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Fundamental rights of migrants in an irregular situation in the European Union

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Comparative report

Foreword

Millions of migrants in Europe live 'irregularly', a vulnerable situation that puts them at heightened risk of fundamental rights violations. Their situation is irregular either because they do not have a valid authorisation to stay or reside, having entered the European Union (EU) in various ways, or they become irregular as they overstay the period to which they are entitled. They try to make a living, typically in jobs which are dangerous, dirty or degrading, filling gaps in the labour market, sometimes under exploitative conditions. Fearful of detection, arrest and expulsion, migrants in an irregular situation often face considerable hurdles in accessing their fundamental rights, including healthcare, education of their children or appropriate housing. This report addresses a number of these fundamental rights challenges with respect to migrants in an irregular situation.

The EU has developed legislation on measures intended to facilitate regular migration and to address irregular migration. Legal migration opportunities for low-skilled labour, however, remain limited in many EU countries as secondary EU law has primarily focused on highly skilled labour. In 2010, the European Commission presented a proposal for a seasonal migrant workers directive, which, once adopted, should provide a tool to fill seasonal labour demands, particularly for unskilled workers, through regular channels. This would be a step towards simplifying and amplifying the options for legal migration, thus reducing the demands on an irregular workforce.

Except for specific categories of persons, such as asylum seekers, it is the prerogative of states to decide who can enter a country and who cannot. Once an individual is in the country, however, he or she is entitled to enjoy a set of fundamental rights granted to all human beings irrespective of their migration status. As this report demonstrates, access to basic rights, such as education or healthcare, by migrants in an irregular situation differs significantly among EU Member States in law and practice.

The European Union Agency for Fundamental Rights (FRA) carried out comparative research on the fundamental rights situation of irregular migrants through a review of available literature and legal sources, a set of questionnaires sent to national and local authorities as well as civil society representatives and through qualitative interviews with migrants in an irregular situation and those who work with them. Based on the findings of this research, the report advises on how fundamental rights should be incorporated in policies, laws and administrative practices affecting migrants in irregular situations.

This report was presented in November 2011 at the Fundamental Rights Conference organised by the FRA together with the Polish EU Presidency.

Morten Kjaerum
Director

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Executive summary

International human rights instruments and the European Convention on Human Rights (ECHR) enshrine and enforce rights which are of general application. Unless individuals are expressly excluded from their scope of application, rights and freedoms are applicable to everyone within the jurisdiction of the contracting parties, including migrants in an irregular situation. Non-compliance with the conditions for entry, stay or residence in a European Union (EU) Member State cannot deprive migrants in an irregular situation of certain basic rights shared by all human beings.

EU law has been interpreted in light of human rights standards which are binding on EU Member States as has been evidenced by references of the Court of Justice of the European Union (CJEU) to the ECHR, the European Social Charter (ESC), the International Covenant on Civil and Political Rights (ICCPR) and International Labour Organization (ILO) conventions.

EU law must be implemented and applied in accordance with the Charter of Fundamental Rights of the European Union. In all those areas not covered by EU law, fundamental rights continue to be guaranteed at the national level. Unlike for legal migrants, there are no explicit safeguards in EU primary law concerning the rights of persons who are subject to the measures aimed at controlling illegal immigration and trafficking in human beings. However, the Treaty on the Functioning of the European Union for example, sets out social and health protection measures that are not expressly restricted to nationals or lawfully staying third-country nationals. In addition, EU secondary law spells out the rights of migrants in an irregular situation to different degrees depending on the thematic area. For persons in return procedures or who are not removed, a minimum level of specific fundamental rights is detailed in the EU Return Directive.

Two broad categories among the irregular migrant population in the EU can be distinguished. A first group is composed of those persons who live in hiding. Their stay is not known to the police or immigration authorities. An estimated 1.9 to 3.8 million migrants in an irregular situation were staying in the EU in 2008, according to the EU-funded project Clandestino. A second group consists of third-country nationals whose presence in the territory is known to the immigration authorities, but who, for a variety of reasons related to legal or humanitarian considerations, practical obstacles or policy choices, are not removed. In these cases, the national authorities may decide to suspend, not issue or merely not enforce a return order, without, however, granting residence rights. The number of persons who are not removed but typically lack regular status is believed to be considerable, although no reliable estimates exist.

The EU Return Directive contains only limited guidance on the fundamental rights guarantees for persons who are **not removed** (Article 14) and does not provide for any mechanism that could put an end to situations of legal limbo deriving from protracted non-removability. EU Member States have chosen different responses in acknowledging non-removed persons, ranging from granting (temporary) residence permits to formally or de facto tolerating their presence to not certifying their non-removal at all. In most cases, any residence title, if awarded, depends on the reasons for not removing the third-country national and is subject to different conditions in the individual EU Member States. These conditions become directly relevant to fundamental rights issues as the degree of access to rights is often determined by the legal residence status obtained.

While states have a right to control immigration, certain **enforcement measures**, such as reporting obligations, data sharing, or arresting migrants in an irregular situation in front of schools, have a negative and often disproportionate impact on the effective exercise of their fundamental rights. Similarly, linking workplace inspections with checks on immigration status creates an environment which is not conducive to identifying labour exploitation or abuse as migrants in an irregular situation are discouraged from reporting on or testifying to such conditions. It is often the atmosphere of fear generated by these enforcement measures that prevents migrants in an irregular situation from claiming their fundamental rights or seeking redress when they are violated. Public institutions may be obliged to report migrants in an irregular situation in EU Member States where irregular entry or stay constitutes a crime. Uncertainty often prevails among authorities as well as migrants. This prevents migrants in an irregular situation from seeking support.

Migrant workers in an irregular situation are at high risk of exploitation in the **labour market**. Although the labour rights of migrants in an irregular situation are recognised in human rights and labour law instruments at the international level and, in part, through the Employers Sanctions Directive at the EU level, not all EU Member States recognise the right to claim back pay or compensation for accidents in

the workplace. With respect to back pay, however, remaining gaps should have been addressed by now given the 20 July 2011 transposition deadline for the Employers Sanctions Directive. Practical obstacles such as proving a work relationship, its duration or the identity of the employer, make it difficult to take advantage of these rights. Migrants often avoid seeking judicial redress when there is a personal relationship between an employer and an employee, considering it inappropriate or avoiding it fear of reprisal. A common strategy is to switch employers and not report discriminatory or abusive treatment. Fear of detection, low awareness of rights and limited or no security of residence are additional factors that increase dependency on employers and discourage recourse to courts.

The support and advocacy work of trade unions and non-governmental organisations (NGOs) is vital to obtaining justice in employment-related disputes. Despite different positions vis-à-vis migrants in an irregular situation and the migrants' tendency to concentrate in economic sectors where there are fewer unions, there has been an increasing trend to involve such migrants in union activities.

The **housing** situation of migrants in an irregular situation is often precarious and insecure. Migrants usually rely on family, friends or others in their social network to find accommodation. This is typically short-term housing, often in overcrowded, insecure dwellings, and sometimes without access to the most basic services such as running water, electricity and heating. Lending support to migrants in an irregular situation is discouraged and can be penalised as facilitation of irregular stay under EU law (Facilitation Directive), although the directive must be implemented in line with the Charter of Fundamental Rights. Registration with local authorities, obligations to notify the police of the presence of foreigners or the need to provide identity documents are obstacles that further restrict access to accommodation in practice. This vulnerability is often exploited by high rents demanded for accommodation that is sometimes of inadequate quality. Homeless shelters are usually the last resort and only a short-term option due to reporting obligations, requirements for a residence permit or source of income, access restrictions and/or limited availability of space.

Suspension of removal does not necessarily lead to granting housing or other forms of social assistance. In some EU Member States, non-removed persons may have access to public accommodation centres but have no right to stay. In others, the situation is reversed, while in yet others, neither the stay of non-removed persons is authorised nor accommodation provided. Similarly, social assistance may or may not be obtainable, or may be restricted to residents of accommodation centres. This is particularly problematic as persons whose removal cannot be carried out – including where this is through no fault of their own – are often excluded from the regular labour market and have no source of income. The lack of knowledge of the rights granted by law to non-removed migrants on the part of both the individuals concerned and service providers renders access to basic social assistance by non-removed persons difficult.

With respect to **health**, the fundamental right to healthcare for migrants in an irregular situation is unevenly protected in the EU Member States. Healthcare entitlements range from a restriction to fee-paying emergency treatment in some EU Member States to, in others, access to the health system as full healthcare recipients on an equal footing with nationals. Common obstacles to implementing these rights include, among others, unawareness of entitlements by migrants as well as healthcare providers, and data exchanges between service providers and immigration enforcement authorities.

The situation of persons who are not removed is generally better although highly diverse with regard to the scope and possibilities for cost coverage of medical treatment. The right to maternity care and child healthcare is unequally provided for and subject to different conditions. The legal situation is often unclear, creating uncertainty for health staff and prompting discretionary responses.

The right to **education** for irregular migrant children remains unclear in many countries. In five EU Member States, only some children in an irregular situation are entitled to access state schools free of charge. In practice there are still major uncertainties among school administrations, teachers, parents, and NGOs as well as among national and local authorities as to whether and to what extent this right applies to irregular migrant children. Documentation requirements for enrolment or receipt of diplomas, reporting obligations, enforcement practices and the allocation of financial resources to schools based on the number of official residents rather than effective population numbers, further risk undermining the right to education. The higher the levels of education and the older the child, the more restricted access usually becomes.

Access to education of persons who are not removed is generally less controversial although the scope and preconditions differ among EU Member States, and often the same practical obstacles apply as to undetected migrants in an irregular situation. Humanitarian approaches and civil engagement by school principals, NGOs, parents' associations or data

protection activists have helped to enable access to schools for migrant children in an irregular situation.

The presence of irregular migration in the EU has an important **family** dimension. Factors that often lead family members to seek reunification outside of the legal framework are: a narrow definition of 'family', resources required to apply for reunification, requirements for sponsors to show stable and regular resources or to meet accommodation requirements and the inability to comply with requirements for family reunification from abroad. Complying with a return decision and/or the requirement to apply for reunification from abroad, however, may further lead authorities to question whether the dispersed family members still have active family ties, thus undermining the possibility of family reunification.

Irregular family members of legal residents may be able to legalise their stay to different degrees in EU Member States, e.g. if granted temporary residence permits or in the case of suspension of removal. Thus considerable uncertainty remains about the possibilities of obtaining legal status. Blanket restrictions on access to marriage on grounds of irregular stay are problematic and disproportionate, but they still can be found in some EU Member States.

Opinions

The European Union Agency for Fundamental Rights (FRA) has formulated the following opinions based on this report's findings and comparative analysis.

Migrants in return procedures who are not removed

Neither the Return Directive, nor other EU policy documents provide for a mechanism to put an end to situations of legal limbo that derive from protracted situations of non-removability. The safeguards set forth in the Return Directive (Article 14(1)) for non-removed persons do not cover all rights and apply only if removal is formally postponed.

European Union (EU) institutions and Member States should pay more attention to the situation of migrants in an irregular situation who have been given a return decision but who have not been removed. Mechanisms should be set up either at Union or Member State level to avoid a situation where persons who are not removed remain in legal limbo for many years.

Following the evaluation of the Return Directive planned for 2014, the European Commission should propose amendments to the directive to ensure that the basic rights of persons who are not removed are respected.

EU Member States should issue a certification of postponement of removal as required by the Return Directive. It is an important tool to protect non-removed persons and to facilitate their access to rights. This should also be done when removal is only postponed de facto.

For more information, see Chapter 2 page 27.

Detection policies and their impact on fundamental rights

The Return Directive expressly recognises the principle of proportionality in Recital 13. This means that the obligation to issue return decisions to illegally staying third-country nationals under Article 6 of the Return Directive cannot be used as a justification for excessive checks or scrutiny, which have the effect of discouraging migrants from accessing basic rights.

EU Member States are, therefore, encouraged to give due importance to the impact on the fundamental rights of migrants when planning and evaluating detection tactics and operations.

To facilitate this, consideration should be given to developing guidance for police officers, either in the form of a handbook or a list of 'dos and don'ts'. Such a tool should discourage, in particular, apprehensions from or near schools, medical facilities, counselling centres, churches or other institutions offering essential services to migrants. It should also discourage data exchange between these institutions and immigration law enforcement bodies as such exchanges can disproportionately hinder migrants' access to basic rights or raise privacy and data protection concerns.

For more information, see Chapter 3 page 39.

Possibility to lodge complaints against abusive or exploitative employers

Access to justice is a crucial right since the enforcement of all other fundamental rights hinges upon it in the event of a breach. Trade unions, labour inspectors, civil society organisations, national human rights institutions and equality bodies play a vital role in making justice mechanisms more accessible. Practical barriers to access justice should be removed through the following actions by Member States:

Building on the Employers Sanctions Directive, establish effective mechanisms to allow migrant workers in an irregular situation to lodge complaints against abusive employers.

Ensuring, where possible, that any personal data revealing migrants' identity or whereabouts are not shared with immigration enforcement bodies when migrants seek redress against abusive employers.

Provide the necessary financial or other appropriate support to trade unions, equality bodies and NGOs, so that they can effectively assist migrants in an irregular situation in seeking justice, including through different forms of arbitration.

For more information, see Chapter 4 page 47.

The impact of provisions which penalise facilitation of irregular stay

Measures to penalise facilitation of irregular stay taken on the basis of the Facilitation Directive may discourage persons and organisations from providing assistance to migrants in an irregular situation and bar them from renting housing in the private market.

This can force them into accepting precarious and insecure accommodation, sometimes at exploitative conditions.

The Facilitation Directive should be revised, making it compulsory for EU Member States to prohibit the penalisation of actions committed with a humanitarian aim. The wording of the directive should be revised so as to exclude the punishment of persons who rent accommodation to migrants in an irregular situation, unless this is done for the sole purpose of preventing removal.

Until such a rewording has taken place, EU Member States should, in order to reduce the risk of exploitative or abusive situations, apply the directive in a way that does not curtail the possibility of migrants in an irregular situation from renting housing on the free market.

For more information see, Chapter 5 page 59.

Housing and social assistance for destitute migrants in return proceedings

Minimum standards of treatment with regards to housing and social assistance are not included in the Return Directive, except possibly in an indirect way for vulnerable persons.

Current safeguards set forth in the Return Directive as regards housing and social assistance for destitute migrants or persons who belong to vulnerable groups should be strengthened, taking into account the duty to respect human dignity set forth in Article 1 of the EU Charter of Fundamental Rights as well as good practices in EU Member States.

For more information see Chapter 5.3 page 65.

Access to healthcare

The fundamental right to healthcare for migrants in an irregular situation is unevenly protected in the EU Member States. The fear of being detected, based on the real or perceived exchange of data between healthcare providers and immigration enforcement, means that irregular migrants delay seeking healthcare until an emergency arises, delays which have negative consequences both for the health of the individual as well as for that of the society at large.

Migrants in an irregular situation should, as a minimum, be entitled by law to access necessary healthcare services. Such healthcare should not be limited to emergency care only, but should also include other forms of necessary healthcare, such as the possibility to see a general practitioner or receive necessary medicines. The same rules for payment of fees and exemption from payment should apply to migrants in an irregular situation as to nationals.

EU Member States should disconnect healthcare from immigration-control policies. They should not impose a duty to report migrants in an irregular situation upon healthcare providers or authorities in charge of healthcare administration. The absence of this duty to report should be clearly communicated to them.

For more information, see Chapter 6 page 71.

Access to education

Legal provisions should explicitly address the right to education of irregular migrant children, thereby safeguarding their access to education. In addition, EU Member States should take the following steps to remove practical obstacles to accessing primary and secondary education:

Instruct school authorities not to require documentation for school enrolment which migrants in an irregular situation cannot procure.

Prohibit the reporting of irregular migrant children to immigration law enforcement bodies and the exchange of information with such bodies.

Implement information campaigns in cooperation with civil society to raise more awareness amongst migrants and educational authorities about entitlements to education of migrant children in an irregular situation.

For more information, see Chapter 7 page 85.

Family life

There are many reasons why individuals join their family members outside established procedures. Entry bans may present an obstacle to or delay family reunifications. Efforts to forestall marriages of convenience should not compromise the right to marry and establish a family.

More research should be done to determine the key factors (e.g. procedural, technical or resource-related obstacles) contributing to the phenomenon of spontaneous family reunifications outside established procedures, as irregular status is one of the factors that heightens the risk of fundamental rights violations. Such research should build on the findings of this report.

The FRA considers it important to monitor the effects of an EU-wide entry-ban system on the exercise of the right to family reunification and to include a first evaluation in the report on the implementation of the Return Directive planned for 2014. Such a report should also evaluate if the consultation process between the Member State issuing a residence permit and the one banning entry leads to unnecessary delays.

Immigration-control measures should not result in the application by Member States of disproportionate restrictions on the right to marry and establish a family, such as blanket prohibitions on marrying or the imposition of restrictions which go beyond an assessment of the genuineness of the relationship.

For more information, see Chapter 8 page 95.

Introduction

Aim of the report

Most fundamental rights apply to *all* persons irrespective of their migration status. Nevertheless, migrants in an irregular situation often face difficulties in enjoying their rights. This can be for a variety of reasons, such as restrictive national legal provisions, practical or bureaucratic obstacles or limited rights awareness.

