaborating with the authorities to determine its identity can trigger the decision of the Minister to submit the applicant to the accelerated procedure.⁹⁵

⁹³ Kolb, R. Prof (2010), Synoptic and analytical report on the questionnaire on "*False identity information as a challenge to immigration authorities*," Council of Europe, Committee of Experts on Terrorism (CODEXTER).p 94, The report is available at:

http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2011/CM_2010_78_add_1_bil.pdf

⁹⁴ Kolb, R. Prof (2010), Synoptic and analytical report on the questionnaire on "*False identity information as a challenge to immigration authorities*," Council of Europe, Committee of Experts on Terrorism (CODEXTER).p 94.

⁹⁵ Article 20 (1) j) of the law of 5 May 2006

3.2. Methods used in the absence of documentary evidence of identity

3.2.1. Applicants for international protection

The measures used to establish an applicant's identity in the absence of credible documentation do not involve additional resources from the general resources that are used in the processing of international protection applications. The identification of the international protection applicant is part of the general examination process, specifically linked to assessing the credibility of the applicant's statements.

In cases where the applicant refuses to cooperate with respect to establishing his/her identity and/or nationality or, with fraudulent intent, has misled the authorities by presenting false documents or information, the Minister may decide to rule on the merits of the application for international protection under the accelerated procedure.⁹⁶

a) Linguistic tests

In order to determine the origin (country and/or region of origin) of the applicant for international protection, the Directorate of Immigration may order a linguistic test.⁹⁷ Generally, these tests are only used when the identity of the applicant could not be established otherwise, or if doubts on the statements of the applicants prevail.

The linguistic tests focus on dialects and other linguistic specificities and are done in collaboration with asylum administrations from another or several other Member States.⁹⁸

⁹⁶ Article 20(1) d) of the Law of 5 May 2006

⁹⁷ The minister can submit the applicant to a linguistic test. If the applicant is being accompanied by his/her lawyer, he/she nonetheless has to respond to the questions in person.

Article 9(1) of the law of 5 May 2006: «Le ministre peut soumettre le demandeur à un test linguistique. Lorsque le demandeur est accompagné par un avocat, il devra néanmoins répondre personnellement aux questions posées», <http://www.legilux.public.lu/leg/a/archives/2006/0078/2006A1402A.html>

⁹⁸ European Return Fund, Pluriannual programme 2008-2013, p 13, <http://www.olai.public.lu/fr/fonds-programmes/fer/documentation/index.html>

b) Age assessment to determine probable age of the applicant⁹⁹

The minister can order medical exams in order to assess the age of the presumed minor applicant. The medical examination consists of X-rays of the bones (for instance the wrist bone, collar bone and pelvic)¹⁰⁰ and takes place in one of three CHL hospitals¹⁰¹, located in the centre, south and north of Luxembourg.

The applicant subject to these age assessment tests is informed about the procedure and method of the examination itself, the potential consequences for refusing to undergo medical examination¹⁰² and the potential consequences of the examination results for the international protection application. Refusal by the presumed minor applicant to undergo the medical examination, however, does not prevent the Minister to decide on the international protection application.¹⁰³

During the international protection examination procedure, every unaccompanied minor is assisted by an “ad hoc administrator”.

The ad hoc administrator will inform the minor about all the procedures and support him in the preparation of the hearing with the administration and inform about the potential consequences of the statements made.¹⁰⁴ The "ad hoc administrator" is allowed to attend the hearing and ask questions or comment within the framework set by the officer conducting the hearing. Unaccompanied minors must however be personally present during the hearing.¹⁰⁵

⁹⁹ EMN NCPs are asked to update the information provided through the EMN Comparative EU Study on Unaccompanied Minors. EMN (2010), *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors*, European Migration Network, May 2010. The EMN Synthesis Report, as well as the 22 National Reports upon which the synthesis is based, are available from <http://emn.sarenet.es/Downloads/prepareShowFiles.do?directoryID=115>

¹⁰⁰ EMN NCP LU Conference ‘Migration policies and family lives in transit’, 15-16/05/2012, intervention by Marie-Anne Rodesch-Hengesch, Ombudsfra fir d’Rechter vum Kand, p 6, <http://www.emnluxembourg.lu/sites/default/files/documents/Rodesch-Hengesch.pdf>

¹⁰¹ Centre Hospitalier Luxembourg

¹⁰² Article 12(3) of the Law of 5 May 2006

¹⁰³ Article 12 (4) of the Law of 5 May 2006

¹⁰⁴ Articles 12 (1), (2), (3), of the Law of 5 May 2006,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

¹⁰⁵ Article 12(1) of the Law of 5 May 2006

c) Fingerprints for comparison with National- and European databases

In the context of international commitments on international protection and in order to determine whether a person has already presented an application for international protection in another Member state before coming to Luxembourg, or to determine the Member state responsible for the examination of the application, the Police may take fingerprints of all persons aged 14 and above¹⁰⁶ and run them against the EURODAC and CCPD (Centre de Coopération Policière et Douanière) databases.

The Judicial Police has access to CCPD¹⁰⁷, EURODAC, iFADO, iPRADO, SIS 2 and VIS. EURODAC, CCPD and SIS are consulted systematically, while EDISON is consulted on a case by case basis. Fingerprints will be run against EURODAC first, even before the applicant is interviewed with regard to his/her identity, travel itinerary etc. That is to support the Police in assessing the credibility of the applicant's statements.¹⁰⁸ The CCPD database is actualised on a daily basis with the list of international protection applicants.

If the applicant refuses to give his/her fingerprints, the law provides for the examination of the application in the context of an accelerated procedure.¹⁰⁹

In the case where an applicant is held in the Detention Centre in order to prepare his/her removal to the presumed country of origin, photographs are taken and

¹⁰⁶ Article 24 of the Law of 5 May 2006

¹⁰⁷ Centre de Coopération Policière et Douanière, established in March 2003. This center was established on the basis of a quadrilateral agreement between the Germany, Belgium, France and Luxembourg. Police, gendarmes and customs of neighboring countries are represented alongside police Luxembourg, http://www.police.public.lu/PoliceGrandDucale/mission_organigramme/description/direction-generale/CCPD/index.html

¹⁰⁸ The Administrative Courts recognize the usefulness of these databases. See Administrative Court, n° 28620C of 24 May 2011.