An EU-funded project produced minimum and maximum estimates of the size of the irregular migrant population for 2008. The aggregate estimate presented for the 27 EU Member States ranged from 1.9 to 3.8 million persons.[1] Although the calculation of this wide range relied on assumptions which were only in part empirically founded, implausibly high and low numbers were excluded. Annex 1 provides a country overview of the estimates presented.

The EU irregular migrant population also has an important gender and family component. Sex and age ratios among migrants found present irregularly provide a rough indicator: in 2010, women averaged 18% of the migrants apprehended in the EU 27. As women are typically less aggressively targeted than men by immigration law enforcement, their actual proportion is likely to be even higher. In the 25 EU Member States for which figures were available, 41,455 of those apprehended were children.[2] This figure included 16,250 children below the age of 14 and 25,205 between the ages of 14 and 17.

The phenomenon of irregular migration is likely to persist, as opportunities for legal migration remain limited and migration-control measures will not stop irregular flows entirely. Many migrants enter with a visa and their status subsequently becomes irregular, sometimes as a result of complex procedures or arbitrary acts by private individuals.[3] Hence, it is reasonable to assume that in the years to come a considerable number of migrants in an irregular situation will continue to live in the EU.

Against this background, the FRA Management Board requested the FRA to carry out a study in 2009 and 2010 on the situation of irregular migrants in the EU. This comparative report is one of the main outcomes of this project. It examines the situation of migrants in an irregular situation from a fundamental rights perspective, independently of broader considerations relating to migration management. Although in recent years a number of NGO reports have been published focusing on specific fundamental rights with respect to migrants in an irregular situation in Europe,[4] this is the first report that covers a range of rights for all 27 EU Member States.

1 Clandestino project 'Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe', European Commission, DG Research, Sixth Framework Programme, Priority 8: Scientific Support to Policies, more information available at: http://clandestino.eliamep.gr; http://irregular-migration.hwwi.net (all hyperlinks accessed on 15 October 2011).

2 Eurostat (2011) *Enforcement of Immigration Legislation Statistics*, extracted on 7 July 2011, and own calculations.

3 See as an illustration the example in Greece, quote in European Union Agency for Fundamental Rights (FRA) (2011) *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner*, Vienna, FRA, p. 43. In this case, employers at some point refused to pay or could not afford the necessary social insurance contributions for migrants, who in turn could not renew their residence permits.

4 See the various publications by the Platform for International Cooperation on Undocumented Migrants (PICUM), available at: www.picum.org/en/publications/reports; Jesuit Refugee Service (JRS) (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, available at: www.jrseurope.org/news_releases/ANDES%20report2010.htm; as well as the research recently undertaken in the field of healthcare cited in chapter 6.

The objective of this report is to provide an overview of the extent to which the fundamental rights of migrants in an irregular situation are legally protected within the EU. It describes the related legislation and policies of the 27 EU Member States. Additionally, it illustrates practical challenges which can become obstacles to the enjoyment of entitlements existing under national law.

The report focuses on a selection of civil, social and economic rights which have been grouped in six thematic areas. It deals first with the fundamental rights implication of immigration law enforcement before examining workers' rights, access to housing and social assistance, healthcare and education. The last chapter is devoted to family life. The FRA selected these areas in order to cover those aspects that are considered particularly important to migrants' everyday lives. An analysis of the applicable international and European human rights framework as well as relevant EU law sets the foundation for the comparative analysis of the six thematic areas described above.

Against the background of EU law, the report makes a broad distinction between migrants who are in return or expulsion procedures but who have not yet been removed and those who live undetected in the Union. Basic standards of treatment are set forth in Union law for persons who have received a return decision but have not yet been removed, as they have been given a time to depart voluntarily or their removal has been postponed. A specific chapter is, therefore, devoted to migrants in an irregular situation who are not removed.

Undetected migrants are primarily the subject of policies and measures developed by the EU for the purpose of combating irregular migration. Directly or indirectly, these policies often substantially affect the rights of migrants in an irregular situation. In some cases Union law expressly protects such rights. This is the case, for example, with the right to claim unpaid wages in the Employers Sanctions Directive. Moreover, migrants in an irregular situation are not excluded from measures taken by the Union in other fields, such as, for example, in relation to public health or workers' health and safety.

Nevertheless, in line with the respective EU competences, the coverage by Union law of the rights of undetected migrants depends on the thematic area examined. For these areas the references made to the EU Charter of Fundamental Rights throughout the text should be understood as relating only to those aspects which are covered by Union law. In all other cases, fundamental rights continue to be guaranteed at the national level by national constitutional systems and by applicable international human rights law and labour law provisions.

Defining migrants in an irregular situation

Broadly speaking this report uses 'migrants in an irregular situation' as synonymous with the term 'illegally staying third-country nationals' used in Article 3 of the Return Directive:[5]

> *"'[I]llegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State;[...]"*

This report does not include EU citizens; it covers only third-country nationals. Among the latter, the following groups are not considered to be migrants in an irregular situation in the sense of this report: asylum seekers and persons granted refugee status or subsidiary protection; persons working in breach of their visa or residence permit. These persons are not included, as they (still) have a right to stay in an EU Member State. In addition, persons residing with forged papers are not dealt with in this report, as in practice they are treated as if they had a residence permit, at least until they are discovered. Only at that point would they fall within the scope of this report.

The report distinguishes between two broad subgroups of migrants in an irregular situation: the first group includes migrants without any residence status who are **undetected**. The second group encompasses those migrants in an irregular situation **who are known** to the immigration authorities, as they have been issued an expulsion or return decision, which has not however been implemented, typically for humanitarian or practical reasons. In those cases in which these persons are not granted a residence permit, they remain in the country with no or only a weak recognition of their right to stay. This second group is referred to as 'non-removed persons'.

While this report provides an overview of the rights of migrants in an irregular situation in general, some parts of the study, notably the one on adequate standards of living, focus primarily on migrants in an irregular situation who are not removed. A systematic coverage of the rights of non-removed persons in the 27 EU Member States has not been possible in this report as their legal situation depends on the type of authorisation to stay that is granted. Often,

5 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98.

however, their legal situation is not different from that of undetected migrants in an irregular situation.

Similarly, certain vulnerable categories of third-country nationals enjoying special protection under EU and international law, such as victims of human trafficking and unaccompanied minors, fall outside the scope of this study.[6]

Finally, the themes covered in this report are primarily analysed from the perspective of migrants who remain in an irregular situation over a protracted period of time. For example, migrants who are in voluntary return procedures (as they have been given a short time to depart on their own before their removal is effected by force) may face specific fundamental rights challenges which are not covered in this report.

Methodology of the study

The report is based on a combination of desk research and primary data collection through questionnaires carried out in the framework of this project and through qualitative interviews. More specifically, the research included the following three parts:

Desk research of existing secondary sources, such as European Migration Network studies and publicly available ad-hoc queries,[7] Platform for International Cooperation on Undocumented Migrants (PICUM) monthly and quarterly newsletters from between early 2007 and mid 2011[8] as well as data and information collected by the FRA through previous projects[9] and a review of relevant national legislative provisions.

Three sets of structured questionnaires to collect comparable information on access to fundamental rights across all EU Member States and on other issues, such as estimates of irregular migrant population or reporting obligations not available from existing sources. The questionnaires were distributed to:

- National authorities, mainly disseminated to National Contact Points within the European Migration Network. Altogether, responses from 24 of the 27 EU Member States were received.[10]
- Local authorities, disseminated via the Eurocities and CLIP networks,[11] as well as among individual city officials known to the researchers involved in the project. However, this questionnaire resulted in just 13 responses[12] and could be used only to a limited extent in the analysis.
- Civil society organisations (with an abridged version also specifically disseminated among trade unions), disseminated to NGOs via PICUM and to national trade union federations via the European Trade Union Congress (ETUC).[13] Overall some 133 responses were received.[14] While in total a high response rate was achieved for the civil society questionnaire, responses were spread unevenly across EU Member States. Nevertheless, the nature of the survey – essentially one of expert opinions – means that the lack of statistical representativeness does not necessarily reduce the validity of the information collected. Among all respondents, however, differences in the level of expertise, political bias as a result of the contested nature of the topic and variations of relevant practices within a country all mean that the responses need to be interpreted with caution.

Empirical fieldwork-based research on two themes (domestic work and healthcare) conducted in 10 EU Member States, namely Belgium, France, Germany, Greece, Hungary, Ireland, Italy, Poland, Spain and Sweden. While the results of this research have been published in two separate thematic reports, the present report also draws from them where appropriate.

The first field research included 118 in-depth interviews with migrant workers in an irregular situation employed in the domestic work sector as well as with NGOs and trade unions working with them.

The second focused on access to healthcare and involved 221 semi-structured qualitative interviews with migrants in an irregular situation, public authorities, civil society representatives and health staff.

6 See on these issues the reports by the FRA (2009) *Child Trafficking in the EU – Challenges, perspectives and good practices*, Luxembourg, Publications Office of the European Union (Publications Office); and FRA (2010) *Separated, asylum-seeking children in European Union Member States – comparative report*, Luxembourg, Publications office.

7 See http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?entryTitle=4.%20EMN%20Ad-Hoc%20Queries.

8 PICUM newsletters are available at: http://picum.org.

9 Country-level information collected by the FRA in 2009 from its Fralex network in the context of the project on the rights of irregular immigrants in voluntary and involuntary return procedures was systematically reviewed. In addition, annual reports from FRA's Raxen network were also reviewed.

10 Completed questionnaires were received from all EU Member States except Luxembourg, Malta and Romania.

11 Eurocities, available at: www.eurocities.eu/main.php; CLIP stands for 'European network of cities for local integration policies for migrants', available at: www.eurofound.europa.eu/areas/populationandsociety/clip.htm.

12 Only 13 responses covering seven EU Member States were received.

13 Trade unions received questionnaires relating only to employment and workers' rights.

14 This represents the total number of valid responses minus incomplete responses and double entries.

Wherever possible, information from questionnaires was cross-checked with other sources, and in particular with national legislation. There is, however, often limited case law providing for a clear interpretation on the applicability of relevant legal provisions to migrants in an irregular situation. Different legal opinions may co-exist, while practices may vary from one place to another. Therefore, the questionnaires did not only ask for national legislative provisions, but also aimed at collecting information on enjoyment of rights in practice. In addition, the survey of local authorities and civil society stakeholders also served to identify contradictory interpretations of national policies, and, as such, also of rights awareness among the two concerned stakeholder groups. Finally, some information gaps remain, as responses from all EU Member State could not be obtained for all questions.

Data collection for this study was conducted in 2010 by a consortium led by the International Centre for Migration Policy Development (ICMPD) and which included the Centre for European Policy Studies (CEPS), the Hellenic Foundation for European and Foreign Policy (Eliamep) and the Platform for International Cooperation on Undocumented Migrants (PICUM). Initial reports were submitted to the FRA by ICMPD (Alina Cibea, Christina Hollomey, Albert Kraler), CEPS (Sergio Carrera, Massimo Merlino), Eliamep (Thanos Maroukis), and individual experts from other institutions (Franck Düvell, Dita Vogel, Bastian Vollmer) contracted by the consortium. These reports were reviewed and consolidated by the FRA. The revised draft comparative report was shared for comments with the National Contact Points of the European Migration Network, selected international organisations as well as through the FRA National Liaison Officers with relevant authorities in the 27 EU Member States. Comments were received from the Office of the High Commissioner for Human Rights, the European Commission and from 17 Member States, partly through the National Contact Points of the European Migration Network which further helped in improving the report's accuracy.

1 Fundamental rights framework

The need to protect the fundamental rights of migrants in an irregular situation has been repeatedly underlined by several international and regional organisations as well as non-state actors. For example, in 2006 the Parliamentary Assembly of the Council of Europe (PACE) called attention to the vulnerability of irregular migrants and pointed to the need for a number of minimum social and political rights, on the one hand, and economic and social rights on the other, to be granted to irregular migrants in Europe.[15] More recently, on 14 October 2010, intergovernmental bodies came together to issue a call to strengthen their protection framework.[16]

This chapter provides an overview of the fundamental and human rights framework applicable to migrants in an irregular situation, focusing on those rights which are the subject of this report. It is structured into three parts. The first part reviews key United Nations (UN) human rights and International Labour Organization (ILO) instruments. The second part focuses on the human rights framework developed within the system of the Council of Europe, essentially the European Convention of Human Rights (ECHR) and the European Social Charter (ESC). The third part deals with community law.

1.1 International human rights law

The international bill of rights law comprises the Universal Declaration of Human Rights (UDHR),[17] the International Covenant on Civil and Political Rights (ICCPR)[18] and the International Covenant on Social, Economic and Cultural Rights (ICESCR).[19] The Office of the High Commissioner has defined nine core international human rights treaties, some of which have optional protocols dealing with specific concerns.[20] A set of instruments adopted in the context of the ILO provides for international standards in the field of labour law.

International human rights norms are generally applicable to every person as a consequence of being human, irrespective of their migration status. Therefore, as a general rule, human rights apply

15 Council of Europe, Parliamentary Assembly (PACE) (2006) Resolution 1509 (2006) Human Rights of Irregular Migrants, 27 June 2006.

16 Among the intergovernmental organisations in question were the World Bank, the UN High Commissioner for Refugees, the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the UN Development Programme and the International Labour Organization. Global Migration Group (GMG) (2010) *Statement of the Global Migration Group on the Human Rights of Migrants in an Irregular Situation*, 30 September 2010, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E. The statement was initiated by the Office of the High Commissioner for Human Rights (OHCHR) while it chaired the GMG. Protecting and promoting the human rights of migrants in an irregular situation is a priority of OHCHR. See OHCHR (2009) *High Commissioner's Strategic Management Plan 2010/2011*, Geneva, OHCHR, in particular p. 31.

17 United Nations (UN), Universal Declaration of Human Rights (UDHR), Article 3, 10 December 1948, 217 A (III).

18 UN, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

19 UN, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

20 The following nine conventions constitute 'Core Human Rights Instruments' according to the OHCHR: International Convention on the Elimination of All Forms of Racial Discrimination (1965), ICCPR (1966), ICESCR (1966), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), International Convention for the Protection of All Persons from Enforced Disappearance (2006), Convention on the Rights of Persons with Disabilities (2006). List available at: www2.ohchr.org/english/law/.

to migrants in an irregular situation, unless they are expressly excluded from the application of the provision. Similarly, core ILO instruments apply to all migrant workers without discrimination.

Human rights standards which are binding for EU Member States can also be relevant for the interpretation of EU law. For instance, the Court of Justice of the European Union (CJEU) has made reference to the European Social Charter,[21] the International Covenant on Civil and Political Rights (ICCPR)[22] and ILO Conventions,[23] which evidences the practice of interpreting EU law in conformity with recognised international fundamental rights standards. When identifying general principles of law, the Court "draws inspiration from [...] the guidelines supplied by international treaties for protection of human rights on which the Member States have collaborated or to which they are signatories".[24]

It is thus important to provide an overview of the state of ratification of those instruments which are most relevant for the protection of migrants in an irregular situation. As Table 1 shows, all EU Member States have ratified the main UN instruments,[25] except for the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), which none have acceded to. Ratification of ILO instruments reviewed in this report differs by EU Member State.

Table 1: State parties to key UN and ILO instruments, EU27

Country	ICERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ICRMW	ILO 87	ILO 143
Austria	✓	(✓)	✓	(✓)	✓	✓		✓	
Belgium	✓	✓	(✓)	✓	✓	✓		✓	
Bulgaria	✓	✓	✓	✓	✓	✓		✓	
Cyprus	✓	✓	✓	✓	✓	✓		✓	✓
Czech Republic	✓	✓	✓	✓	✓	✓		✓	
Denmark	✓	✓	✓	✓	✓	✓		✓	
Estonia	✓	✓	✓	✓	✓	✓		✓	
Finland	✓	✓	✓	✓	✓	✓		✓	
France	✓	(✓)	(✓)	(✓)	✓	✓		✓	
Germany	✓	✓	✓	✓	✓	✓		✓	
Greece	✓	✓	✓	✓	✓	✓		✓	
Hungary	✓	✓	✓	✓	✓	✓		✓	
Ireland	✓	✓	✓	✓	✓	✓		✓	
Italy	✓	✓	✓	✓	✓	✓		✓	✓
Latvia	✓	✓	✓	✓	✓	✓		✓	
Lithuania	✓	✓	✓	✓	✓	✓		✓	
Luxembourg	✓	✓	✓	✓	✓	✓		✓	
Malta	✓	(✓)	✓	✓	✓	✓		✓	
Netherlands	✓	✓	✓	✓	✓	✓		✓	

21 CJEU, C-149/77, *Defrenne v. Sabena (No. 3)*, 15 June 1978.
22 CJEU, C-374/87, *Orkem v. Commission*, 18 October 1989; C-249/96, *Grant v. South-West Trains Ltd.*, 17 February 1998.
23 CJEU, C-41/90, *Höfner and Elser v. Macrotron*, 23 April 1991; C-158/91, *Levy*, 2 August 1993; C-197/96, *Commission v. France*, 16 January 1997.
24 CJEU, Opinion of the Court of 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, European Court Reports 1996.
25 See Tables 4, 6, 7 and 9 for reservations/declarations related to the specific provisions of these conventions which affect migrants in an irregular situation.