¹⁰⁹ Article 20 (1) f) of the Law of 5 May 2006. See also Administrative Court n° 28769C of 20 June 2011. The court said: «Relativement au reproche au fond fait à l'appelant d'avoir constamment manipulé ses doigts afin d'empêcher une prise d'empreintes digitales utilisables pour une vérification dans le système EURODAC, le tribunal a justement relevé qu'il ressort des pièces du dossier qu'avant la prise de la décision déférée, il a été procédé à dix relevés d'empreintes en dates des 22 février, 11 mai, 24 août, 25 novembre et 21 décembre 2010 ainsi qu'en dates des 10 janvier, 16 février, 10 mars, 29 avril et 13 mai 2011, qui se sont tous révélés inexploitable par le système EURODAC en raison du mauvais état de l'épiderme des doigts de l'appelant. Depuis la prise de la décision litigieuse, il a encore été procédé à une prise des empreintes digitales en date du 27 mai 2011, également sans succès... Il se dégage par ailleurs des rapports de la police judiciaire des 7 mars 2011 et 13 mai 2011 que l'état des extrémités des doigts de l'appelant varie d'un relevé à l'autre, les lignes papillaires étant des fois plus illisibles que d'autres, tandis que les paumes des mains ne sont pas manipulées.» It is important to mention that in this case the court decided that the offer by the detainee of submitting himself to a DNA test was not relevant because for the identification on the EURODAC files the only valid information is finger prints.

fingerprints are only taken if necessary for the establishment of the identity or the procurement of travel documents (with the respective diplomatic missions of the countries of origin).¹¹⁰

The Refugee Service has access to ‘general’ databases, i.e. official websites of other Member States and third countries containing guidelines and expertise on how to recognise valid or identity documents issued from the given country. The Directorate of Immigration, in cases of doubts, can access the German and Austrian databases in order to determine the validity of documents. It has also access to Edison and receives the EURODAC ‘hit list’ given by the Police. It is important to mention that the Judicial Police does not have complete access to the database of the Directorate of Immigration, e.g. medical records and that the Directorate of Immigration does not have direct access to the general database of the Grand Ducal police.

d) Photograph for comparison with National- and European databases

The Judicial Police/ Foreigner Service proceeds to all kinds of verifications needed in order to establish the applicant’s identity and travel itinerary, including taking fingerprints and photographs. The standard procedure in all cases is to take the photographs and fingerprints and run them against the EURODAC database before interviewing the applicant. Also the information is run against the database of the Centre for Customs and Police Cooperation.¹¹¹ Afterwards, a report, stating the procedural steps, is drafted.¹¹²

¹¹⁰ Article 120(4) of 29 August 2008

¹¹¹ http://www.police.public.lu/PoliceGrandDucale/mission_organigramme/description/direction-generale/CCPD/dossierpressebcep.pdf

¹¹² Article 8 of the modified Law of 5 May 2006 on the right to asylum and to complementary forms of protection; Article 60(1) applies to applications for temporary protection.
<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

Article 8: Il procède à une audition du demandeur. Il peut procéder en cas de nécessité à une fouille corporelle du demandeur et une fouille de ses affaires, étant entendu que cette fouille se fera dans le respect de la dignité humaine. Il peut retenir, contre récépissé, tout objet utile à l’enquête. Il procède à la prise d’empreintes digitales du demandeur ainsi qu’à la prise de photographies et dresse un rapport. For temporary protection: Article 60 (1): Le service de police judiciaire procède à toute vérification nécessaire à l’établissement de l’identité de la personne sollicitant le bénéfice de la protection temporaire. Il peut procéder en cas de nécessité à une fouille corporelle du demandeur et une fouille de ses affaires, étant entendu que cette fouille se fera dans le respect de la dignité humaine. Il peut être procédé à la prise d’empreintes digitales ainsi qu’à la prise de photographies de la personne concernée. Il procède à une audition de la personne concernée et dresse un rapport.

e) DNA analysis

The only time that DNA testing can be used for identifying a third country national that has applied for international protection (and/or had been rejected) is if that person is a suspect in a judicial investigation.¹¹³ In this case, the public prosecutor can order human cells to be collected for the purpose of DNA testing.¹¹⁴

f) Interviews to determine probable country and or region of origin (or other elements of identity, such as faith and ethnicity)¹¹⁵

Once the Judicial Police has finished the interview/hearing to determine the travel itinerary and the identity of the applicant for international protection, the applicant has the right to be heard by an official of the directorate and has an obligation to respond when summoned by the Minister. This interview will focus on the reasons for applying for international protection. Oral statements made by the applicant may be registered by appropriate technical means, provided that the latter has been informed prior to the registration. If the applicant is accompanied by a lawyer, he/she must nevertheless respond personally to questions.¹¹⁶

A written report is made of every personal interview and the statements made.¹¹⁷ The absence of the applicant or his lawyer at the interview, or the refusal of the applicant to sign the written report do not prevent the responsible officials from taking a decision on the international protection application. In case of refusal to sign the report, the reasons for refusal need to stand out in the application file.

Exceptions to the normal interview procedure: No interview is conducted if the applicant is in no condition to be heard, due to lasting circumstances beyond his control¹¹⁸. In case of doubt, the Minister can request a medical or psychological certificate.

¹¹³ See 2.1.

¹¹⁴ Article 45 (6) of the CIC

¹¹⁵ This would depend on the elements included in your national definition of “identity” used within the procedures covered by this Study. See Section 2.1.

¹¹⁶ Article 9 (1) of the law of 5 May 2006

¹¹⁷ Article 9 (3) of the Law of the 5 May 2006.

¹¹⁸ Article 5 of the Law of the 5 May 2006.

g) Cooperation with (presumed) countries of origin

During the processing of applications, Luxembourg does not contact or convey information to the country of origin in the context of applications for international protection, since it is assumed that the country of origin tends to be a region in crisis or a non-democratic state nor respecting human rights.¹¹⁹

However, in exceptional cases (if international protection applications are patently abused, for example if it is obviously based on economic grounds) contact with the country of origin (through police cooperation) remains possible.¹²⁰

3.2.2. Return of rejected applicants for international protection

The lack of identity documents/ transport documents involves a lot of time- and human resources (administrative staff of the *Refugee Service* of the Directorate of Immigration and the Detention Centre, Police officers, honorary consuls contacting the consulates of their countries located in other Member States, travel expenses of consular officials, travel costs of language experts).

In the case of the return of a rejected international protection applicant who does not collaborate with regard to his/her return and where flight risk presumes, an administrative detention decision can be taken while the return is being prepared by the authorities.¹²¹ However, administrative detention is limited to a period of six months, after which the person has to be released.¹²² The return procedure needs to take place within these same six months.

¹¹⁹ Kolb, R. Prof (2010), Synoptic and analytical report on the questionnaire on “False identity information as a challenge to immigration authorities,” Council of Europe, Committee of Experts on Terrorism (CODEXTER), p 11, p 93,

http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2011/CM_2010_78_add_1_bil.pdf

¹²⁰ Kolb, R. Prof (2010), Synoptic and analytical report on the questionnaire on “False identity information as a challenge to immigration authorities,” Council of Europe, Committee of Experts on Terrorism (CODEXTER), p 11, p 93,

http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/2011/CM_2010_78_add_1_bil.pdf

¹²¹ Article 120(1) of the Law of 29 August 2008, Mémorial A n°151 of 25 July 2011,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

<http://www.legilux.public.lu/leg/a/archives/2011/0151/index.html>.