Country	ICERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ICRMW	ILO 87	ILO 143
Poland	✔	✔	✔	✔	✔	✔		✔	
Portugal	✔	✔	✔	✔	✔	✔		✔	✔
Romania	✔	✔	✔	✔	✔	✔		✔	
Slovakia	✔	✔	✔	✔	✔	✔		✔	
Slovenia	✔	✔	✔	✔	✔	✔		✔	✔
Spain	✔	✔	✔	✔	✔	✔		✔	
Sweden	✔	✔	✔	✔	✔	✔		✔	✔
United Kingdom	✔	(✔)	✔	✔	✔	✔		✔	

Notes: *ICERD - International Convention on the Elimination of All Forms of Racial Discrimination; ICCPR - International Covenant on Civil and Political Rights; ICESCR - International Covenant on Economic, Social and Cultural Rights; CEDAW - Convention on the Elimination of All Forms of Discrimination against Women; CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CRC - Convention on the Rights of the Child; ICRMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; ILO 87 - Freedom of Association and Protection of the Right to Organise Convention; ILO 143 - Migrant Workers Convention.*

The (parentheses) indicate reservations and de facto reservations (declarations) that may restrict the rights of migrants in an irregular situation.

An underlined check means that individual complaint mechanisms are in force. For the ICESCR, of the 10 required ratifications of the Optional Protocol, only three have been submitted to date. Spain is the only EU Member State that has ratified the Protocol. An additional eight EU Member States have signed (Belgium, Finland, Italy, Luxembourg, the Netherlands, Portugal, Slovakia and Slovenia). Individual complaint mechanisms are not in place for the CRC and are not envisaged for ILO conventions.

Source: *FRA, 2011*

Article 2 of the UDHR clearly stipulates that everyone is entitled to the rights and freedoms set forth in the Declaration "**without distinction of any kind**, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth **"or other status**" (bold added). The UDHR has been accepted by all EU Member States, but is not a legally binding treaty.

The two Covenants (ICCPR and ICESCR) have been ratified by all EU Member States and are legally binding. The Covenants are generally applicable to all except when otherwise specified. The ICCPR stipulates that there are rights which only apply to citizens, such as the right to vote in Article 25, and rights which only apply to lawfully residing aliens.[26] By contrast, the text of the ICESCR does not make any distinction on the basis of nationality or legal status and grants rights to all.[27] However, the interpretation of the personal scope of social rights included in the Covenant (social security, social services, medical care and health protection) has proven controversial. In 1985, the UN Declaration on *The Human Rights of Individuals who are not Nationals of the Country in which They Live* limited the application of social rights only to migrants **lawfully** residing in the territory of the state. However, the Committee on Economic, Social and Cultural Rights (CESCR) later specified in three General Comments that migrants in an irregular situation have a right to healthcare.[28] Taking note of Article 2 of the CRC, it also confirmed that the right to education extends to all persons of school age residing in the territory.[29]

Thematic human rights treaties, which are addressed to specific groups or fundamental human rights, are also relevant for the protection of migrants in an irregular situation. While this may not always be evident from the text of the conventions, clarifications in this regard have been delivered by the committees of

26 Such as the right of movement and to choose a residence (Article 12) and the limits on the expulsion of aliens (Article 13). See, for more details, UN Human Rights Committee (HRC) *CCPR General Comment No. 15: The position of aliens under the Covenant*, 11 April 1986.

27 Article 3(2) of the Covenant provides for the possibility of introducing limitations for non-nationals, but this provision only applies to 'developing countries' and is thus not relevant for EU Member States.

28 See the UN monitoring body of the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) (2000) *General Comment No. 14: The right to the highest attainable standard of health (Article 12)*, 11 August 2000, paragraph 34; CESCR (2008) *General Comment No. 19: The right to social security (Article 9)*, 4 February 2008, paragraph 37; CESCR (2009) *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2))*, 10 June 2009, of CESCR in relation to non-discrimination, which explicitly prohibits discrimination in Covenant rights on the ground of nationality regardless of legal status and documentation, paragraph 30. General comments contain the interpretation of the content of the human rights provisions by the Committee.

29 See CESCR (1999) *General Comment No. 13: The right to education (Article 13)*, 8 December 1999, paragraph 34.

independent experts set up by the various instruments to monitor their implementation.[30]

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[31] calls on state parties to undertake a policy of eliminating racial discrimination. The ICERD allows for different treatment between citizens and non-citizens (Article 1(2)). Guarantees against racial discrimination also apply, however, to non-citizens regardless of their immigration status. [32]

Likewise, the Committee on the Elimination of All Forms of Discrimination against Women has interpreted the CEDAW as granting basic human rights, such as access to legal remedies and justice and humane treatment whilst in detention, to undocumented female migrant workers.[33]

The Convention on the Rights of the Child (CRC)[34] also has broad scope. In Article 2 it states that its provisions apply to every child in a signatory state: **"without discrimination of any kind** irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or **other status"** (bold added). General Comment No. 6 of the Committee on the Rights of the Child further specified that the rights enshrined in the CRC, if not explicitly stated otherwise, apply to all children irrespective of their status.[35]

Although the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) has not yet been ratified by any EU Member State,[36] most of the rights enumerated in the Convention restate the application of rights already spelled out in the ICCPR, the ICESCR and the other core human rights treaties ratified by all EU Member States.[37]

Finally, certain instruments of the ILO are applicable to all migrant workers, regardless of nationality or legal status. Eight ILO Conventions have been identified by the ILO's governing body as fundamental to the rights of people at work and hence applicable to all workers.[38] These include, for example, ILO Convention No. 87 on freedom of association and protection of the right to organise. The Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143)[39] contains specific provisions on migrant workers in an irregular situation. In addition, the Convention on Decent Work for Domestic Workers adopted in 2011 applies to all domestic workers (Article 2).

Although not legally binding, the rights of migrants in an irregular situation have also featured within the conclusions and recommendations directed at EU Member States during the Universal Periodic Review (UPR) process. The UPR is a human rights mechanism launched in 2008 by the UN's Human Rights Council which reviews the human rights records of every UN Member State once every four years. Each state can declare what actions it has taken to improve its domestic human rights situation. Other states can provide non-binding recommendations. Typical recommendations directed at EU Member States

30 For a list of the core international human rights instruments and their monitoring bodies see the web page of the OHCHR: www2.ohchr.org/english/law/.

31 For a more detailed overview of ICERD, see Thornberry, P. (2005) 'Confronting Racial Discrimination: A CERD Perspective', *Human Rights Law Review*, Vol. 5, No. 2, pp. 239-69.

32 UN, Committee on the Elimination of Racial Discrimination (CERD) (2004) *General Comment No. 30: Discrimination against non-citizens*, 1 October 2004, paragraph 7.

33 UN, Committee on the Elimination of Discrimination against Women (2008) *General Recommendation No. 26 on women migrant workers*, 5 December 2008. While paragraph 6 sets forth a number of rights that are applicable to women migrant workers in general, paragraph 26 (l) lists the responsibilities of host countries towards undocumented women migrant workers. See also paragraph 26(c)(i) on legal remedies and complaints mechanisms protecting them from discrimination, exploitation and abuse as well as paragraph 26(i), according to which victims of abuse must be provided with relevant emergency and social services, regardless of their immigration status. See on this issue also Kapuy, K. (2009) 'European and International Law in Relation to the Social Security of Irregular Migrant Workers', in Pieters D. and Schoukens, P. (eds.), *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford, Intersentia, pp. 124-25.

34 UN, Convention on the Rights of the Child, 20 November 1989.

35 UN, Committee on the Rights of the Child (2005) *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005.

36 A UNESCO-commissioned report (see footnote 37), based on interviews with migration stakeholders, examines obstacles for ratification of the ICRMW in seven European countries, which include misconceptions of the substance of certain provisions. See also OHCHR Europe Regional Office (2011) *Migrant Workers' Rights in Europe*, Brussels, OHCHR – Europe Regional Office, available at: http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf.

37 See MacDonald, E. and Cholewinski, R. (2007) *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, Paris, UNESCO, p. 23; Weissbrodt, D. and Meili, S. (2010) 'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?', *Refugee Survey Quarterly*, Vol. 28(4), p. 43.

38 ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182 covering freedom of association and collective bargaining, child labour, forced and compulsory labour, discrimination in respect to employment and occupation. All EU Member States have ratified them. The 1998 ILO Declaration on Fundamental Principles and Rights at Work stresses in Article 2 that all ILO Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the ILO to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning fundamental rights.

39 Migrant Workers (Supplementary Provisions) Convention (No. 143), 1975 ratified by five EU Member States. The applicability of Article 1 of Convention No. 143 to migrants in an irregular situation has been confirmed by the Committee of Experts, see ILO Conference 87th Session 1999, 'Global Survey on Migrant Workers' paragraph 297, available at: www.ilo.org/public/libdoc/ilo/P/09661/09661(1999-87_1B).pdf.

include calls to accede to the ICRMW and to protect the rights of all migrants, regardless of their status.[40] Other recommendations are explicitly focused on migrants in an irregular situation, such as those calling on EU Member States to guarantee them access to basic social services or to take appropriate legislative measures to decriminalise irregular entry and stay.[41]

1.2 The Council of Europe framework

The Council of Europe oversees a comprehensive regional human rights framework with approximately 200 legally binding treaties or conventions. Two core human rights instruments of the Council of Europe are the ECHR and the revised ESC. Read in light of the resulting case law, both instruments are relevant for the protection of migrants in an irregular situation.

Unless otherwise specified, the provisions in the **European Convention on Human Rights** (ECHR) are of general application. Hence its rights and freedoms generally apply to *everyone* within the jurisdiction of the contracting parties. All 27 EU Member States are contracting parties of the ECHR. The EU is not party to the ECHR yet; the Treaty of Lisbon, however, provides the legal basis for accession. Individuals whose rights and freedoms provided for by the ECHR have been violated, can under certain conditions approach the European Court of Human Rights (ECtHR) whose judgments are binding.

The ECHR primarily covers civil and political rights, although it also provides for the right to education in Protocol 1, Article 2, and therefore only parts of the rights are analysed in this report. Furthermore, in some cases, the ECtHR has held that certain aspects of social security are protected under the ECHR. Two provisions of the ECHR are central to the protection of migrants in an irregular situation: the right not to be subject to torture or inhuman and degrading treatment enshrined in Article 3; and the right to respect private and family life in Article 8. Although the fair trial guarantees enshrined in Article 6 of the ECHR do not apply to immigration rulings, the right to an effective remedy in these cases is guaranteed by Article 13 and Article 1 of Protocol 7 to the ECHR.

Article 3 of the ECHR prohibits torture as well as cruel, inhuman or degrading treatment or punishment. First, it provides safeguards for the treatment of migrants in an irregular situation, including when they are deprived of liberty. Second, it restricts the authorities of the contracting states from proceeding with an expulsion to a country where there is a real risk that an individual will be subject to prohibited treatment.

While Article 8 of the ECHR does not preclude expulsion, it has been used by the ECtHR to protect individuals against expulsion decisions, which were not considered justified in light of the right to respect private and family life. In *Berrehab v. the Netherlands*,[42] it considered the expulsion to be an unjustified interference with the right to family life in the country of residence. In the *Boultif case* the ECtHR established criteria to assess a 'fair balance' between the interest of the state in maintaining public order and the right to family life of the individual concerned.[43]

The **European Social Charter** (ESC) was first adopted in 1961 and revised in 1996. It complements the ECHR by offering further guarantees of economic and social human rights, although the two versions differ in scope. Five EU Member States are not party to the ESC and nine have not ratified the revised ESC, but all EU Member States have ratified at least one of the two.[44] While individual complaints are not permitted, an additional protocol entitles social partners and NGOs to lodge collective complaints of Charter violations in states which have ratified or accepted

40 See for example, the recommendation of Mexico to Germany to "[m]aintain under study the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families from a human rights perspective, recognizing the fact that human rights are universal in nature and therefore are not conditioned by migrant status." HRC (2009) *Report of the Working Group on the Universal Periodic Review: Germany*, 4 March 2009, paragraph 2; the recommendation by Algeria to Romania to work "towards improving its human rights situation" and "adhere to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families." HRC (2008) *Report of the Working Group on the Universal Periodic Review: Romania*, 3 June 2008, paragraph 14; Egypt recommended that the Netherlands accede to the International Convention on the ICRMW, HRC (2008) *Report of the Working Group on the Universal Periodic Review: the Netherlands*, 13 May 2008, paragraph 23.

41 See for example the recommendation of Canada to Germany to "ensure that measures to control irregular migration do not operate to impede access to primary health care, education and judicial authorities." HRC (2009) *Report of the Working Group on the Universal Periodic Review: Germany*, 4 March 2009, paragraph 38.

42 ECtHR, *Berrehab v. the Netherlands*, No. 10730/84, 21 June 1988. See also *Moustaquim v. Belgium*, No. 12313/86, 18 February 2001.

43 ECtHR, *Boultif v. Switzerland*, No. 54273/00, 2 August 2001. The so-called *Boultif* criteria are listed on p. 30.

44 All EU Member States except Bulgaria, Estonia, Lithuania, Romania and Slovenia are party to the European Social Charter. The following nine EU Member States are not party to the revised European Social Charter: Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the United Kingdom.

it.[45] From a procedural point of view, if the Committee of Social Rights considers a complaint admissible it sends a report to the concerned parties and to the Committee of Ministers. Building on the report, the Committee of Ministers then adopts a resolution which can recommend the state resolve the conflict with the Charter.

The scope of the ESC is limited: its Appendix extends its application to "foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". In principle, this wording excludes migrants in an irregular situation from the application of the social rights enshrined in the Charter.

Nevertheless, the European Committee on Social Rights concluded in *FIDH v. France* that legislation or practice which denies entitlement to medical assistance, regardless of legal status in the country, was contrary to the ESC.[46] The Committee stressed that healthcare is a prerequisite for the preservation of human dignity, which is a fundamental value in European human rights law.[47] Furthermore, in *Defence for Children International v. the Netherlands*,[48] the European Committee on Social Rights pointed out that the right to shelter is directly linked to the rights to life, social protection and respect for the child's human dignity and best interests. The Committee considered the general principle of **the best interests of the child**, as recognised in Article 3 of the CRC, as a binding principle under the ESC. The Committee next considered that "the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity." The Committee concluded that: "states parties are required, under Article 31(2) of the revised Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction".[49]

1.3 European Union law

When analysing the protection of the rights of migrants in an irregular situation, the first issue is to determine whether or not this is an area covered by Union law. The answer to this question determines whether the Charter of Fundamental Rights of the European Union applies. According to Article 51, the Charter applies to EU institutions and EU Member States only when they are implementing Union law.

The need to respect fundamental rights does not require the existence of secondary EU law. According to the case law of the CJEU, Member States must respect fundamental rights wherever "national legislation falls within the field of application of Community law".[50] The entry into force of the Charter does not change matters.[51] In all other cases outside the scope of Union law, fundamental rights are guaranteed at national level by national constitutional systems and by applicable international human rights law and labour law provisions.

The majority of the rights and principles enshrined in the Charter are accorded to everyone and therefore also to third-country nationals, independent of their migration status. A limited number of provisions contained in the Charter are restricted to citizens or lawful residents only. These concern, amongst others, consular protection (Article 46) and certain political rights (Articles 39 and 40) as well as social security benefits (Article 34(2)), freedom of movement (Article 45) and access to the labour market (Article 15). More importantly for this report, the Charter restricts certain rights and principles which are granted to everyone according to "national laws and practices." This is for example, the case of Article 34 on social security and social assistance and of Article 35 on healthcare.

Under Article 79(1) of the Treaty on the Functioning of the European Union (TFEU), the Union must "develop a common immigration policy" which ensures "fair treatment of third-country nationals residing legally in Member States" and prevents and combats "illegal immigration and trafficking in human beings".

While an express reference to fair treatment (and thus indirectly to fundamental rights) is made with

45 Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No. 158, 1995. As of June 2011, the Protocol has been signed by 16 EU Member States: Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Netherlands, Portugal, Slovakia, Slovenia and Sweden; it entered into force in 10 EU Member States: Belgium, Cyprus, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal and Sweden, available at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=158&CM=&DF=&CL=ENG. The collective complaints procedure under the Protocol is also applicable for Bulgaria and Slovenia, see Declarations in accordance with Article D (2) ETS 163, available at: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=163&CM=8&DF=16/06/2011&CL=ENG&VL=1. The collective complaint procedure is also applicable for Bulgaria and Slovenia, based on Declarations in accordance with Article D(2) ETS 163.

46 See the European Committee on Social Rights (ECSR), *International Federation for Human Rights (FIDH) v. France*, Collective complaint No. 14/2003, decision on the merits of 8 September 2004, available at: www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits_en.pdf.

47 *Ibid.*, paragraphs 31 and 32.

48 ECSR, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, 27 October 2009.

49 *Ibid.*, paragraph 64 of the decision.

50 CJEU, C-299/95, *Kremzow*, 29 May 1997, paragraph 15.

51 See for example, CJEU, C-555/07, *Kücükdeveci*, 19 January 2010, paragraph 21, read in conjunction with paragraph 50f.

regards to migrants residing legally, community policies concerning illegal immigration are framed in migration-control terms: there is no direct reference to the dignity or rights of persons who are the subject of measures aimed at preventing and combating illegal immigration and trafficking in human beings.

According to Article 79(2)(c), the TFEU measures to be adopted at Union level shall be in the area of "illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorization". In practice, measures designed to achieve migration management objectives are likely to impact directly or indirectly on the rights of persons affected, including on migrants in an irregular situation. Measures to facilitate removal of persons from the territory include, for example, the possibility of detention which touches upon the core fundamental right to liberty.

The close relationship between immigration control and enforcement measures and the protection of fundamental rights of the persons affected cannot be neglected. As an illustration, the Facilitation Directive imposes on states the duty to penalise those who, for financial gain, intentionally assist an irregular migrant to enter and/or reside in the EU.[52] If landlords who rent a flat to migrants in an irregular situation are punished, migrants will have difficulties in finding a place to stay and may end up in exploitative housing conditions. Similarly, measures taken to detect irregularly staying migrants in order to comply with the duty to issue a return decision described in Chapter 3 impact in different ways on fundamental rights.

The Return Directive, which establishes common standards for the return of third-country nationals staying irregularly in the territory of EU Member States, provides for minimum safeguards pending return. Article 14 lists some minimum entitlements for migrants in an irregular situation who have been given a period to leave the country on their own initiative or whose removal has been postponed by the authorities. Thus, the rights of persons in return proceedings, but who have not yet been removed, clearly fall within the scope of Union law, which must be transposed and implemented in accordance with the provisions of the Charter.

The situation is somewhat unclear as regards rights of undetected migrants who have not been issued a return decision. The areas covered in this report are namely subject to a different degree of policy intervention by the EU. The social policy measures to combat exclusion and to protect the rights of workers envisaged in Article 151 and 152 TFEU are not, for example, expressly restricted to nationals or lawfully staying third-country nationals. The 1989 Directive on Safety and Health at Work[53] defines 'worker' as 'any person employed by an employer' without restricting it to regular workers. In addition, the Employers Sanctions Directive[54] explicitly provides for the rights of migrant workers in an irregular situation to claim outstanding remuneration resulting from illegal employment or to lodge complaints against employers.

In the area of health, Article 168 TFEU highlights that a "high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities." Action by the EU "shall complement national policies" and "be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health." Measures taken to pursue such public health objectives are not barred by the status of the persons to whom these are addressed.

Finally, the non-discrimination guarantees of the Racial Equality Directive also apply to migrants in an irregular situation. They prohibit differentiated treatment among them when this is based on race or ethnic origin. The directive, however, does not apply to differences of treatment based on nationality and is without prejudice to any treatment which arises from the legal status of third-country nationals.[55]

Conclusions

The international human rights instruments as well as the ECHR enshrine rights which are of general application. Unless individuals are expressly excluded from their scope of application, those rights and freedoms are applicable to everyone within the jurisdiction of the contracting parties, independent of a person's status. Non-compliance with the conditions

52 Council Directive 2002/90/EC of of 28 November 2002 on defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328/17. This provision is similar to the duty to criminalise certain acts set forth in the Palermo Protocol on Smuggling. See in particular Article 6 of the UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

53 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183/1.

54 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168/24.

55 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/24. See Recital 13 and Article 3(2).

for entry, stay or residence in a Member State does not deprive migrants of basic rights which are shared by all human beings.

Against the background of EU law, a broad distinction between migrants who are in return or expulsion procedures and those who live undetected in the Union has to be made. Union law regulates at least in basic form the standards of treatment for persons who have been issued a return decision. As long as these persons are not removed, they must be treated in accordance with their fundamental rights.

Undetected migrants are primarily subject to policies and measures developed by the EU for the purpose of combating irregular migration. They may also be covered by measures taken by the Union in other fields, for example, in relation to public health or the safety and health of workers. Whenever the Union takes steps which affect them, these must be transposed and implemented in full respect of fundamental rights.

In sum, the existing international and European legal frameworks establish duties by states towards migrants in an irregular situation, which will be examined in more detail in the following chapters.

2

Non-removed persons

Return Directive

Article 14 – Safeguards pending return

Member States shall [...] ensure that the following principles are taken into account as far as possible in relation to third-country nationals [...] during the period for which removal has been postponed [...]:

(a) family unity with family members present in their territory;

(b) emergency healthcare and essential treatment of illness;

(c) minors are granted access to the basic education system for minors (subject to the length of their stay);

(d) considerations to the special needs of vulnerable persons.

Among the irregular migrant population, two broad categories can be distinguished: those who live in hiding undetected by immigration law enforcement authorities and those whose presence is known but who have not, for a variety of reasons, been removed. This chapter deals with the latter category. After a general introduction to the issue, the first part of this chapter reviews the various impediments to removal. The second section examines the legal and policy responses of the 27 EU Member States.

This chapter does not examine the level of access to fundamental rights in the 27 EU Member States by non-removed persons. Such access depends usually on whether these persons are granted an authorisation to stay, and if so, on the type of authorisation or residence permit given. As this varies not only between, but also within, Member States, and on the basis of the grounds for non-removal, a comprehensive description of their entitlements is beyond the scope of this report. Where possible, however, their fundamental rights situation is described in the thematic chapters of this report.

The group of persons described in this chapter is heterogeneous. Their common feature is that their presence in the territory of an EU Member State is acknowledged by the police or immigration authorities, who often also know where they are staying. It includes, for example, rejected asylum seekers whose removal is barred by legal or practical obstacles, persons who have appealed a return decision and have been granted a suspension from its execution, as well as third-country nationals awaiting the renewal of an expired residence permit. By contrast, asylum seekers have a right to stay while their applications are processed and are therefore not covered here.[56]

This chapter focuses primarily on migrants who remain in an irregular situation over a protracted period of time. It deals with the group of persons mentioned in Recital 12 of the Return Directive which refers to "third-country nationals who are staying illegally but who cannot yet be removed".

The presence of persons who are in return procedures but are not removed is a Europe-wide phenomenon. Although reliable estimates are not available, an indication of the scope of the issue can be deduced

56 Council Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers, OJ 2003 L31/18, Articles 6 and 7.

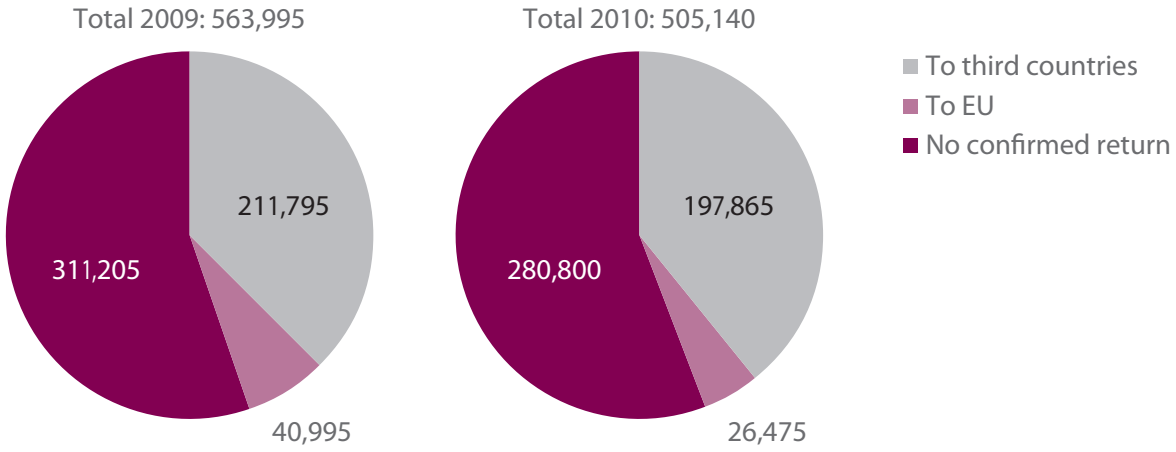
from Eurostat data on immigration law enforcement.[57] As illustrated in Figure 1 (which also provides data for 2009), in 2010, more than 500,000 irregularly staying third-country nationals were ordered to leave the territory of an EU Member State.[58] Following an order from an EU Member State to leave, some 224,000 persons were either forcibly removed or returned on their own, the majority of whom (almost 198,000 persons) to a third country. The fate of the rest is not recorded in the statistics. An unknown number may be accounted for by unconfirmed voluntary departures. Others may have received a residence permit while others will only be removed in the year after the return order is issued. It is plausible to assume that a substantial portion continued to stay in the EU. [59]

Limited guidance can be found at the European level concerning persons who are not removed. The Return Directive prohibits detention where prospects for removal no longer exist (Article 15(4)).[60] In Article 9, it recognises that legal, humanitarian or practical obstacles may hinder a removal. However, it provides only limited guarantees to ensure that persons in return procedures who are not removed are treated in accordance with basic fundamental rights standards.

Article 6(4) of the directive foresees the possibility of Member States to grant a residence permit for "compassionate, humanitarian, or other reasons". It also allows Member States to formally suspend removal in a number of circumstances (Article 9); however, apart from the specific situations listed in Article 9(1), there is no duty requiring Member States to suspend removal, even when it proves impossible to carry out. Under Recital 12 of the directive, EU law only highlights the need to address the situation of irregularly staying third-county nationals who cannot yet be removed and calls for the defining of basic conditions of subsistence according to national legislation.

At the same time, the minimum safeguards foreseen in Article 14(1) for persons who are not removed apply as long as the removal is formally suspended. In those cases

Figure 1: Orders to leave for 2009 and 2010 and indications of confirmed returns of third-country nationals (no. of persons)



Source: FRA, 2011, based on data extracted from Eurostat on third-country nationals ordered to leave and third-country nationals returned following an order to leave[59]

57 Although collected on the basis of common definitions, there are some doubts with regard to their comparability. See European Migration Network (EMN) (2008) *Annual Report on Migration and International Protection Statistics*, Brussels, EMN.

58 For exact definitions, see Eurostat (2010) *Enforcement of Immigration Legislation Reference Metadata in Euro SDMX Metadata Structure (ESMS)*, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/EN/migr_eil_esms.htm.

59 Eurostat data, http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database; data extracted on 13 September 2011.

60 In the *Kadzoev* case (C-357/09 PPU), the CJEU pointed out that under Article 15(4) of Directive 2008/115, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.

where the removal has been postponed according to Article 9, the directive provides four minimum safeguards:

- unity with family members present in their territory;
- emergency healthcare and essential treatment of illness;
- access to the basic education system for minors (subject to the length of their stay);
- consideration for the special needs of vulnerable persons.

These safeguards are not comprehensive as they do not reflect all human rights to which migrants in an irregular situation are entitled under international law. For example, they do not mention access to justice or the right to be registered at birth. Moreover, according to Article 14(2) if removal is suspended a written confirmation must be provided:

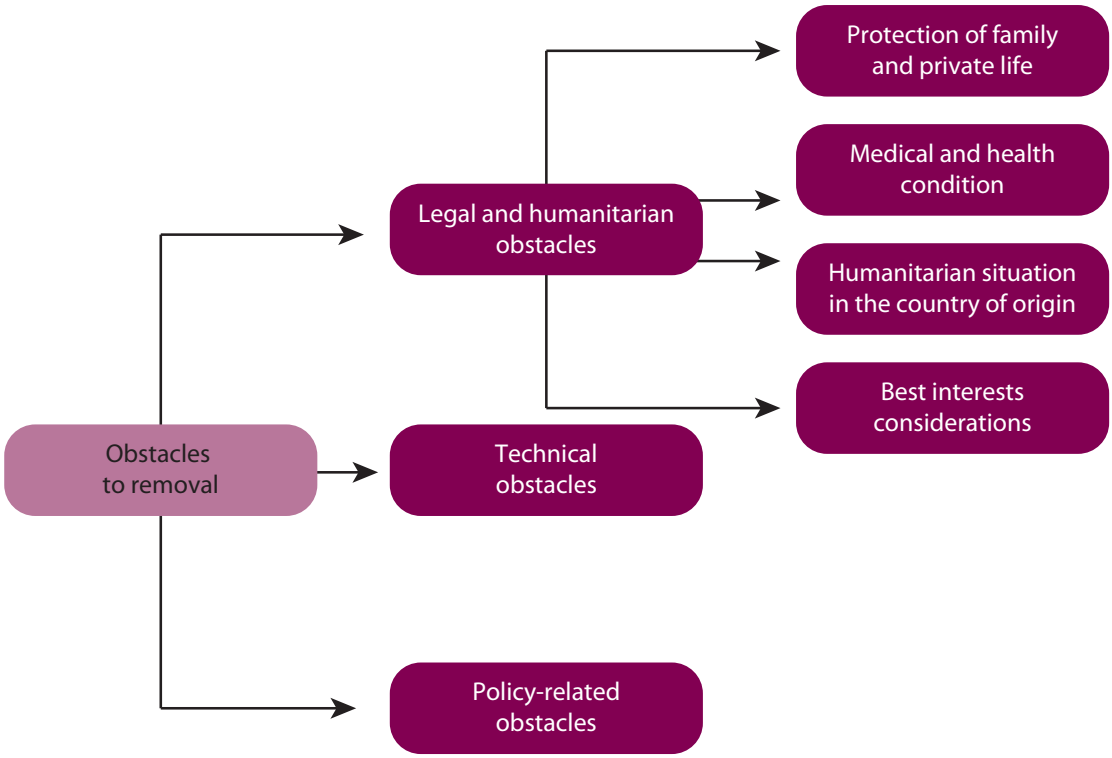
> *"Member States shall provide the persons [to whom a period for voluntary departure has been granted or the return decision temporarily suspended] with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced."*

The directive does not provide for any mechanism to put an end to situations of legal limbo that derive from protracted situations of non-removability. The European Commission has suggested tackling this issue, so far without success.[61]

2.1 Reasons preventing removal

Leaving aside the criteria for granting international protection under the Qualification Directive which are outside the scope of this report, a number of obstacles may prevent removal of migrants in an irregular situation. The report groups these into three broad categories: obstacles embedded in human rights law

Figure 2: Obstacles to removal



Source: FRA, 2011

61 See European Commission (2001) *Working Document on the relationship between safeguarding internal security and complying with international protection obligations and instruments*, COM(2001) 743 final, Brussels, 5 December 2001; European Commission (2009) *Communication on an Area of Freedom, Security and Justice Serving the Citizen: Wider Freedom in a Safer Environment*, COM(2009) 262, Brussels, 10 June 2009.

and humanitarian considerations; practical or technical obstacles; and policy choices against return.

Legal and/or humanitarian considerations for the suspension of removal can be found in the legislation of all EU Member States. Practical obstacles and other technical reasons are foreseen in over half of EU Member States, while in a few removal can also be suspended as a policy choice.

Human rights law and humanitarian considerations

Protection of private and family life

This ground derives from commitments stemming from human rights law, particularly Article 8 of the ECHR as interpreted by the ECtHR. The ECtHR has recognised on several occasions that the right to private and family life can, in certain cases, bar removal.[62] In *Boultif v. Switzerland*, the Court affirmed that the deportation of a person from a country where he or she enjoys family life may amount to a violation of Article 8.1 of the ECHR. It established a set of criteria for assessing the extent to which an expulsion is 'necessary in a democratic society' and 'proportionate to the legitimate aim pursued':[63] These include:

- the nature and seriousness of the offence committed;
- the duration of the applicant's stay in the host country;
- the time which has elapsed since the commission of the offence and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage and whether the couple lead a real and genuine family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children in the marriage and, if so, their ages;
- the seriousness of the difficulties for the spouse in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.

Two additional criteria were added in the case *Üner v. the Netherlands*: the best interests and well-being of the children and the solidity of social, cultural and family ties to the host country and to the country of destination.[64]

In approximately one-third of EU Member States, legislation explicitly provides for the possibility of allowing migrants in an irregular situation to remain in the host country if their removal constitutes unjustified interference in their right to family life. Austrian law makes specific mention of Article 8 of the ECHR.[65] In other EU Member States, no express reference is made to the ECHR.[66]

Practices differ for bars to removal deriving from Article 8 of the ECHR. In Denmark,[67] Hungary,[68] and Sweden,[69] for example, the right to private and family life is one of the grounds which justify the issuance of a temporary residence permit. In Germany or Slovakia, in contrast, it would normally lead to a toleration status.[70]

Medical and health conditions

Medical conditions or serious illness can also bar the return of migrants in an irregular situation. The ECtHR has found in its case law that the removal of a foreigner could in exceptional cases raise compelling

62 See for example, ECtHR, *Mamatkulov and Askarov v. Turkey* [GC], No. 46827/99 and No. 46951/99, 4 February 2005.

63 See paragraphs 46-48 of the judgment in ECtHR, *Üner v. the Netherlands* [GC], No. 46410/99, 18 October 2006, the ECtHR confirmed its jurisprudence that private life can constitute an obstacle to expulsion.

64 ECtHR, *Üner v. the Netherlands* [GC], No. 46410/99, 18 October 2006.

65 Section 44a in conjunction with 43(2) or 44(3) Settlement and Residence Act (*Niederlassungs - und Aufenthaltsgesetz*). A similar reference to the ECHR is contained in guidance provided by the UK Border Agency: Discretionary leave is granted if removal would result in a direct breach of Article 8 of the ECHR. See the website of the UK Border Agency - 'Asylum Policy Instructions', available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/.