¹²² Article 120(3) of the Law of 29 August 2008, Mémorial A n°151 of 25 July 2011,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

<http://www.legilux.public.lu/leg/a/archives/2011/0151/index.html>

a) Linguistic tests

Once an applicant was refused international protection status, he/she has to return to his/her country of origin. If the identity or origin, however, is unknown due to lacking identity documents and could not be established through other means and/or doubts on the origin of the person persist, a linguistic test may be ordered by the Directorate of Immigration.¹²³ The tests focus on dialects and other linguistic specificities and are done in collaboration with asylum administrations from another or several other Member States.¹²⁴

b) Age assessment to determine probable age of rejected applicant

The minister can order medical exams in order to assess the age of the presumed minor rejected applicant. The medical examination consists of X-rays of the bones (for

¹²³ Article 9(1) of the law on asylum: The minister can submit the applicant to a linguistic test.

Le ministre peut soumettre le demandeur à un test linguistique. Lorsque le demandeur est accompagné par un avocat, il devra néanmoins répondre personnellement aux questions posées, <http://www.legilux.public.lu/leg/a/archives/2006/0078/2006A1402A.html>

¹²⁴ European Return Fund, Pluriannual programme 2008-2013, p 13, <http://www.olai.public.lu/fr/fonds-programmes/fer/documentation/index.html> First instance Administrative Court, 2nd Chamber, n° 30636 of 7 June 2012. In this case the court stated: « le ministre pour organiser l'éloignement du demandeur, il se dégage des éléments du dossier et des explications fournies par la partie étatique que si l'autorité ministérielle a dès le 2 mai 2012 tenté d'organiser un test linguistique en vue de déterminer l'origine du demandeur au vu de ses différents alias et de son absence totale de coopération... »,

First instance Administrative Court, 3rd Chamber, n° 30606 of 21 June 2012. The court said : « Il se dégage toutefois, d'une part, du rapport de l'audition du demandeur à l'Ambassade de la République du Cameroun à Bruxelles en date du 21 janvier 2010 qu'à cette occasion il a déclaré avoir la nationalité du Ghana et, d'autre part, d'une expertise linguistique du 24 mars 2010 que le demandeur provient avec une très grande probabilité (« mit überwiegender Wahrscheinlichkeit ») du Nigéria et que, si une origine camerounaise ne peut être complètement exclue, la probabilité qu'il est originaire du Cameroun ou du Ghana est nettement moindre qu'une origine nigériane » ; First instance Administrative Court, 1st Chamber, n° 30003 of 19 March 2012 the court hold : « Au vu des démarches concrètement entreprises par le ministre, retracées ci-avant, et de l'absence de collaboration manifeste dans le chef du demandeur, qui aurait pu, sinon aurait dû, en acceptant de se soumettre au test linguistique, lever les doutes subsistant quant sa nationalité effective, force est de constater que les reproches d'ordre général afférents formulés par le demandeur, non autrement circonstanciés, ne sont pas de nature à énerver la régularité de la décision litigieuse pour ne pas être vérifiés en fait. » , First instance Administrative Court, 1st Chamber, n° 29845 of 20 February 2012, the court hold : « Or, au vu des démarches concrètement entreprises par le ministre, retracées ci-avant, et de l'absence de collaboration manifeste dans le chef du demandeur, qui aurait pu, sinon aurait dû, en acceptant de se soumettre au test linguistique, lever les doutes subsistant quant sa nationalité effective, force est de constater que les reproches d'ordre général afférents formulés par le demandeur, non autrement circonstanciés, ne sont pas de nature à énerver la régularité de la décision litigieuse pour ne pas être vérifiés en fait.»

instance the wrist bone, collar bone and pelvic)¹²⁵ and takes place in one of three CHL hospitals¹²⁶, located in the centre, south and north of Luxembourg.

It is to be noted that an unaccompanied minor can only be returned to his/her (presumed) country of origin if the decision is based on imperative grounds of public security or if return is in the best interests of the child.¹²⁷

c) d) Fingerprints and Photographs for comparison with National- and European databases

In the case where a rejected applicant is held in the Detention Centre in order to prepare his/her removal to the presumed country of origin, photographs are taken and fingerprints are only taken if necessary for the establishment of the identity or the procurement of travel documents (with the respective diplomatic missions of the countries of origin).¹²⁸

e) DNA analysis

The only time that DNA testing can be used for identifying a third country national that has applied for international protection (and/or had been rejected) is if that person is a suspect in a judicial investigation.¹²⁹ In this case, the public prosecutor can order human cells to be collected for the purpose of DNA testing.¹³⁰

f) Interviews to determine probable country and or region of origin (or other elements of identity, such as faith and ethnicity)¹³¹

¹²⁵ EMN NCP LU Conference 'Migration policies and family lives in transit', 15-16/05/2012, intervention by Marie-Anne Rodesch-Hengesch, Ombudsfra fir d'Rechter vum Kand, p 6,

<http://www.emnluxembourg.lu/sites/default/files/documents/Rodesch-Hengesch.pdf>

¹²⁶ Centre Hospitalier Luxembourg

¹²⁷ Article 30 (2) «Aucune décision d'éloignement du territoire, à l'exception de celle qui se fonde sur des motifs graves de sécurité publique, ne peut être prise à l'encontre du citoyen de l'Union, s'il a séjourné sur le territoire pendant les dix années précédentes ou s'il est mineur, sauf si l'éloignement est nécessaire dans l'intérêt de celui-ci. Est considéré comme motif grave de sécurité publique, une condamnation définitive à une peine privative de liberté d'au moins cinq ans du chef d'une des infractions figurant aux titres I et VI du Livre II du Code pénal.»
<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf#page=2>

¹²⁸ Article 120(4) of 29 August 2008

¹²⁹ See 1.1.1

¹³⁰ Article 45 (6) of the CIC

¹³¹ This would depend on the elements included in your national definition of "identity" used within the procedures covered by this Study. See Section 2.1.

In the case of the return of a rejected applicant, the Directorate of Immigration contacts the (presumed) country of origin's diplomatic authorities in order to confirm the identity of the person concerned. For that purposes, they can interview the person. Given that the responsible consular- and diplomatic entities are mostly located abroad, in Brussels, interview procedures can be complex and resource intensive since many entities expect the physical presence of the person in Brussels.

g) Cooperation with (presumed) countries of origin

In order to establish the identity, nationality or residence of the rejected applicant, the Ministry can contact the embassies/consulates of the presumed country of origin. In general terms, the country of origin cooperates in the identification processes. In the absence of identity documents, this cooperation can consist in a hearing of the rejected applicant. Once the origin or identity of the applicant is established, they issue the necessary travel documents or a travel pass, in order to facilitate the return.