66 See, for example, Bulgaria (the formal suspension of removal can also be based on the right to family life; Law on Foreigners in the Republic of Bulgaria, Article 24, Article 24a, Article 24b and Article 25, Article 25a, Article 25b); Czech Republic (Act No. 326/1999 Coll. on the Residence of Foreign Nationals in the Territory of the Czech Republic, Sections 33 and 43 read in conjunction with Section 179); Romania (Emergency Ordinance, Article 92(1)); Slovakia (Act on the Stay of Aliens 48/2002, Article 43(1)).

67 According to the Aliens Act (2002) – Sections 9(c)(1), 9(c)(2), 9(c)(3) - a residence permit might be issued on the basis of exceptional reasons/hindrances to deportation, which include regard for family unity.

68 Act II of 2007 on the Entry and Stay of Third-Country Nationals, Sections 48(3) and 30(1).

69 A residence permit on the grounds of "exceptional distressing situations", under which particular attention should be paid to the alien's family ties (and relatives living in Sweden). Aliens Act Chapter 5, Section 6.

70 Considerations relating to family life is one of the factors that can prevent removal "for reasons of law and fact" provided for in Section 60a of the German Residence Act. Slovakia, Act on the Stay of Aliens 48/2002, Article 43(1).

humanitarian considerations amounting to a violation of Article 3.[71]

Obligations deriving from Article 3 of the ECHR do not include the duty to grant a residence status to persons who cannot be removed in light of a health condition. This possibility is left to the discretion of national authorities. As a result, in those cases where the protection against expulsion is not accompanied by the right to residence, the person may remain in legal limbo with difficulties in accessing basic rights.

According to a study by the European Migration Network over half of EU Member States provide for a national protection status based on medical grounds.[72] In some cases, medical reasons can justify the issuance of a residence permit, but this is not always the case. As an illustration, in Austria, the law provides for the suspension of deportation but not necessarily for the issuance of a residence permit when the reasons for suspension are not considered permanent.[73]

Humanitarian considerations related to the country of origin

The Qualification Directive (2004/83/EC)[74] does not cover all categories of people who are in need of international protection. The United Nations High Commissioner for Refugees (UNHCR) has highlighted, for example, the limitations of Article 15(c) of the directive. The provision entitles only those individuals to receive subsidiary protection who can show an 'individual' threat to their life or person, resulting from indiscriminate violence in a situation of 'armed conflict'. However, international protection needs may also arise in the case of civil strife or massive violations of human rights which do not amount to armed conflict.[75]

A number of EU Member States do not consider the grounds set forth in the Qualification Directive as sufficient to cater to all the categories in need of international protection. As two recent studies show, the majority of EU Member States have adopted national protection provisions which go beyond the scope of the Qualification Directive.[76]

Finally, there may also be a bar deriving from Article 3 of the ECHR that may prevent removal of individuals excluded from international protection, as they are considered not to be deserving of refugee or subsidiary protection status.[77] While the ECHR may bar their removal, it does not oblige states to grant a residence permit to them. The absence of a residence permit may, as shown later in the report, have a considerable impact on the ability of such individuals to enjoy basic rights.

More than half of EU Member States have drawn up some form of protection based on humanitarian grounds.[78] Under Finnish law, for instance, residence permits are issued on humanitarian grounds to those aliens residing in Finland who do not fall under the grounds for granting asylum or providing subsidiary protection, but who cannot return to their country of origin or of former habitual residence as a result of an environmental catastrophe, security situation due to an international or internal conflict or a poor human rights situation[79]. Italian law foresees the possibility of granting a temporary residence permit for humanitarian reasons by Prime Minister's Decree in those situations where "relevant humanitarian demands, in case of conflict, natural disasters or other events of great seriousness in non-EU countries" impede the expulsion.[80] Immigration law in Latvia allows for non-issuance of a removal order for humanitarian reasons and authorises stay for up to one year.[81]

Best interests considerations

The Committee for the Rights of the Child has stressed that the return of a separated or unaccompanied child should only be undertaken after a careful assessment

71 See ECtHR, *D. v. the United Kingdom*, No. 30240/96, 2 May 1997; ECtHR, *N. v. the United Kingdom* [GC], No. 26565/05, 27 May 2008 in paragraphs 32-45, where the Grand Chamber of the Court summarised its case law on this matter and the principles to be drawn from it.

72 EMN (2010) *The different national practices concerning granting of non-EU harmonised protection statuses*, December 2010, Brussels, EMN, p. 28.

73 Asylum Act 2005, Section 10 paragraph 3; see also Settlement and Residence Act, Section 44a and Section 69a.

74 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, OJ 2004 L 304.

75 UN High Commissioner for Refugees (UNHCR) (2008) *Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, available at: www.unhcr.org/refworld/docid/479df7472.html. See also European Council on refugees and Exiles (ECRE) (2008) *The Impact of the EU Qualification Directive on International Protection*, Brussels, ECRE, available at: www.ecre.org/topics/areas-of-work/protection-in-europe/150.html.

76 See the EMN (2010) *The different national practices concerning granting of non-EU harmonised protection statuses,* December 2010, Brussels, EMN; and the European Council on Refugees and Exiles (2009) *Complementary Protection in Europe*, 29 July 2009. Protection based on medical grounds or on family unity have not been included in this calculation.

77 See Qualification Directive, Articles 12, 14, 17, and 19 as well as the 1951 Convention relating to the Status of Refugees, Article 1F.

78 See EMN (2010) *The different national practices concerning granting of non-EU harmonised protection statuses,* December 2010, Brussels, EMN, p. 28.

79 Finland, Aliens Act, Section 88(a).

80 Italy, Legislative Decree No. 286/1998, Article 19(1).

81 Latvia, Immigration Law, Article 2(3).

of what is in the best interests of the child.[82] In this vein, family reunifications aside, the Return Directive bars the removal of unaccompanied children where no adequate reception is available in the country of return.[83]

Policies concerning separated children differ substantially among EU Member States.[84] In those countries which grant some form of special protection to unaccompanied and separated children, the latter are usually issued a residence permit. However, once they reach adulthood such a permit may expire. Where no other residence permit is granted and removal is not carried out, such children may end up in the host country in an irregular status once they reach majority.

Practical circumstances and technical reasons

Practical reasons or technical obstacles include: difficulties in identifying the individual or determining his/her nationality, the absence of travel documents and the lack of safe and reasonable travel and/or arrival facilities. In practice, such obstacles play an important role.

Legislation in about half of EU Member States considers the possibility of suspending removal when its implementation is not possible due to practical or technical reasons.[85] In some cases suspension of removal leads to the issuance of a temporary residence permit (e.g. Belgium, Denmark or Finland), sometimes combined with residence restrictions, as is the case in France.[86]

In others, legislation only renders the stay lawful until removal is implemented (e.g. toleration permit (*Duldung*) in Germany, tolerated status in Romania). In Austria and Lithuania, a temporary residence permit can only be granted if the obstacles preventing removal persist over a certain length of time.[87] Sometimes, formal suspension of removal or issuance of a residence permit is only foreseen for obstacles for which the migrant bears no blame (e.g. Austria).[88] In the Netherlands, it only applies to migrants in an irregular situation who try to leave the country voluntarily but do not succeed.[89] Such conditions and restrictions limit the scope of persons who can obtain a lawful stay during the time their removal is pending.

Table 2 provides an overview of policy options that exist in the 27 EU Member States for persons whose removal is hindered by practical or technical obstacles. It indicates for each option which type of documentation, if any, is given to the persons concerned. It is assumed that in all countries, at least some persons are not provided with any form of certification of their suspension of removal. In these cases, once released, they cannot be distinguished from migrants in an irregular situation who have never been detected.

Policy choice not to remove

The third set of grounds for justifying the non-return of third-country nationals falls within the category of policy choices by the state in question. These can encompass decisions taken by states on the basis of values enshrined in national constitutions other than those dealt with above or on the grounds of safeguarding the political interests of the state.

82 See Committee on the Rights of the Child (2005) *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2009, paragraph 84.

83 See Article 10(2).

84 For an overview of policies see EMN (2010) *Policies on Reception, Return, Integration arrangements for, and numbers of, unaccompanied minors,* May 2010, Brussels, EMN, p. 51 and annex 7. The report by the FRA on separated children provides an illustration of the impact of such policies in practice. See FRA (2010) *Separated, asylum-seeking children in European Union Member States – comparative report*, Luxembourg, Publications Office.

85 Austria, Aliens Police Act, Section 46a; Belgium, Aliens Act, Article 9bis (whereby a residence permit can be issued for exceptional circumstances); Bulgaria, Law on Foreigners, Sections 24 and 25); Cyprus (persons released from detention whose removal is postponed for technical or humanitarian reasons can be issued with a temporary residence permit, the 'pink card'); Czech Republic, Act on the Residence of Foreign Nationals, Sections 33 and 43; Denmark, Aliens Act, Section 9 (c) (2); Finland, Aliens Act, Section 51; Greece, Law 3907/2011, Article 24(4) (the certificate of suspended removal is valid for 6 months and can be renewed); Germany, Residence Act, Section 60a; Ireland, Immigration Act 1999, Sections 3 (3) (b) and 3(6) which provides the Minister with the power to grant leave to remain; Lithuania, Legal Status of Aliens Act, Articles 128 and 132 (possibility to grant a residence permit if obstacles preventing removal persist for over one year); the Netherlands, Aliens Act, Sections8 and 63, Aliens Act Implementation Guidelines at B/14/3.2.2; Poland, Act on Granting Protection to Foreigners in Articles 97 and 98; Romania, Aliens Act, Article 92; Slovakia, Residence Act, Article 43(1)(c).

86 See France, Code of Entry and Residence of Foreigners, Article L 513-4. Foreigners who are difficult to remove are placed under house arrest. They receive a temporary residence permit specifying the suspension of removal and a copy of the administrative decision on the suspension.

87 Austria, Settlement and Residence Act, Section 69a(1); Lithuania, Legal Status of Aliens Act, Article 132.

88 Austria, Aliens Police Act, Section 46a.

89 See Netherlands, Aliens Law Implementation Guidelines (*Vreemdelingencirculaire)* 2000 at B/14/3.2.2.

Table 2: Policy options for persons not removed due to practical or technical obstacles – certification given to persons concerned

Country	No certification (status remains irregular)	Copy of suspension decision only	Toleration certificate	Residence permit	Source
Austria	✓		✓	✓	Residence Act, 69a (permit after 1 year possible) Aliens Police Act, 46a
Belgium	✓			✓	Aliens Act, 9bis
Bulgaria	✓	✓			Law on Foreigners, 24-25
Cyprus	✓			✓	Aliens and Migration Regulations, Article 15(1)(B) 1972
Czech Republic	✓		✓	✓	Foreign Nationals Act, Sections 33 and 43 read with 179
Denmark	✓			✓	Aliens Act, 9(c)(2)
Estonia	✓				OLPEA, 14(5) and 7(3)
Finland	✓			✓	Aliens Act, 51,52,89
France	✓			✓	Code of Entry and Residence of Foreigners, Article L 513-4
Germany	✓		✓	✓	Residence Act, 60a (permit possible after some time, in line with special rules)
Greece	✓	✓			Law 3907/2011, 24.4
Hungary	✓		✓		TCN Act, 48(3)
Ireland	✓			✓	Immigration Act 1999, 3(3)b, 3(6) Temporary leave to remain
Italy	✓				Legislative Decree 286/98, Article 14 (as amended)
Latvia	✓				-
Lithuania	✓	✓		✓	Legal Status of Aliens Act, 128, 132 Permit possible after 1 year
Luxembourg	✓				-
Malta	✓		✓		Administrative practice to issue visa to those released
Netherlands	✓			✓	Aliens Act, 8j and Aliens Act Implementation Guidelines at B/14/3.2.2
Poland	✓			✓	2003 Aliens Protection Act, 97, 98
Portugal	✓				-
Romania			✓		Emergency Ordinance 194/2002 republished, Chapter V, Section 6, Article 102-104
Slovakia	✓		✓		Aliens Act, 43(1)c
Slovenia	✓		✓		Aliens Act, 52
Spain	✓				-
Sweden	✓			✓	Aliens Act, Chapter 12 (Sections 1-19)
United Kingdom	✓				-

Notes: It is assumed that in all countries, at least some persons are not provided with any form of certification of their suspension of removal. General discretionary powers by the administration to grant a permit have not been included in this list.
Source: FRA, 2011, based on national legal provisions

At least a handful of EU Member States provide in their national legislation for the possibility of suspending removal or granting a residence permit based on public interests considerations. In Germany, for example, the grounds for granting a toleration (*Duldung*) include, among others, protection of the political interests of the Federal Republic of Germany.[90] Similarly, national security and public policy or reasons of public interest can also be found in legislation on foreigners in Hungary, Ireland and Romania.[91]

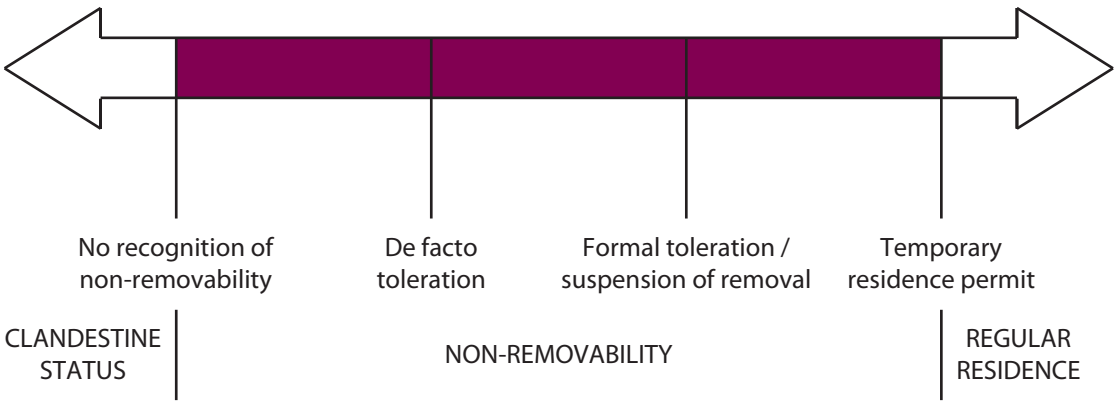
Finally, states may consider granting a temporary residence permit to migrants in an irregular situation who cooperate with the justice system either as victims or as witnesses for specific cases. An example of such policies at the EU level can be found in Directive 2004/81/EC which foresees a reflection period as well as a temporary residence permit for the duration of the relevant national criminal proceedings.[92] The rationale for these types of permits lies in the interest of the state to ensure prosecution of certain serious crimes but also in the protection of victims. Such permits are usually of a short-term nature or are linked to the length of the proceedings.

2.2 Responses to non-removability

National policies dealing with situations of non-removability vary considerably across the EU. They differ both within and between states, according to the grounds for suspension as well as on other factors, such as the profile of the individual or other interests at stake. Responses may range from a pure de facto toleration of the individual on state territory to the granting of a residence permit.

Figure 3 shows that different solutions with varying degrees of 'security of residence' are possible. It illustrates that the choice is not necessarily one between irregularity and full regular status. Different forms of intermediate solutions exist. Some have only a de facto toleration with minimal or no security of residence, as is the case when the persons concerned do not receive a written confirmation of the suspension of their removal. In other cases, the suspension is more official and leads to a formal authorisation to stay.

Figure 3: Degree of security of residence



Source: FRA, 2011

90 Germany, Residence Act (2007), Section 60a.

91 Hungary, Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, Section 18; in Ireland, considerations of national security and public policy are to be taken into account when issuing a deportation order (Immigration Act 1999, Section 3 (6)); Romania, Emergency Ordinance No. 194 from 12 December 2002 (republished), Article 69(2) and Article 103(d).

92 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, and who cooperate with the competent authorities, OJ 2004 L 261. See also Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L101/1, and replacing Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ 2002 L 203, which sets forth assistance and support for victims of trafficking in human beings.

In the United States (US), migrants whose status is neither fully irregular nor regular have been described as persons in a 'twilight status'.[93] According to one source, there are probably about one–1.5 million persons represented in the estimates of unauthorised residents who are known to immigration authorities in the US and have full legal statuses pending but are not (yet) fully legal.[94]

In general terms, the degree of recognition of presence of a person who is between regularity and irregularity and the way in which this is certified has an impact on the protection of his/her fundamental rights and, first and foremost, on protection from arbitrary detention. In many cases increased residence security also means increased access to basic rights. This is, however, not always the case. In Spain, for example, the level of residence security is minimal, but migrants in an irregular situation can access a variety of social rights if they register with the local municipality.

The legal status accorded to a person is rarely definitive. It can change as the circumstances upon which it was granted evolve. For example, when the obstacle to removal disappears, a temporary residence right may not be renewed anymore. Similarly, prolonged stay in the receiving country may lead to a longer-term residence permit.

Often, the degree of security of residence depends on the reasons for suspending removal. For example, where suspension of removal is possible for separated children, this will normally lead to the issuance of a residence permit. By contrast, if the removal is postponed due to difficulties in identifying the nationality of the person, this may often lead only to a de facto toleration of the person on the territory.

Where domestic law provides for the possibility of granting temporary stay or residence for certain grounds, in practice not everyone can benefit from it. Often, their issuance is discretionary and/or limited to individuals who fulfil certain conditions, such as length of stay, good conduct or degree of de facto integration.

There are in essence three possible policy responses to migrants in an irregular situation who are not removed for legal, practical or policy considerations: they can be tolerated only de facto, they can be provided with a formal toleration or they can be granted a residence permit.

93 Passel, J. (2005) *Unauthorized Migrants: Numbers and Characteristics*, Washington, DC, Pew Hispanic Center. Martin, D. (2005) *Twilight Statuses: A Closer Examination of the Unauthorized Population*, Policy Brief, Migration Policy Institute, June 2005, No. 2.

94 Passel, J. (2005) Background *Briefing Prepared for Task Force on Immigration and America's Future*, Washington, DC, Pew Hispanic Center, 14 June 2005, p. 9.

De facto toleration

A number of EU Member States do not provide in their national law or administrative practices for any status or mechanism to deal with certain categories of non-removed persons. They are not provided with any documentation (except possibly a copy of the decision on their release from detention) and remain under obligation to leave the country.

In some EU Member States these persons are not protected from being arbitrarily re-arrested and detained. In Italy, the law provides that when, the removal or the order of accompaniment to the border cannot be carried out for practical reasons, the individual is kept in a detention centre for 30 days, which can be renewed for additional 30- and 60-day periods, for a total of up to six months and exceptionally 18 months. After release, the person is ordered to leave the country within seven days. If the order is not executed, the person can be rearrested up until the six- or 18-month period is reached.[95] In Belgium, the impossibility of removal can in some cases lead to a permit based on exceptional circumstances, but, more often, the individual is released from detention and no documentation is issued preventing new arrests.[96] In the Netherlands, moratoriums of removals to certain countries can be announced, but affected persons would normally not be granted a right to stay.[97] The 2008 Luxembourg law on freedom of movement and immigration does not contain any mechanisms to deal with practical obstacles to removal.

In other EU Member States, repeated arrest and detention is not possible. In Portugal and Spain, a person must be released after 60 days in immigration detention.[98] After release, the person's status remains irregular and he/she is under the obligation to leave the country and can be removed at any time.[99] Normally no authorisation to stay is given. However, in both countries, all persons, including migrants in an irregular situation, are entitled to enjoy a set of fundamental rights. In Spain, according to the jurisprudence of the Constitutional Tribunal, fundamental rights are recognised for migrants in an irregular situation because they are fundamental rights recognised to all people as human beings.[100]

95 Italy, Legislative Decree 286/98, Article 14(5), as amended by Law 94/2009 of 15 July and by law decree 89 of 23 June 2011.

96 An authorisation to reside can be requested by the individual according to Article 9bis of the Aliens Law. However, in the majority of cases this does not occur (information provided by the Fralex national focal point in May 2009 in the context of the FRA project on the rights of irregular immigrants in voluntary and involuntary return procedures).

97 EMN (2010) *The Practises in The Netherlands concerning the granting of non-EU harmonised protection Statuses*, April 2010.

98 Portugal, Law 23/07, Article 146 (3). In Spain, the upper limit of 40 days was extended to 60 days in 2009, Law 4/2000 (as amended), Article 62 (2).

99 Spain, Law 23/07, Article 160; Spain, Law 4/2000, Article 62.2.

100 See Spain, Constitutional Tribunal (*Tribunal Constitucional de España*), Judgements STC 236/2007 and 259/2007.

Where the law does not foresee any specific authorisation to stay for those persons whose removal is delayed or cannot be enforced for practical or humanitarian reasons, this leads to a de facto toleration. Non-removed persons tolerated only de facto remain in a state of limbo with no legal right to stay but no possibility of expulsion. In those countries where the legal protection of migrants in an irregular situation is weak, this can lead to violations of fundamental rights of non-removed persons.

Formal toleration

There are a number of EU Member States where the national law provides for a formal authorisation to stay (toleration) specifically for persons whose removal has been suspended. In a majority of cases suspension of removal is certified with a document proving that the removal is postponed which is given to the individual concerned,[101] although this is not always the case. Such a document normally protects the individual from arrest and detention for the purpose of removal. If a toleration or similar permit is issued, this accords a certain level of 'security of residence'. It recognises the person's presence in the country but remains inferior to recognition provided by a residence permit, which normally entitles the holder to a broader range of rights. It remains, therefore, only a temporary solution.

In some EU Member States (Austria, Bulgaria, Germany, Greece, Lithuania and Romania), holders of a toleration status remain under the obligation to leave the country.[102] The toleration basically only suspends return as long as it is impossible in fact or in law.

In other EU Member States a right to stay in the country for a certain period of time – which does not amount to a residence permit under national law – is accorded with the suspension of removal. In the Czech Republic, for instance, a person whose deportation has been suspended will be granted a 'toleration visa' which may be valid for a period of up to one year.[103] In Hungary, non-removed persons are given a document which indicates that their immigration procedure is pending.[104]

Similarly, in Malta, although the law does not provide for a suspension of removal, if rejected asylum seekers (or other migrants in an irregular situation) are released from detention and their removal is still pending, they can be issued by administrative practice with a short-term visa.[105] In Slovenia, permission to stay is issued for a period of six months and may be extended, as long as the conditions for which the extension was granted continue to exist. The police issue persons granted a permission to remain a personal identity card certifying their right to stay and a copy of the administrative decision to suspend removal.[106] In Slovakia, a tolerated stay is granted.[107]

Toleration is a temporary solution. The reason for non-removability may be of a short-term nature, for instance in situations of pregnancy, temporary sickness or when a new transport carrier needs to be found. Suspensions of removals, however, often last for a considerable period of time. As an illustration: at the end of October 2009, 58,800 irregular migrants in Germany had been holding a toleration to stay for more than six years.[108]

Protracted situations of legally unclear situations are undesirable for both the individual concerned as well as the state. As the likelihood of return grows increasingly remote over time, the host country needs to find solutions to end situations of legal limbo. There are essentially two options to achieve this. The first is to resort to exceptional and time-limited regularisation programmes, which have been widely used in the past.[109] The second option is to foresee the possibility of granting residence permits on a case-by-case basis to persons whose removal has been suspended as part of the regular migration policy.

Among the 11 EU Member States where the FRA could identify some forms of formal toleration (falling short of a residence permit) for persons with suspended removal, at least four have designed mechanisms to end situations of protracted legal limbo. These are listed in Table 3.

101 Bulgarian Law, for example, establishes a formal suspension of removal but the right to stay in the country is not granted, and in practice only a copy of the administrative decision suspending removal is given to the person. (National Authority Survey, Bulgarian Ministry of Interior). See also Greece, Law 3907/2011, Article 24 (4).

102 Austria, Settlement and Residence Act, Section 69a(1); Germany, Residence Act, Section 60a; Greece, Law 3907/2011, Article 24 (4); Lithuania, Law on the legal status of aliens, Article 128 (3); Romania, Emergency Ordinance No. 194 (2002 as amended) at 104 (2). Bulgarian Law establishes 'prohibition to leave' as a formal suspension of removal (see footnote 101).

103 Czech Republic, Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic (§120a, §33 + §179, §43+§179).

104 Hungary, Third-Country National Act, Section 48 (3).

105 The visa is valid three months and generally renewable. Chapter 217 of the Laws of Malta, Immigration Act, Article 6.

106 Slovenia, Aliens Act 71/08, Articles 52 and following.

107 *Ibid.*, Article 43(1)c.

108 Government response to a question of the members of parliament Ulla Jelpke, Jan Korte, Sevim Dağdelen and other members as well as the parliamentary party *Die Linke*, Bundestagsdrucksache 17/764 of 22 February 2010 (status of 31 December 2009).

109 Regularisation programmes have been enacted in several countries, including in Belgium, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain and the UK. See Baldwin-Edwards, M. and Kraler, A. (2009) *REGINE-Regularisations in Europe*, Amsterdam, Amsterdam University Press.

Table 3: Ways out of limbo: examples of residence permit for tolerated persons

Country	Time period after which a toleration can lead to a residence permit	Legal source
Austria	one year	Residence Act, 69a(1)
Czech Republic	one year	Act on the Residence of Foreign Nationals in the Territory of the Czech Republic, Section 43
Germany	six-eight years	Residency Act, Sections 104(a) and (b)
Lithuania	one year	Law on the Legal Status of Aliens of 29 April 2004, Article 132

Source: FRA, 2011, based on national legal provisions

In Germany, persons who have held a toleration permit (*Duldung*) can, after a certain period of time and provided they fulfil a number of conditions, obtain a residence permit on the basis of Sections 104(a) and (b) of the Residence Act. Conditions to qualify for a permit are drawn from the right-of-residence ruling (*Bleiberecht*) passed by the Standing Conference of Ministers and Senators of the Interior of the Federal German states *(Länder)* on 17 November 2006.[110] Employment conditions, at least six-to-eight years of suspended removal, a clean criminal record, no threat to national security and public order as well as a minimum level of de facto integration are required. Since the end of 2006, some 35,000 persons have been regularised, although the majority of them only on a trial basis, as they did not fulfil employment conditions. In late 2009, permits issued on a trial basis were extended for a further two years.[111]

Similarly, in other EU Member States the issuance of a residence permit that is linked to the suspension of removal status depends on how protracted the conditions impeding return are. In the Czech Republic and Lithuania, for example, the tolerated person will receive a residence permit if the conditions upon which a toleration visa (for the Czech Republic) or a temporary residence permit (for Lithuania) were granted, remain after one year although in practice this mechanism is rarely used in the Czech Republic.[112] A one year deadline is also foreseen in Austria.[113]

Temporary residence permits

Although national provisions are rather diverse, all Member States have the possibility of granting temporary residence to at least certain categories of persons who are not removed for humanitarian, practical or policy considerations. Once an individual is issued a residence permit, even of a temporary nature, his/her situation is no longer irregular and therefore falls outside the scope of this analysis. Legislation in Cyprus, Finland and Poland are mentioned here as an illustration of policies to grant temporary residence permits. In Cyprus, for example, migrants who are not removed can obtain a temporary residence permit ('pink card').[114] In Finland, aliens are issued with a temporary residence permit if they cannot be returned for temporary reasons of health or if they cannot actually be removed from the country.[115] In Poland, a person who receives a tolerated stay permit has a right to obtain a residence card, which is valid for one year.[116]

In some EU Member States, granting a residence permit can depend on a number of conditions, such as time,[117] absence of fault on the migrant's side for preventing the removal or absence of a threat to public order and public policy.[118]

110 EMN (2010) *The granting of non-harmonised protection statuses in Germany*, January 2010, p. 37. See also: www.bundesregierung.de/Content/DE/Archiv16/Artikel/2006/11/2006-11-17-einigung-beim-bleiberecht.htm.
111 *Ibid.* at 72-73. On 4 December 2009, the Standing Conference of Ministers and Senators of the Interior agreed a follow-up regulation, prolonging the regulation governing old cases by two years.
112 Czech Republic, Act on the Residence of Foreign Nationals in the Territory of the Czech Republic, Section 43 and information provided by a civil society organisation; Lithuania, Law on the Legal Status of Aliens, Article 132.
113 Austria, Residence Act, 69a(1).
114 Cyprus, 1972 Aliens and Migration Regulations, Article 15 (1)(B).
115 Finland, Aliens Act, Section 51.
116 Poland, 2003 Act on granting aliens protection in the territory of Poland, Article 99.
117 Denmark, Aliens Act, Section 9(c)2 requires the suspension last for 18 months before a permit is considered.
118 See, for example, Austrian Residence Act in 69a(1).

Conclusions

The situation of third-country nationals who are in return procedures is regulated by the Return Directive. It provides, however, only limited guarantees to ensure that persons in return procedures who are not removed are treated in accordance with basic fundamental rights standards. Moreover, neither the directive, nor other EU policy documents provide for a mechanism to put an end to situations of legal limbo that derive from protracted situations of non-removability.

Impediments for removal may be based on several grounds linked to legal or humanitarian considerations, practical obstacles or policy choice. EU Member States have adopted different policies to deal with this phenomenon. In some cases, (temporary) residence permits are issued, in others, stay is authorised on the basis of a formal toleration and, in a third group of cases, the presence of persons who are not removed is simply tolerated de facto. The level of security of residence usually determines the degree to which non-removed persons have access to fundamental rights, with Spain being an exception, as it grants the same level of rights to anybody who is registered at the municipality.

FRA opinion

Neither the Return Directive nor other EU policy documents provide for a mechanism to put an end to situations of legal limbo that derive from protracted situations of non-removability. The safeguards set forth in the Return Directive (Article 14(1)) for non-removed persons do not cover all rights and apply only if removal is formally postponed.

EU institutions and Member States should pay more attention to the situation of migrants in an irregular situation who have been given a return decision but who have not been removed. Mechanisms should be set up either at Union or Member State level to avoid situations where persons who are not removed remain in legal limbo for many years.

Following the evaluation of the Return Directive planned for 2014, the European Commission should propose amendments to the directive to ensure that the basic rights of persons who are not removed are respected.

EU Member States should issue a certification of postponement of removal as required by the Return Directive. It is an important tool to protect non-removed persons and to facilitate their access to rights. This should also be done when removal is only postponed de facto.

3

Immigration law enforcement

Return Directive

Recital 13

The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

Article 6 (1)

Member States shall issue a return decision to any third-country national staying illegally on their territory [...].

Under international law, sovereign states are entitled to enforce immigration law and thus determine who can stay, reside or work in the country. Such power is, however, limited by international obligations that a state has assumed, including human rights obligations, such as those deriving from Articles 3 and 8 of the ECHR.

In addition, measures to control migration and enforce immigration law can have an indirect negative impact on the ability of migrants in an irregular situation to enjoy basic rights in the host country. If they know they risk arrest, they will be discouraged from, for example, approaching health service providers or NGOs that offer legal advice.

At the Union level, the Return Directive contains in Article 6(1) a duty to issue a return decision to illegally staying third-country nationals and hence, indirectly, to look for and detect persons who are staying in the country in an irregular manner. Recital 13 of the Return Directive expressly recognises the principle of proportionality when using coercive measures, which also relates to measures aimed at apprehending migrants in an irregular situation. Building on the UN Smuggling Protocol,[119] the Facilitation Directive imposes on states the duty to penalise those who, for financial gain, intentionally assist a person to enter and/or reside in the EU in an irregular manner.[120]

This chapter reviews different types of law enforcement practices and investigates whether and to what extent they potentially undermine access to fundamental rights of the persons targeted. In doing so, it will highlight those measures that might be disproportionate, given their impact on the ability of migrants in an irregular situation to enjoy basic rights such as healthcare or education.

The report deals with the two different levels of policing irregular migration in order to detect migrants who are in an irregular situation within a state:

- directly through 'pro-active' law enforcement measures and
- indirectly via service providers, in particular through reporting obligations and data exchange practices.

3.1 Direct enforcement measures

This report groups proactive enforcement measures into five categories: identity documents (IDs) checks in public places, such as streets, stations, or public

119 UN General Assembly (2000) *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, provides in Article 6(1)c for the duty to criminalise actions effected by illegal means which enable a person to remain in the territory of a State without complying with the necessary requirements.

120 See footnote 52.

transport; routine workplace inspections; one-off high-profile raids; routine searches of places of accommodation; and arrests of suspects at or near service providers, such as schools, health centres, religious places and NGOs.

Identification checks

ID checks occur in most EU Member States. Often they are part of routine checks of traffic, public transport or at other public places. Routine identity checks may be undertaken to look for criminals or for individuals unlawfully staying in the country. Depending where checks are carried out, these may deter migrants from approaching authorities and services.

Overall, ID checks are an important and frequently used method of direct policing in most of the EU Member States. In principle, this method represents a legitimate way of managing the irregular migration flow within a country. It may, however, also have two additional implications from a fundamental rights point of view.

First, identity checks carried out near public services, such as schools, health centres or religious facilities have the indirect effect of discouraging migrants from accessing such services. Sometimes specific nationalities or ethnicities are targeted by policing activities, as indicated in the FRA EU Minorities and Discrimination Survey (EU-MIDIS), which focused on migrants more generally.