The Ministry may be required to submit any document (in its possession) necessary to determine the identity, nationality or place of residence of the person: ID, proof of nationality, a driver's license, photograph and fingerprints¹³² and elements that can be considered together as body of evidence.¹³³ The Ministry complies with the principle of confidentiality and never discloses the contents of a hearing of a failed international protection applicant. In the case of Tunisia, Algeria and Morocco they send the fingerprints in paper form to the embassies by mail.¹³⁴

Certain countries of origin do not cooperate with the return of presumed nationals or will take longer periods to answer, e.g. Algeria, Nigeria. Other countries of origin do not accept forced returns and may send officials to accompany rejected applicants.

Luxembourg has an active cooperation with Algeria, Morocco and Tunisia for identifying their nationals to be returned. Fingerprints are indispensable to identify nationals from Algeria, Morocco and Tunisia. They are sent in paper form by post to

¹³² First instance Administrative Court, 2nd Chamber, n° 29933 of 15 March 2012. The court stated: «...les autorités luxembourgeoises avaient transmis, dès le 12 septembre 2011, aux autorités consulaires ivoiriennes à Bruxelles une demande tendant à la vérification des empreintes digitales du demandeur aux fins d'identification.» See also, Réponse du Ministre du Travail, de l'Emploi et de l'Immigration à la Question parlementaire n°1500 du 8 juin 2011, www.chd.lu

¹³³ Réponse du Ministre du Travail, de l'Emploi et de l'Immigration à la Question parlementaire n°1500 du 8 juin 2011, www.chd.lu

¹³⁴ LU NCP answer to BE Ad-Hoc Query on the (possible) use of biometrics and videoconferences in the return (identification) process of irregular migrants, 8 August 2012.

the embassies of these countries (normally located in Brussels). The embassies will transmit them to the competent authorities in their country of origin. Tunisia normally answers within one month. In the cases of Morocco and Algeria the answer can take a year in force return cases. It is important to mention that in voluntary return cases, the waiting period is shorter¹³⁵. There is also a good collaboration with the Nigerian authorities after the Memorandum of Understanding was signed (see above).

Sometimes, on arrival in Luxembourg and after talking to the applicants, it turns out that the applicant is not a national from the claimed country of origin¹³⁶; i.e. mostly African countries. In these cases the procedure has to be re-launched.¹³⁷ For their part, the consular authorities of presumed countries of origin are divided between several injunctions, i.e. the requirement, in principle, to readmit their nationals and to protect their national's interests against a third State. This contradiction gives rise to divergent practices with regard to issuing travel passes, varying significantly between countries of origin.¹³⁸

Rejected applicants can be held in the Detention Centre for 6 months.

¹³⁵ LU NCP answer to BE Ad-Hoc Query on the (possible) use of biometrics and videoconferences in the return (identification) process of irregular migrants, 8 August 2012.

¹³⁶ See First instance Administrative Court, 2nd Chamber, n° 28621 of 16 May 2011.

¹³⁷ Réponse du Ministre du Travail, de l'Emploi et de l'Immigration à la Question parlementaire n°1500 du 8 juin 2011, www.chd.lu

¹³⁸ Réponse du Ministre du Travail, de l'Emploi et de l'Immigration à la Question parlementaire n°1500 du 8 juin 2011, www.chd.lu

4. Decision-making process

4.1. Status and weight of different methods to determine identity

In Luxembourg, all the available elements of an international protection application are collected and will be considered in entirety and not weighted individually.¹³⁹

Identify establishment is one part of the overall examination procedure. The Judicial Police, responsible for establishing the identity of the applicant, in its report to the Directorate of Immigration, summarises the procedures undertaken and the findings based on this. However, there is no grading structure or spectrum used to denote the degree of identity determination.

4.2. Decisions taken by competent authorities on basis of outcomes of identity establishment

In Luxembourg, identification of the applicant is not a decisive factor for deciding on the merits of the international protection case. The fact of not proving one's identity is in itself not a sufficient motive for rejecting an application for international protection.¹⁴⁰

¹³⁹ Governmental point of view, Interview on 20 June 2012. See also Articles 18 and 19 of the Law of 5 May 2006.

¹⁴⁰ First instance Administrative Court, 1st Chamber, n° 30032 of 16 April 2012. The court said: « D'autre part, en ce qui concerne les doutes émis par la Cour administrative lors de la première demande de protection internationale quant à l'identité du demandeur au vu du permis de conduire versé par ce dernier, force est au tribunal de constater que le demandeur lui a soumis des documents supplémentaires, dont l'authenticité n'a pas été contestée par la partie étatique, permettant d'établir pour le moins l'identité de ses parents, l'explication fournie par le demandeur quant à ses propres papiers, c'est-à-dire que la police iranienne aurait confisqué tous ses papiers se trouvant dans sa chambre lors de la persécution en juin 2005 n'étant a priori pas invraisemblable. » See also First instance Administrative Court, 3rd Chamber, n° 28745 of 23 November 2011. The court said: « S'il est vrai que la simple invocation de rapports, faisant état d'une manière générale de violations des droits de l'homme dans un pays, ne suffit pas à établir que tout ressortissant de ce pays encourt un risque d'être persécuté, il n'en demeure pas moins que le demandeur a été arrêté et détenu dans le contexte du coup d'Etat contre le Président Camara, qu'il est connu comme un militant politique et qu'il est d'origine ethnique peule. Tous ces éléments permettent de retenir que le demandeur pourrait être personnellement ciblé par les autorités guinéennes pour des considérations politiques et ethniques, le ministre n'ayant pas démontré en l'espèce qu'il existe de bonnes raisons de penser que la persécution subie par le demandeur ne se reproduirait pas, les seules promesses d'un président nouvellement élu de vouloir sortir le pays de la crise, en l'absence d'autres précisions, ne permettant pas de croire à une amélioration de la situation sécuritaire actuelle en Guinée.»

The decision is based on an overall analysis of the person's statements, taking into account all other elements of the application, and must be motivated.¹⁴¹ The decision is neither based solely on the ground that identity was not established, neither based exclusively on the medical/linguistic test. Overall, it is the perceived credibility¹⁴² of the applicant's statements that informs the final decision¹⁴³, going beyond merely establishing the applicant's identity¹⁴⁴, especially since there may be a valid reason for the applicant not to disclose his/her identity¹⁴⁵. E.g. a person may be obliged to use false documents in order to be able to leave the country of origin where he/she may be prosecuted.¹⁴⁶ In these types of cases and if the credibility of the applicant's statements is considered sufficient, the Directorate of Immigration as well as the administrative courts tend to grant international protection to the applicant, even though the identification of the person could not be established.¹⁴⁷

¹⁴¹ Article 19(1) of the modified law of 5 May 2006,

<http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

¹⁴² See First instance Administrative Court, n° 30606 of 3rd Chamber of 21 June 2012. The court said: « Face au constat que les éléments nouveaux produits par le demandeur se résument à l'affirmation qu'il serait toujours recherché par l'autorité policière du Cameroun, déclaration qui se recoupe avec les faits produits à la base de la première demande de protection internationale, et face au constat que les éléments de preuve nouveaux dont il a déclaré disposer n'ont pas pu être produites, et eu égard à la très haute probabilité que le demandeur provient du Nigéria mettant ainsi en doute la crédibilité de son récit dans son ensemble, le tribunal est amené à retenir que le demandeur n'a pas fourni des éléments ou des faits qui sont nouveaux et qui augmentent de manière significative la probabilité qu'il remplisse les conditions requises pour prétendre au statut de réfugié ou au statut conféré par la protection subsidiaire au sens de l'article 23 de la loi du 5 mai 2006. »

¹⁴³ See First instance Administrative Court, 1st Chamber, n° 30032 of 16 April 2012, 3rd Chamber, n° 30023 of 13 June 2012, 1st Chamber, n° 29406 of 7 May 2012, 3rd Chamber n° 29203 of 7 March 2012

¹⁴⁴ First instance Administrative Court, 1st Chamber, n° 25586 of 19 May 2009. The court said: « En effet, vous revenez très tard sur vos déclarations pour admettre que vous auriez finalement menti lors de votre première procédure de protection internationale. Ce changement brutal d'identité ne saurait être considéré comme crédible et de bonne foi, d'autant plus que vous n'avez jamais tenté de rectifier vos déclarations. Votre nouvelle demande de protection internationale est donc également à considérer comme abusive. A cela s'ajoute que des doutes doivent être émis quant à votre identité réelle d'autant plus que vous ne présentez aucune pièce d'identité. »

¹⁴⁵ See First instance Administrative Court, 1st Chamber, n° 29406 of 7 May 2012. The court states: « Il convient cependant de souligner avec force à cet égard que la crédibilité du récit d'un demandeur en protection internationale ne saurait dépendre de la production par celui-ci de documents officiels, émanant de ses persécuteurs, attestant des persécutions subies, une telle exigence étant, en droit des réfugiés, un non-sens, alors qu'il est souvent impossible pour les réfugiés d'apporter des preuves formelles à l'appui de leur demande de protection internationale et leur crainte de persécution ou d'atteintes graves »

¹⁴⁶ Kolb, R. Prof (2010), Synoptic and analytical report on the questionnaire on "False identity information as a challenge to immigration authorities," Council of Europe, Committee of Experts on Terrorism (CODEXTER), p 94, http://www.coe.int/t/dlapil/co-dexter/Source/Working_Documents/2011/CM_2010_78_add_1_bil.pdf

¹⁴⁷ Governmental point of view, Interview, 20 June 2012 and First instance Administrative Court, n° 29406 of 7 May 2012.

Nevertheless, if considerable doubt remains on the identity of the applicant and he/she does not want to collaborate with the authorities, the person can be held in the Detention Centre for a maximum period of three months.¹⁴⁸ This period can be extended every three months to a maximum detention of one year.¹⁴⁹

It is important to note that the status of international protection can be, and has been revoked after initial granting, if new elements and evidence appear at a later stage showing that the applicant had made use of false documents or fraudulent declarations during his/her application (Article 36) and that these were decisive for the granting of the status.¹⁵⁰ The same applies if presumed non-existing identity documents appear in another context (e.g. marriage¹⁵¹).

If authorities conclude that the person has not collaborated with regard to identity establishment, had made use of false documents or has hidden elements that would have led the Ministry to reject the application, the Minister can decide to process the application under accelerated procedure.¹⁵²

Indeed, an analysis of relating case law¹⁵³ shows that in most cases where the authorities have had a serious doubt on the identity of the person and where the credibility of their history and statements was questioned, the decision on the application was often negative.¹⁵⁴ With regard to forced returns, a number of elements

¹⁴⁸ Article 10 (1) b of the Law of 5 May 2006

¹⁴⁹ Article 10 (2) of the Law of 5 May 2006 in relation with article 20 (1) f) of the Law of 5 May 2006

¹⁵⁰ Subsidiary protection, Article 41.

¹⁵¹ Governmental point of view, Interview 20 June 2012

¹⁵² Article 20(1) of the Law of 29 August 2008, Mémorial A n°151 of 25 July 2011, <http://www.legilux.public.lu/leg/a/archives/2011/0151/a151.pdf>

¹⁵³ A large number of relevant case law on the subject could be identified in the EMN jurisprudence database, www.emn.lu

¹⁵⁴ See First instance Administrative Court, n° 30008 of 23 March, 2012. The court said: « ...Il convient encore d'ajouter que la circonstance que l'âge indiqué par le demandeur après que l'identité sous laquelle il a voyagé s'est avérée ne pas être la sienne, est également apparu, au regard de l'examen osseux précité, comme ne correspondant pas aux affirmations du demandeur, laisse planer un doute sur la crédibilité de ses intentions et sa bonne foi. Dans ces conditions, le tribunal est amené à retenir que le ministre pouvait à bon droit retenir que la demande de protection internationale avait été déposée par le demandeur dans le but de prévenir son éloignement, de sorte que le moyen afférent laisse d'être fondé. » Also First instance Administrative Court, 1st Chamber, n° 29241 of 24 October 2011. The court said : « Compte tenu de ces contradictions et incohérences, lesquelles, comme retenu par la partie étatique, jettent le doute sur la réalité du récit du demandeur, respectivement sur la véracité de l'article de presse et de son contenu, ledit article de presse ne constitue pas un élément susceptible d'augmenter de manière significative la probabilité que le demandeur remplisse les conditions requises pour prétendre au statut de réfugié ou au statut conféré par la protection subsidiaire, étant rappelé à ce sujet que l'examen à effectuer par le tribunal, saisi d'un recours en annulation, et partant appelé à examiner l'existence et l'exactitude des faits matériels qui sont à la base de la décision attaquée ainsi qu'à vérifier si les motifs dûment établis sont de nature à motiver légalement la décision attaquée, ne se limite pas

could be identified as slowing down the return procedure or render the return impossible altogether. Lack of cooperation from the rejected applicant in establishing their identity and difficulties to procure valid travel documents due to difficult or non-existing contacts with consular and diplomatic entities have been mentioned as key barriers to return in the pluriannual programme on the European Return Fund.¹⁵⁵