FRA PUBLICATION

EU-MIDIS survey

The survey examines immigrant and ethnic minority groups' experiences of discriminatory treatment, racist crime victimisation, awareness of rights and reporting of complaints.[121] Migrants who are stopped are more likely to be asked for identity papers. As an illustration, in Italy, 90% of North Africans who were stopped were asked for identity papers in comparison with 48% of the majority population.[122] In Germany, 85% of persons from ex-Yugoslavia who were stopped were asked for a driving licence or vehicle documents compared with 50% of the majority population.[123]

Second, locations may be targeted which are also visited by minority representatives regularly residing in the country. This, in turn, can have the effect of exposing the latter to frequent police stops.[124]

Where police powers are exercised on the basis of broad profiles involving race or ethnicity, they may become counter-productive because of the negative effects they have on individuals and the minority to which they belong. Individuals have described such encounters as "frightening, humiliating or even traumatic" experiences.[125] Profiling also discourages reporting crimes including hate crimes, harassment and discrimination to local and community police. The non-discrimination guarantees of the Racial Equality Directive also apply to migrants in an irregular situation, as they prohibit differentiated treatment when this is based on race or ethnic origin.[126]

FRA PUBLICATION

Handbook on discriminatory ethnic profiling

The adverse effects of potentially discriminatory ethnic profiling may result in increased levels of hostility in other encounters between individuals and police or other law enforcement officers. Greater hostility increases the chances that routine encounters will escalate into aggression and conflict, posing safety concerns for officers and community members alike.[127]

Workplace inspections

A primary purpose of workplace inspections is to protect workers from exploitative, abusive or unfair working conditions. Labour inspectors are an essential instrument to prevent inadequate working conditions as well as to detect and protect possible victims. At the same time, however, in almost all EU Member States, workplace inspections are listed by civil society organisations as a policing measure used to detect migrants in an irregular situation. Some responses in the civil society survey suggest that routine workplace inspections generally target labour law violations and only detect migrants in an irregular situation as a side-effect (Denmark, Sweden). This may, however, not always be so. In Poland, for example, Polish Border Guards are responsible for carrying out checks on irregularity within the territory of Poland in the area of employment in cooperation with the National Labour Inspectorate.[128] Accordingly, the Polish labour

121 FRA (2009) *European Union Minorities and Discrimination Survey (EU-MIDIS) – Main results report*, Luxembourg, Publications Office.
122 FRA (2010) 'Police Stops and Minorities', *EU-MIDIS Data in Focus Report 4*, Luxembourg, Publications Office, p. 11.
123 *Ibid.*
124 *Ibid.*
125 FRA (2010) *Understanding and preventing discriminatory ethnic profiling: A guide*, Luxembourg, Publications Office.
126 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/24. See Recital 13 and Article 3.2. The directive allows, however, differences of treatment which arise from the legal status of the third-country nationals.
127 FRA (2010) *Understanding and preventing discriminatory ethnic profiling: a guide*, Luxembourg, Publications Office, p. 44.
128 EMN (2010) *Annual Policy Report 2009 for Poland*, December 2009, available at: http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do%3b?directoryID=125.

inspectors often conduct joint work inspections with the Polish Border Guards.[129]

The interconnection of work-place inspections with immigration status checks creates an environment which is not conducive to identifying labour exploitation or abuse as in practice it impedes access to effective remedies. The absence of a safe environment discourages migrants in an irregular situation from filing complaints against employers. Furthermore, the removal of migrants from the work place may also destroy evidence of exploitative working conditions.

Large-scale raids

Large-scale raids are another tool to detect migrants in an irregular situation, and can involve the use of force. In order to comply with fundamental rights standards, it is important to ensure that the use of force remains proportionate to the threat. Disproportionate use of force may, in addition, trigger violent reactions by targeted migrants. Police awareness of de-escalation measures and skills to apply these in an operation can reduce the risk of unjustified interference with a person's rights, in particular to his or her physical integrity.

Searches at places of accommodation

Other pro-active, routine policing operations target places of accommodation. For example, in Greece,[130] Italy,[131] and France[132] residences of large groups of migrants in an irregular situation have been targets of police operations. In Patras (Greece) on 12 July 2009, irregular migrants were evicted from their makeshift camp and arrested[133] and in 2010 evictions took place in central Athens.[134] On one occasion, the local police of the village of Coccaglio in Northern Italy were ordered to visit all immigrant households and check the residency status of foreign nationals.[135] At times, the police specifically target accommodation places of migrants in an irregular situation at addresses which are known from past detections.[136]

Some reports imply that such enforcement operations do not always and necessarily result in subsequent arrests. In France in June 2009, for instance, hundreds of migrants in an irregular situation were evicted from an occupied building but not arrested.[137] Targeting places of accommodation to evict migrants without subsequently removing the person is not a solution. The Committee for Economic Social and Cultural Rights considers that evictions motivated solely by the migrants' irregular status violate the right to housing.[138] Evicting migrants in an irregular situation from the homes in which they have established their private and family life means leaving them on the streets with no shelter. In such cases, the eviction can be considered a disproportionate response by the state in its attempts to control irregular migration.

Policing public service providers

Some reports suggest that occasionally the police target public service providers, such as schools or hospitals in order to apprehend migrants in an irregular situation. Sometimes, enforcement actions target humanitarian supporters. In 2007, the French police targeted humanitarian supporters and searched for irregular migrants at soup kitchens.[139] Other examples include: school children and their families in Cyprus[140] and schools in France.[141] Instances of arrest of migrants in an irregular situation at or near educational or health facilities are

129 ILO (2010) *Labour inspection in Europe: undeclared work, migration, trafficking*, Geneva, ILO, pp. 24-25 in particular, available at: www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@lab_admin/documents/publication/wcms_120319.pdf. See also the general findings of the Conference on Illegal Employment of Foreigners held in Warsaw in May 2010, where the Polish General Labour Inspectorate declared the need to further tighten cooperation with the Polish Border Guards – its key and essential partner in the course of fulfilling of their inspection duties, available at: www.pip.gov.pl/html/pl/news/10/10100026.php.

130 Kathimerini (2009) 'Police removes migrants from Athens squats', 31 July 2009; Daily Telegraph (2009) 'Greek immigration crisis spawns shanty towns and squats', 7 September 2009. See also the article on operation "Lightning", which had the purpose of removing illegal immigrants residing in different areas in central Athens, Ta Nea online (2009) '"Vacuum" 100 people per day' (*«Σκούπα» 100 ατόμων την ημέρα*), 12 June 2009.

131 Spiegel (2008) 'Italy cracks down on illegal immigrants', 16 May 2008.

132 Radio France International (RFI) (2009) 'The Calais migrant camp not a no man's land', 23 September 2009.

133 UNHCR (2010) *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Greece*, November 2010, p. 9, available at: www.unhcr.org/refworld/pdfid/4cd8f2ec2.pdf.

134 *Ibid.*

135 Libération (2009) 'Ils sont rentrés et ont balancé les lacrymo', 24 June 2009.

136 FRA civil society questionnaire, response from Austria.

137 PICUM (2009) PICUM Newsletter, July 2009, 6 July 2009.

138 The Committee for Economic Social and Cultural Rights defined forced evictions as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection", which would result in a violation of the right to housing protected by the Covenant. CESCR (1991) *General Comment No. 4: The right to adequate housing (Article 11(1))*, 13 December 1991, paragraph 18.

139 FRA civil society questionnaire, response from France.

140 FRA civil society questionnaire, response from Cyprus.

141 Guardian (2006) 'Sarkozy forced to review plans to deport children of illegal immigrants', 6 June 2006, available at: www.guardian.co.uk/world/2006/jun/07/france.angeliquechrisafis.

only reported only from some countries. Indeed, the assessment of civil society experts' responses show that the apprehension of migrants in an irregular situation at or near service providers seem to take place in a regular manner only in five EU Member States (Cyprus, Denmark, Greece, Ireland and Sweden).[142]

Arresting migrants in or near basic service providers, such as schools or hospitals belongs to those measures which have the most severe impact on the fundamental rights situation of migrants in an irregular situation. In practice, as a result of the fear of being arrested by the police, migrants in an irregular situation avoid approaching public service providers and are thus effectively deprived of basic rights. Such practices should therefore be scrutinised for their impact on fundamental rights. As noted by one migrant interviewed in Belgium: "I know that with the medical card I can go to any doctor for my disease but I am scared of going to hospital because of the fear of being discovered and arrested by the police."

3.2 Reporting obligations

Policing of irregular migration can also be carried out indirectly. Direct and indirect policing methods are usually inextricably linked and are used by the public authorities in combination. This section covers the following measures that belong to such indirect policing: criminalisation of irregular stay and related general reporting obligations, and reporting obligations of certain service providers and data exchange practices.

General reporting duties based on crimes of irregular stay

Figure 4 shows that in 17 EU Member States irregular border crossing or irregular stay is, at least on paper, considered a crime.[143] In Belgium,[144] Cyprus,[145] Denmark,[146] Estonia,[147] Finland,[148] France,[149] Germany,[150] Greece,[151] Ireland,[152] Lithuania,[153] Luxembourg,[154] Romania,[155] Sweden[156] and the United Kingdom[157] this crime can be punished by imprisonment and/or a fine whereas in Italy, sanctions have the form of a fine only.[158] In Latvia[159] and the Netherlands,[160] an irregular entry and/or stay can be a crime under certain conditions but is not one per se. In the Netherlands, however, irregular stay of adults is expected to be criminalised in late 2011 allowing for immediate detention upon detection.[161]

National regulations often require public authorities and service providers to report crimes to the relevant law enforcement agency. In principle, this duty applies also to the crime of irregular entry and/or stay, where this is foreseen. For example, Article 29 of the Belgian Code of Criminal Procedure and Article 361 of the Italian Criminal Code require every authority, public officer or civil servant who, while executing his/her profession, is confronted with a crime or an offence, to report this to the public prosecutor. Similar provisions imposing an obligation on the public authorities to report a crime to the police exist in many other countries as well.[162] Where irregular entry and residence are considered a criminal offence, official institutions are in principle

142 It should be noted that only one NGO response each was received from Cyprus, Denmark, Greece and Sweden. Nevertheless, such responses were given by well-regarded NGOs in the respective countries and are considered to have a good grasp of the issues at stake.

143 In other EU Member States, an irregular entry or stay is often considered to be an administrative offence rather than a crime (e.g. the Czech Republic, according to the Act on Residence of Foreign Nationals in the territory of the Czech Republic, Articles 156 and 157; or Slovakia, Act on. 48/2002 Coll. on the residence of Foreigners, Article 76).

144 Belgium, Aliens Act, Article 75.

145 Cyprus, Aliens and Immigration Act, Chapter 105.

146 Denmark, Aliens Act, Article 55 (1).

147 Estonia, Penal Code, Articles 258 and 260.

148 Finland, Aliens Act, Section 185 and Penal Code 39/1889, Chapter 2a, Section 1 (1) and Chapter 17, Section 7.

149 France, Code of the Entry and Stay of Foreigners and Asylum Law, Article L621-1.

150 Germany, Residence Act, Articles 95 (1) 2 and 3.

151 Greece, Law 3386/2005, Article 83 (1). It should be noted that in Greece only irregular entry and attempted entry constitute criminal offences – and not irregular stay.

152 Ireland, Immigration Act 2003, Section 5.

153 Lithuania, Penal Code, Article 291.

154 Luxembourg, Immigration Law, Article 140.

155 Irregular entry is criminalised under the Romanian Law of the State Frontiers (Articles 65 and139) and under the Criminal Code (Article 330). Irregular stay is considered an administrative offence that is punishable by a fine (Law on Foreigners, Article 134(2)).

156 Sweden, Aliens Act (2005:716), Chapter 20, Sections 1, 2 and 4.

157 United Kingdom, Immigration Act 1971, Section 24.

158 See Law 94/2009 which has amended Article 10-bis of legislative decree 286/1998 and introduced a fine of €5,000–10,000.

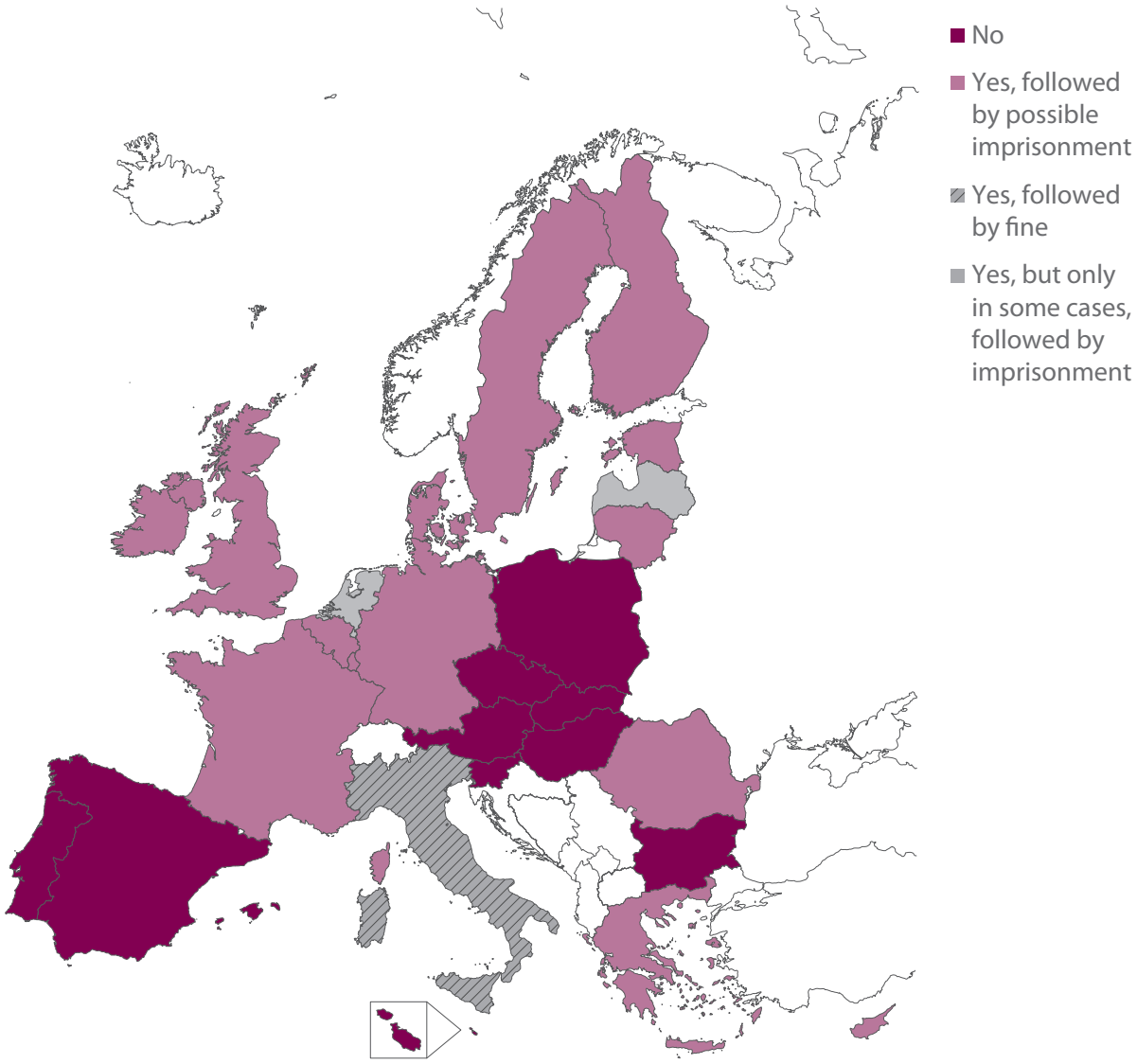
159 According to Article 284 of the Latvian Criminal Code, irregular entry and stay is regarded as a crime only in certain specific cases. Irregular entry is a criminal offence only if committed repeatedly within the period of one year, in which case it is punishable by, *inter alia*, a deprivation of liberty of up to three years or a fine up to 60 minimum monthly wages.

160 In the Netherlands, a person declared an 'unwanted alien' who finds him or herself in the Dutch territory commits, by this very fact, a crime under Article 197 Criminal Code, which is punishable by imprisonment for up to six months.

161 Report by the Minister for Immigration and Asylum to the Parliament, 8 July 2011.

162 See, for example, Article 37 (2) of the Greek Code of Criminal Procedure as well as Article 40 which contains a similar duty for private citizens. Such general obligations also exist in countries where irregular entry/stays are not considered a crime - see, for example, Article 8 of the Czech Code of Criminal Procedure; Article 304 of the Polish Code of Criminal; Article 3 of the Slovak Code of Criminal Procedure; Article 145 of the Slovenian Code of Criminal Procedure.

Figure 4: Is irregular entry/stay considered a crime?



Sources: FRA, 2011, based on national legal provisions

obliged to report migrants in an irregular situation, unless this is barred by professional ethics codes (such as in the case of medical staff) or other specific rules (e.g. on data protection). Reporting duties can undermine access to services since, by approaching relevant service providers, migrants in an irregular situation risk detection and arrest.

In Italy, regional governments have nevertheless demonstrated that it is possible for lower levels of government to soften the impact of such criminalisation. The Italian region of Tuscany, for example, passed an immigration law on 1 June 2010 to address the treatment and status of undocumented migrants. While Italy tries to control the presence of migrants in an irregular situation through criminalisation, Tuscany's law emphasises the basic human rights of all immigrants and grants free access to healthcare and other forms of social assistance, such as meals at municipal cafeterias and beds in shelters.[163]

Imprisonment in Italy for crimes of irregular entry or stay was the subject of a 2011 judgment by the CJEU, which concluded that criminal detention of a migrant who does not comply with an order to leave the national territory was incompatible with the Return Directive. It clarified that migrants in an irregular situation should be detained in the framework of administrative measures foreseen by the Return Directive, and that the safeguards established by that directive should apply.[164] Italy subsequently changed its legislation.[165]

163 See www.regione.toscana.it/leggeimmigrazione.
164 CJEU, C-61/11, *El Dridi,* 28 April 2011.
165 See Law Decree of 23 June 2011, No. 89, as modified by Law 129 of 2 August 2011.

Criminalisation also has negative consequences for the fundamental rights situation of migrants in an irregular situation in cases where reporting is only permitted under specific circumstances or where unclear rules create an atmosphere of uncertainty. The negative impact of such criminalisation on access to fundamental rights is intensified where the relevant national law contains specific provisions that do not explicitly exempt the provision of aid on a purely humanitarian basis from sanctions for facilitation of irregular entry or stay. In France,[166] for example, a woman was brought to court for housing an Afghan minor who was homeless.[167]

Reporting obligations of certain service providers

Service providers, such as, institutions dealing with health or education issues may not necessarily be exempted from reporting irregular status to the immigration enforcement authorities. In these cases, reporting requirements have an impact on access to basic social rights.