Procedures to obtain travel documents require complex and resource intensive administrative preparations, especially given that the responsible consular- and diplomatic entities are mostly located abroad. Consequently, Luxembourg authorities have to travel to the concerned entities located in the bordering countries and notably Brussels, in order to develop and nurture bilateral relations, especially with regard to organising the return of their claimed nationals.¹⁵⁶

Alternatively, they have to organise and cover transport and accommodation to Luxembourg for identification purposes, of the responsible foreign representatives.¹⁵⁷

à la seule pertinence des faits allégués, mais s'étend également à la valeur des éléments de preuve et de la crédibilité des déclarations du demandeur ». See also First instance Administrative Court, 2nd Chamber, n° 24337 of 13 October 2008. In this case the court said: «En outre, le rapport du test linguistique effectué arrive à la conclusion que le demandeur pourrait être originaire soit du Mali soit de la Guinée, en précisant que la probabilité qu'il soit originaire du Mali est plus forte, en raison du fait qu'il n'arrive pas à fournir des précisions sur sa ville natale et du fait qu'il croit énumérer les noms de quartiers d'une ville guinéenne lorsqu'en réalité il cite des noms de quartiers de la capitale du Mali. Le rapport sur l'évaluation du test linguistique ajoute que le nom d'une école citée par le demandeur correspond à une école située à Bamako, capitale du Mali et non point à une école guinéenne. D'ailleurs, le demandeur ne peut présenter aucun document permettant de déterminer son identité ou sa nationalité. Si le demandeur soulève dans son recours que le rapport sur le test linguistique retient qu'il pourrait également être originaire de la Guinée en raison du fait qu'il parle plutôt le Malinke du Faranah, il n'en demeure pas moins que le rapport arrive à la conclusion qu'il est plus probable que le demandeur soit originaire du Mali et que le demandeur n'a pas pu, ni lors de l'audition effectuée par l'agent du ministère ni, lors du test linguistique, fournir des détails géographiques ou politiques sur la Guinée, supposée être son pays natal, de sorte que l'identité et surtout la nationalité du demandeur sont fortement sujettes à caution... Par conséquent, il résulte des considérations qui précèdent que la crédibilité et la véracité du récit du demandeur sont sérieusement ébranlées par les incohérences et contradictions relevées à juste titre par le ministre.»

¹⁵⁵ Ministry of Foreign Affairs, Directorate of Immigration, European Return Fund, Pluriannual programme 2008-2013, p 18, <http://www.mae.lu/en/content/view/full/25548>. See Administrative Court n° 28769C of 20 June 2011.

¹⁵⁶ Ministry of Foreign Affairs, Directorate of Immigration, European Return Fund, Pluriannual programme 2008-2013, <http://www.mae.lu/en/content/view/full/25548>

¹⁵⁷ E.g. in judgment n°30009 the First instance Administrative Court recognized that even though the personnel of the Directorate of Immigration had been in close contact with the Embassy of Mali, the foreseen interview to identify the person had not been possible (after almost five months) because of the impairment of the diplomatic officials to do so. Or see Administrative Court n° 28790C of 24 June 2011 on cooperation with the diplomatic mission of Algeria in Brussels. The court stated: «Or, l'ensemble de ces démarches entreprises par les autorités luxembourgeoises ne permet pas de suivre les reproches de l'intimé en rapport avec un défaut de diligences de leur part, étant insisté sur ce qu'il ne saurait leur être reproché d'avoir attendu dans une première phase 20 jours avant de relancer téléphoniquement le consulat algérien et ensuite 16 jours pour adresser une lettre de rappel aux autorités algériennes afin d'obtenir la confirmation de l'identité de l'appelant et par la suite l'émission d'un laissez-passer, étant donné dans ce

The case law shows that in some cases Luxemburgish authorities are at the mercy of the collaboration of the foreign authorities, which in certain cases are reluctant to collaborate especially when it comes to force return cases. This is the case of Algerian authorities that expect the transfer of the person to be made by Algerian Police officers, at the expense of the Luxemburgish government. There are cases where diplomatic authorities put specific conditions to Luxemburgish authorities, such as the physical presence of the rejected applicant in the diplomatic mission in Brussels.¹⁵⁸ In these cases, agents from the Custodial and mobile reserve unit¹⁵⁹ and an official from the Directorate of Immigration accompany the person to the embassy, and need to inform the Belgian authorities of the transit in advance in accordance with an agreement between the two countries.¹⁶⁰ Case law seems to suggest that the procedures and results for establishing identity are particularly difficult when applicants/persons to be returned (presumably) originate from Afghanistan¹⁶¹, Algeria¹⁶², Nigeria¹⁶³, Somalia¹⁶⁴ or Sierra Leone¹⁶⁵.

contexte que les autorités luxembourgeoises sont essentiellement tributaires de la collaboration et de l'efficacité des autorités étrangères».

¹⁵⁸See First instance Administrative Court, Vacation Chamber, n° 28987 of 30 August 2011. The government had argued in this case that the transfer of the person to Brussels was impossible. They said: « Le délégué du gouvernement répond que d'un côté les démarches en vue d'établir l'identité du demandeur auraient été rendues difficiles par le fait que le demandeur serait connu sous quatre identités différentes. Par ailleurs, une anticipation des démarches n'aurait pas été possible, puisque l'ambassade de Sierra Leone à Bruxelles exigerait toujours une présentation physique des personnes pour lesquelles un laissez-passer est sollicité, dans les locaux de l'ambassade. Or, le transport d'un détenu à Bruxelles serait impossible.»

¹⁵⁹Police Grand-Ducal, Unité de Garde et de Réserve Mobile (UGRM)

¹⁶⁰Information given by the Judicial Police, Interview, 22 August 2012

¹⁶¹Seven cases related to international protection: First instance Administrative Court, 3rd Chamber, n° 29203 of 7 March 2012, 2nd Chamber n° 28678 of 16 February 2012; 1st Chamber, n° 27548 of 25 May 2011, 3rd Chamber, n° 26737 of 29 September 2010, 1st Chamber n° 26722 of 14 July 2010 and 1st Chamber n° 26655 of 12 March 2010. See www.emn.lu

¹⁶²34 cases of administrative detention at the First instance Administrative Courts and 4 cases at the Administrative Court level and 8 cases related to international protection at First instance Administrative Court (i.e. First instance Administrative Court, 2nd Chamber n°28767 of 30 June 2011) and one case at Administrative Court level. See www.emn.lu

¹⁶³In total in the EMN database there are 29 judgments related to identity in administrative retention cases and 16 cases of international protection involving Nigerian nationals (i.e., See judgments n° 28621 of 26 May 2011, First instance Administrative Court, 2nd Chamber; n°28671 of 6 June 2011, First instance Administrative Court, 2nd Chamber). See www.emn.lu. It is important to mention that since the signature of the Memorandum of Understanding between Luxembourg and Nigeria signed on 28 mars 2006 on the readmission of persons found to be irregularly present in Luxembourg, the collaboration with the diplomatic authorities of Nigeria has improved. Nevertheless in certain judgments the administrative courts have repeated that the delays to identify the person are due because the Luxemburgish authorities depend on the collaboration of the Nigerian authorities. See First instance Administrative Court, 2nd Chamber, n° 28767 of 30 June 2011. The court said: «Au vu des diligences ainsi déployées par l'autorité ministérielle, le tribunal est amené à constater qu'au moment où il statue, des démarches suffisantes ont été entreprises afin d'organiser l'éloignement du demandeur du

In other cases, foreign authorities (embassies and competent authorities in the country of origin) simply refuse to collaborate with national authorities. If the delay of six months expires, the administrative courts (and even the Directorate of Immigration) will order the liberation of the individual.¹⁶⁶

territoire et que confrontées aux hésitations des autorités nigérianes à délivrer des documents de voyage au demandeur, les autorités».

¹⁶⁴ There are 7 judgments related to identity in international protection cases (First instance Administrative Court, 3rd Chamber n° 27727 of 29 June 2011, 2nd Chamber n° 24221 of 27 October 2008, 23388 of 20 February 2008, 22776 of 17 October 2007 and 21556 of 27 November 2006, 1st Chamber n° 26073 of 20 January 2010 and 21512 of 6 December 2006) and 10 judgments (4 of the Administrative Court (29235C of 25 October 2011, 28838C of 20 October 2011, 28769C of 30 June 2011 and 28059C of 10 March 2011 and 6 of the First instance Administrative Court, 3rd Chamber, n° 30008 of 23 March 2012, 29066 of 23 September 2011, 28726 of 16 June 2011, 28548 of 6 May 2011 and 27966 of 3 March 2011) in administrative retention. See emn.lu

¹⁶⁵ There are 12 cases in administrative retention (First instance Administrative Court, 3rd Chamber 2nd Chamber n° 29068 of 26 September 2011, 28987 of 7 September 2011, 28336 of 14 April 2011, 27463 of 19 November 2010, 27391 of 28 October 2010, 27302 of 23 September 2010, 27285 of 17 September 2010, 26241 of 29 October 2009 25586 of 19 May 2009, 25526 of 25 March 2009, 25403 of 25 February 2009, 2nd Chamber n° 25373 of 19 February 2009 and 7 cases on international protection dealing with identity issues involving Sierra Leone nationals (Administrative Court n° 22357 of 27 March 2007 and First instance Administrative Court, 23059 of 22 October 2007, 22941 of 12 December 2007, 1st Chamber 22012 of 29 January 2007, 21747 of 11 December 2006, 21567 of 4 December 2006 and 21427 of 27 November 2006).

¹⁶⁶ See First instance Administrative Court 2nd Chamber n° 28767 of 30 June 2011. The court said: « Au vu des diligences ainsi déployées par l'autorité ministérielle, le tribunal est amené à constater qu'au moment où il statue, des démarches suffisantes ont été entreprises afin d'organiser l'éloignement du demandeur du territoire et que confrontées aux hésitations des autorités nigérianes à délivrer des documents de voyage au demandeur, les autorités luxembourgeoises ont décidé de mettre un terme à la mesure de placement au Centre de séjour provisoire pour étrangers en situation irrégulière afin de ne pas prolonger inutilement la privation de liberté du demandeur. Il s'ensuit que le moyen fondé sur une absence de diligences suffisantes, voire de l'inertie des autorités laisse d'être fondé. »

5. Conclusions

Identifying an applicant for international protection can become a complex issue. In situations of war or other life threatening situations, people may be obliged to leave the country by any means possible and search for refuge somewhere else. In many cases, belongings including travel or identification documents are left behind. For this reason, the Geneva Convention, through Articles 27 and 28, contains the obligation of the State to provide travel documents to a person that is granted international protection.

The identification of an international protection applicant is an integral part of the international protection procedure, according to Article 4 (2) of Directive 2004/83/CE, because this allows the competent authorities to circumscribe the applicant in the geographical context where he/she claims the danger exists, and thus serves to examine the credibility of the applicant's statements on the grounds for needing international protection. However, in Luxembourg, identification of the applicant is not a decisive factor for deciding on the merits of the international protection case. The fact of not proving one's identity is in itself not a sufficient motive for rejecting an application for international protection. The decision on an application for international protection in Luxembourg is based on an overall analysis of the person's statements, taking into account all other elements of the application, and must be motivated.

There is no definition of identity neither in the EU Acquis nor in national legislation (Law of 5 May 2006 on the right to asylum and other form of protection; Law of 29 August 2008 on the free movement of persons and immigration; Criminal Procedure Code). The authorities of the Directorate of Immigration use a general definition of identity that is considered broad enough with regard to international protection examinations.

In Luxembourg, the authority to grant international protection status lies with the Ministry of Immigration. The international protection applicant must file his/her application at the Directorate of Immigration and submit all relevant identity documents (Law of 5 May 2006). The obligation of the applicant to collaborate with the authorities in order to establish his/her identity and assess the credibility of his/her statements is enshrined in law (Law of 5 May 2006). Refusing to collaborate can lead the Minister to decide to examine the application under accelerated procedure or/and take restraining measures during the instruction of the application, i.e. placing the applicant in a closed detention facility.

In order to inform its final decision, the Directorate of Immigration accepts, in principle, any document that can prove the identity of the applicant (e.g. driver license, military card, birth certificates, photocopies of official documents). However, Article 34 (2) 1 of the Law of 29 August 2008 establishes the passport as the only valid identity document for a third country national for entering the territory.

Once the Directorate of Immigration receives the travel- or identity documents of the applicant, they are directly transferred to the Judicial Police. Article 8 of the Law of 5 May 2006 charges the Judicial Police not only to interview/ hear the applicant in relation to his/her travel itinerary, used means of transports and border crossing in order to arrive in Luxembourg, but also with identity verification/establishment of the applicant. The Judicial Police officers systematically verify the documents against general databases, i.e. iFADO, iPRADO and E DISON. In case of doubts on the authenticity of a document, it will be transferred to the Central Airport Police Unit (UCPA) and the Document Expertise Section (SED) that is specialized in analyzing documents. If there is evidence concluding that the document is false, the police directly transfers a drawn up report to the public prosecutor, who decides whether to press criminal charges or not.

During the last few years, the large majority of international protection applications in Luxembourg have come from the Balkan countries. Concerning these applicants, most of them (85% to 90%) present valid identity documents.

Cases of false documents normally occur when third country nationals are transiting through Luxembourg on the way to the United Kingdom. Once caught, they apply for international protection in order to avoid expulsion. Nevertheless, with other applicants, mostly originating from African countries, the lack of identity documents is commonly observed. In some cases, identity documents were intentionally destroyed or withheld from the authorities in order to avoid being identified. In these cases and especially if applicants do not collaborate with the authorities, identification procedures can become complicated and resource consuming, given the limited set of methods and means available to the Judicial Police (provided for in the Asylum law).

Current national legislation (Article 8 of the Law of 5 May 2006) only foresees taking photographs and fingerprints of applicants, which are then run against EU or regional databases (e.g. EURODAC, VIS, SIS II, CCPD). This allows the Judicial Police to see whether the applicant had entered the European Union using a valid passport and a visa, had been subject to a reentry ban or had already applied for international protection in another Member State prior applying in Luxembourg (Dublin Convention).

The Judicial Police uses the information gained from these databases not only to verify the identity of the applicant but also to verify the veracity of his/her statements. However, if the database search does not yield any additional useful information, the police does not have any other means to verify the identity because national legislation does not allow the use of more invasive exams, such as DNA testing or Iris scans. Only if the applicant is suspected of having committed a felony or a crime and is subject to a judicial proceeding, the public prosecutor can demand DNA testing in order to identify the person (Article 45 (6) of the Criminal Procedure Code).

The other methods foreseen by law for trying to establish the identity of an applicant or rejected applicant are circumstantial and not systematic. The Directorate of Immigration will audition the person on the reasons on which he/she request the protection of the Luxembourgish government and can use a linguistic test as well as a medical test (X-rays of wrist bone, pelvic) to determine the origin/age of the applicant. However, these exams are not conclusive as to determining the identity of the person. Based on the Geneva Convention, national authorities can only contact the diplomatic authorities of the (presumed) country of origin once international protection has been refused to the applicant and in the context of return, but not while the application is being examined. In these cases, national authorities are relying on the collaboration of the concerned diplomatic authorities not only to identify the person but also to issue necessary travel documents for the return of the rejected applicant.

In some cases the diplomatic authorities (especially some African countries) request the physical presence of the person at the embassy or consulate. Seen that most of the diplomatic missions are outside of Luxembourg (normally in Brussels) the transfer of the person implies considerate logistics and legal issues for national authorities. The Judicial Police, accompanied by an official Directorate of Immigration, transfers the person to the diplomatic mission.

In the cases where, after interviewing the person, the diplomatic officers inform the Directorate of Immigration that the person is not a national of their country and they thus cannot deliver travel documents, the identification/travel document issuance procedure starts again. In other cases, the diplomatic authorities do not collaborate or they take a lot of time to answer.

Decision-making on status granting for a person that cannot be identified becomes difficult and can only take place after a careful evaluation of all the elements of the application and be motivated on the credibility of the statements of the applicant.

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Annex: Available statistics (informing about the extent of the issue) ¹⁶⁷

	07	08	09	10	11
Total Number of applicants for international protection	426	463	505	786	2164 ¹⁶⁸
Number of applicants for whom <u>identity</u> was not documented at the time of application	/	/	/	/	/
Number of applicants for whom <u>identity was wholly or partially established</u> during the asylum process thereby allowing the relevant authorities to reach a particular decision on international application (e.g. grant, refuse, defer)	/	/	/	/	/
Positive Decisions ¹⁶⁹	167	107	152	102	47
Positive Decisions for applicants whose identity was not documented at the time of application	/	/	/	/	/
Positive Decisions for applicants whose identity was considered sufficiently established by the decision-making authorities	/	/	/	/	/
Negative Decisions ¹⁷⁰	474	257	231	269	745
Negative Decisions for applicants whose identity was not documented at the time of application	/	/	/	/	/
Negative Decisions for applicants whose identity was not considered by sufficiently established by the decision-making authorities	/	/	/	/	/
Forced ¹⁷¹ <u>Returns undertaken</u> of all rejected applicants	69 ¹⁷²	88	47	72	31
(Forced) ¹⁷³ Returns of rejected applicants whose identity had to be established at the time of return	/	/	/	/	/
Number of (Forced) ¹⁷⁴ Returns of rejected applicants whose return could not be executed as their identity was not considered to be sufficiently established by the authorities of the (presumed) country of origin	/	/	/	/	/

Information about the provided statistics:

¹⁶⁷ Statistics from the Directorate of Immigration, Ministry of Foreign Affairs. The statistics on decisions relate exclusively to the granting and refusal of international protection, and not to all decisions made as part of the application for international protection (which include decisions of "Dublin incompetence")

¹⁶⁸ The authorities described the increase in the number of asylum seekers (mostly Roma and nationals of the western Balkan countries, particularly Serbia and Macedonia) as a direct consequence of the liberalisation in 2010 of the visa system under the Schengen Agreement, which favoured nationals from several Balkan countries (Albania, Macedonia, Montenegro, Serbia). In 2011, the Directorate of Immigration received 2,164 international protection requests (individuals), compared to 786 in 2011. Over 78% of all DPI come from western Balkan countries, notably Serbia (43.76% of all requests received), Macedonia (20.61%), Kosovo (7.02%) and Montenegro (4.76%)

EMN, National Contact Point Luxembourg, Annual policy report on migration and asylum 2011, pp 25,111, <https://www.emnluxembourg.lu/type-documentation/rapport-politique-sur-les-migrations-et-lasile-2011>

¹⁶⁹ The positive decisions include both granting of refugee status and subsidiary protection status.

¹⁷⁰ The negative decisions include international protection applications that were considered unfounded, in the accelerated procedure or not, and international protection applications considered inadmissible. They do not include decisions of incompetence, implicit withdrawals or abandonment of applications, exclusions from international protection, granted tolerance status (in the past attributed to rejected applicants) or granted resident authorisations on humanitarian grounds to applicants or rejected applicants.

¹⁷¹ While the scope of this Focussed Study (with respect to Returns) includes only the forced return of rejected applicants, it is acknowledged that distinguishing between forced and voluntary returns in official statistics may not be possible. Where possible, do make this distinction.

¹⁷² For 2007: total number of forced returns (rejected asylum seekers and other forced returns).

¹⁷³ Idem.

¹⁷⁴ Idem.



The objective of the European Migration Network (EMN) is to provide up-to-date, objective, reliable and comparable information on migration and asylum to Community Institutions, Member States' authorities and institutions, and the general public, with a view to supporting policy-making in the European Union in these areas.