In some countries, certain service providers offering basic services, such as schooling or healthcare, are prohibited from reporting migrants who are in an irregular situation to the police although irregular entry and stay can constitute a crime. This is the case for health and education authorities in Finland, Italy or the Netherlands, for example.

Promising practice

Clarifying the duty not to report migrants in an irregular situation

The Committee for the Rights of Foreigners of the Council for Human Rights (an advisory body to the Czech Government) concluded after a meeting with health professionals in September 2010 that reporting migrants in an irregular situation to the police is unlawful and should not take place. As a follow-up, the Czech Medical Chamber clarified this issue in a newsletter, sent to every doctor. According to the Multicultural Centre Prague, there are plans for a similar follow-up by the Czech Association of Nurses.[168]

However, there are countries in which these service providers are not exempt from the obligation to report migrants with suspect legal status to the immigration and/or law enforcement authorities, although they provide essential and sometimes even life-saving services. In some cases, health authorities, schools and kindergartens or landlords have a duty to report an individual's irregular status to the police only for those individuals sought for criminal purposes. In the Netherlands, persons sheltering migrants who are or can be assumed to be in an irregular situation are obliged to notify the local police immediately.

Undoubtedly, reporting requirements have an impact on access to basic social rights, including the right to education and healthcare. In Cyprus, for example, a circular of the Ministry of Education explicitly requires state schools to report enrolment of migrant children, hence also of children without a right to stay.[169] A similar obligation to report foreign student enrolment exists in Slovakia[170] and Sweden,[171] while in the UK, educational institutions are obliged to report absent foreign students.[172]

Germany's situation is more complex. At the federal level, a general 'duty to report' existed under the Residence Act, Section 87, until changes to this section were adopted in in the summer of 2011.[173] The recently adopted changes to the Act explicitly exempts schools, nurseries and educational facilities from this duty.[174] Other public institutions, however, remain obliged by federal law to report migrants to the immigration authorities as soon as staff learns about the irregularity of their situation. As described in more detail in the healthcare chapter, social welfare office staff are required to report migrants in an irregular situation to the police if the migrants obtain healthcare services which cannot be classed as emergency care.[175]

166 France, Code of the Entry and Stay of Foreigners and Asylum Law, Articles L622-1 to L622-10.
167 France Info (2009) 'Jugée pour „délit de solidarité"... et relaxée', 8 September 2009, available at: www.france-info.com/france-justice-police-2009-09-08-jugee-pour-delit-de-solidarite-et-relaxee-340012-9-11.html.
168 See www.migrationonline.cz/e-library/?x=2265535.
169 Such duty derives from an unpublished circular by the Ministry of Education and Culture of February 2004.
170 Slovakia, Aliens Act, Article 53(3).
171 Sweden, Aliens Ordinance (2006:97), Chapter 7 Section 1(4), available in English at: www.sweden.gov.se/content/1/c6/07/56/18/7cbd265a.pdf.
172 See UK Border Agency, Guide to sponsoring students under tier 4 of the points-based system. The guide includes new policy measures introduced on 5 September 2011; see paragraph 24 of the guide, available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/guidancefrom31mar09/sponsor-guidance-t4-050911.pdf?view=Binary. See also Times Higher Education (THE) (2009) 'Delegates split over boycott of immigration rules', available at: www.timeshighereducation.co.uk/story.asp?storycode=406776.
173 See also Kluth, W. and Czernota, D. (2006) *Der Rechtsstatus illegal aufhältiger Personen in der deutschen Rechtsordnung in rechtsvergleichender Betrachtung*, Rechtsgutachten, Halle, Universität Halle; Bommes, M. and Wilmes, M. (2007) *Menschen ohne Papiere in Köln. Eine Studie zur Lebenssituation irregulärer Migranten*, Cologne, City of Cologne.
174 The changes to Section 87 (2) of the Residence Act, proposed by the Committee of Home Affairs (Drucksache 17/6497), were adopted by the Parliament (*Bundestag*) on 6 July 2011 and approved by the second chamber (*Bundesrat*) on 23 September 2011 (Drucksache 481/11).
175 See Chapter 6.

As regards education, even before the exemption at federal level, several federal states enacted legislation or issued administrative instructions that exempted school authorities from this general duty, for example in North Rhine-Westphalia.[176] In Hamburg and Berlin, registration systems in the form of databases were set up for schoolchildren, but parents' associations campaigned against them and activists supporting data protection boycotted them.[177] The civil rights movement led to a softening of the provisions and thus personal data are only retained at the server of each school. There is no ID to identify children, and any coding needed to process data for statistical requirements cannot be used by anyone other than a school official. It is forbidden to process data on sensitive issues in a way that would allow individuals to be identified (like data on how many pupils have a foreign language as a mother tongue).[178]

The introduction of a reporting obligation for health staff was also proposed in Italy. The matter was the subject of heated debate in 2009, when it was discussed as a part of the so-called 'security package' legislation. In the end, following a campaign to prevent its implementation, the proposal was not introduced.[179]

Data exchange practices

In certain cases, in order for migrants to benefit from social rights, the public service provider (e.g. healthcare centres, schools, civil registries) may need to register the name and contact details of the person receiving the services. Similarly, landlords may need to register tenants with local authorities. Where the police or immigration authorities have access to such registers, the person's irregular status may come to their attention, and this information may then be used for immigration law enforcement purposes.

The sharing of personal information must respect certain data protection principles in order to not infringe on personal privacy. Data can only be used for the purpose for which they were collected. Individuals whose data are stored must be adequately informed and have the possibility to access (and if necessary correct) the information stored.

Data exchange practices between regional registers and the immigration authority or between tax and immigration authorities vary. Often, only some authorities have access to this information or access is restricted or impractical. In Germany, data exchanges are routine,[180] whereas in Greece the number of data exchanges is considered low.[181] In Spain, data exchange between regional registers, the police and the central government's immigration authorities is barred except in cases of national security.[182] The differences seem to be determined by national and organisational cultures, national data protection regulations, levels of institutional autonomy or integration, and the efficiency of cooperation among authorities.

Finally, another practice to detect migrants in an irregular situation through reporting involves the public at large. In some countries, individual members of the public are encouraged to report migrants in an irregular situation to the authorities or to special telephone hotlines. NGOs reported that special denunciation hotlines exist, for instance in Cyprus, Romania and the United Kingdom.[183] In addition, NGOs reported that denunciation to the authorities often occurs in Hungary, notably in border regions, and, occasionally in the Netherlands.

Conclusions

Immigration law enforcement measures are legitimate, as states have the authority to decide who can stay, reside or work in their territory. They are also in line with the duty to issue return decisions to irregularly staying third-country nationals as per the Return Directive. Immigration law enforcement measures, however, need to be designed in such a way that they do not disproportionally affect access to fundamental rights.

In this context certain detection strategies and approaches, such as arresting migrants near service providers or data exchange with public service providers, are particularly problematic. They discourage migrants in an irregular situation from

176 Germany, SchG NRW, Section 34 Section 6, s.1; Ordinance by the Ministry of Education North-Rhine Westphalia.

177 See on this issue Flüchtlingsrat Berlin (2009) 'Flüchtlingsrat lehnt geplante Schülerdatei ab - Verbot der Datenübermittlung gefordert', Press release, 29 January 2009, available at: www.fluechtlingsrat-berlin.de/print_pe.php?sid=424.

178 Berlin, *Gesetz zur automatisierten Schülerdatei* (Artikel I SchulG-Änderung), 2 March 2009, GVBl. p. 62, available at: www.berlin.de/imperia/md/content/sen-bildung/schulorganisation/egovernment/gesetz_schuelerdatei_64a_64b.pdf?start&ts=1307711296&file=gesetz_schuelerdatei_64a_64b.pdf.(works. See also information on Schüler-ID, available at: http://de.wikipedia.org/wiki/Sch%C3%BCler-ID.

179 See the national campaign 'Forbidden to denounce' (*Campagna nazionale "Divieto di segnalazione"),* available at: www.immigrazioneoggi.it/documentazione/divieto_di_segnalazione-analisi.pdf.

180 See Clandestino (2009) *Policy Brief – Germany*, August 2099, available at: http://irregular-migration.hwwi.de/typo3_upload/groups/31/4.Background_Information/4.2.Policy_Briefs_EN/Germany_PolicyBrief_Clandestino_Nov09_2.pdf.

181 Kanellopoulos, C.N. (2005) *Illegally resident third-country nationals in Greece: state approaches towards them, their profile and social situation* (1st draft), Athens, KEPE, p. 36, available at: www.emnitaly.it/down/ev-25-02.pdf.

182 FRA local authorities questionnaire, responses from Spain.

183 FRA civil society questionnaire, responses from Cyprus, Romania and the United Kingdom.

making use of essential public services, such as healthcare or education for their children, or prevent them from approaching religious, humanitarian or other civil society structures which provide assistance, advice or support. In fact, it is often the atmosphere of fear generated by such measures that prevents migrants in an irregular situation from accessing basic rights or seeking redress when these are violated.

FRA opinion

The Return Directive expressly recognises the principle of proportionality in Recital 13. This means that the obligation to issue return decisions to illegally staying third-country nationals under Article 6 of the Return Directive cannot be used as a justification for excessive checks or scrutiny, which have the effect of discouraging migrants from accessing basic rights.

EU Member States are, therefore, encouraged to give due importance to the impact on the fundamental rights of migrants when planning and evaluating detection tactics and operations.

To facilitate this, consideration should be given to developing guidance for police officers, either in the form of a handbook or a list of 'dos and don'ts'. Such a tool should discourage, in particular, apprehensions from or near schools, medical facilities, counselling centres, churches or other institutions offering essential services to migrants It should also discourage data exchange between these institutions and immigration law enforcement bodies as such exchanges can disproportionately hinder migrants' access to basic rights or raise privacy and data protection concerns.

4

Workers' rights

Charter of Fundamental Rights of the European Union

Article 31 – Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.

Migrants in an irregular situation are normally not allowed to work, although in some countries persons who are authorised to stay following the suspension of their removal may, under certain conditions, be entitled to access the labour market.[184] In Greece, for example, persons who cannot be removed for practical reasons will be issued a formal suspension of removal entitling them to basic rights during the period until their departure can take place, including, under certain conditions, the permission to work.[185] In addition, interviews showed that some migrant workers, although they are in an irregular situation, declare their work and pay annual taxes.

No reliable estimates exist on the number of migrant workers in an irregular situation who work in the EU. For the domestic work sector, a rough indication can be deduced from regularisation data: some 500,000 irregular third-country nationals employed in domestic work have been regularised since 2002 in Italy and Spain, and another 250,000 persons are pending regularisation in Italy.[186] However, migrant workers in an irregular status are also employed in other sectors, such as agriculture, construction, manufacturing, hospitality and food processing.[187]

Core labour law standards apply to all workers, regardless of status. The ILO's governing body has identified eight ILO Conventions as fundamental to the rights of people at work and hence applicable to all workers.[188] Similarly, the social policy measures to combat exclusion and to protect the rights of workers envisaged in Article 151 and 152 TFEU are not expressly restricted to nationals or lawfully staying third-country nationals. The 1989 Directive on Safety and Health at Work defines 'worker' as 'any person employed by an employer' without restricting it to regular workers.[189] An employment relationship where core labour law rights are disregarded becomes exploitative.

184 See EMN Ad-Hoc Query: 'Practices followed concerning TCNs whose compulsory removal is impossible', requested by EMN National Contact Point for Greece on 8 January 2010. Compilation produced on 14 April 2010. Finland and, under certain conditions Slovakia, grant access to the labour market.

185 Greece, Law 2907/2011, Articles 24(4) and 37(5).

186 FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, pp. 19 and 50.

187 McKay, S., Markova, E., Paraskevopoulou, A. and Wright, T. (2009) *Final Report: The relationship between migration status and employment outcomes,* Undocumented Worker Transitions Project, London Metropolitan University, Working Lives Research Institute, pp. 33-34.

188 ILO Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182 covering freedom of association and collective bargaining, child labour, forced and compulsory labour, discrimination in respect to employment and occupation. All EU Member States have ratified them. The 1998 ILO Declaration on Fundamental Principles and Rights at Work stresses at Article 2 that all ILO Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights.

189 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183/1.

This chapter explores three core rights which are central to ensuring fair employment conditions for migrants in an irregular situation, namely:

- the right to claim withheld pay;
- the right to compensation for work accidents;
- access to justice.

Withholding wages and a lack of compensation in case of work accidents occur in most sectors of the economy which employ migrant workers in an irregular situation (care, cleaning, agriculture, construction, manufacturing, hospitality and food processing).[190] Access to courts and trade unions are crucial for claiming the other two rights.

4.1 Withheld or unfair pay

This section deals with withheld or unfair remuneration and with the possibility of claiming fair payment. Safeguarding fair working conditions for all workers, of which remuneration is a core component, is expressly protected in a number of international legal instruments.

The duty of employers to pay fair remuneration can also be found in EU law. Article 5 of the 1989 Community Charter of the Fundamental Social Rights of Workers stresses that "[a]ll employment shall be fairly remunerated" and that "workers shall be assured of an equitable wage" sufficient to guarantee "a decent standard of living".

The Employers Sanctions Directive contains an important safeguard to address exploitation regarding wages.[191] According to Article 6, EU Member States must make available mechanisms to ensure that migrant workers in an irregular situation may either introduce a claim against an employer for any remuneration due or may call on a competent authority of the EU Member State concerned to start recovery procedures. Back payments should at least be "as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branch" (Article 6a).

In the majority of EU Member States, irregular residence does not nullify a person's rights as a worker and the effects of labour law, although due to an absence of case law, the situation is often unclear or subject to different interpretations. In at least 19 countries, entitlements to fair remuneration apply to all workers, including migrants in an irregular situation.[192] As an illustration, in Luxembourg, legislation on aliens contains a duty for the employer to pay unauthorised workers their salaries as well as a social contribution.[193] Section 1152 of the Austrian Civil Code allows for a wage claim based on the collective bargaining agreement to be made even if the work contract is legally void. In Romania, the law sets out the employer's obligation to pay compensation for unjustifiably delayed or unpaid salary including, in the case of migrants in an irregular situation, the amount of any remuneration,

190 McKay, S., Markova, E., Paraskevopoulou, A. and Wright, T. (2009) *Final Report: The relationship between migration status and employment outcomes,* Undocumented Worker Transitions Project, London Metropolitan University, Working Lives Research Institute, p. 33.

191 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168, pp. 24-32 *(Employers Sanctions Directive)*.

192 Austria, Belgium, Bulgaria, Cyprus, France, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden. See for Austria, Civil Code, Section 1152 and Aliens Employment Act *(Ausländerbeschäftigungsgesetz)*, Section 25; Belgium, Collective labour agreement No. 65.530/CO/323 of 30 September 1999; Bulgaria, Employment Promotion Act (15 June 2011), Article 73 (3); Cyprus, European Commission against Racism and Intolerance (ECRI) (2011) *Report on Cyprus*, May 2011, p. 23; France, Labour Code, Article L. 8252-1; Germany, communication to the FRA by the Federal Ministry of Labour and Social Affairs in March 2011; Greece, Supreme Court ruling No. 206/2009 in light of Article 904 of the Urban Code; Hungary, communication to the FRA by the Hungarian Ministry for National Economy, March 2011; Italy, Law 189/2002, and National Collective Agreement (CCNL) of 13 February 2007; Ireland, National Minimum Wage Act 2001 and the Statutory Code of Practice; Latvia, response to FRA national authorities questionnaire; Luxembourg, 2008 Law on Freedom of Movement and Immigration, Article 146; Poland, Act on Minimum Pay for Work, 10 October 2002 establishes minimum wages in Poland and Article 2 of the 1998 Polish Labour Code considers an employee any person employed on the ground of a labour contract, election, appointment or cooperative labour contract; Portugal, communication to the FRA by the Portuguese Aliens and Borders Service; Romania, Law 53/24.01.2003 Labour Code, updated by Law 40/2011 for the amendment and completion of Law 53/2003, Article 279[1](1) (no case law concerning migrants in irregular situations seems to exist); Slovenia, Employment Relationships Act, Articles 42, 126-130, 133-135 and 137 (but no case law seems to exists). In Spain, Article 33(3) of the new Aliens Acts 4/2000 and Article 9 (2) of the Labour Statute *(Ley del Estatuto de los Trabajadores,* modified by Law 38/2007), oblige the employer to pay the remuneration for the time worked even if the labour contract turns out to be void. For Sweden, see SOU 2010:63 (2010), *EU:s direktiv om sanktioner mot arbetsgivare: Betänkande av Sanktionsutredningen*. In Malta, the Department of Industrial and Employment Relations which is the regulatory and enforcing body of Maltese Labour Law clarified to the FRA in June 2011 that all persons, irrespective of their nationality and status, are entitled to receive remuneration according to labour law for their work, provided there is an employment relationship between the parties. The Department of Industrial and Employment Relations accepts any claim arising from such employment relationship irrespective whether such relationship is regular or not. This, however, would be without prejudice to any other action that may be taken by other departments or entities regarding the irregularity of the employment relationship. For the Netherlands, see Cholewinski, R. (2005) *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg, Council of Europe Publishing.

193 Luxembourg, 2008 Law on Freedom of Movement and Immigration, Article 146.

taxes and social security contribution due as well as the costs of returning the person. In Malta, the Employment and Industrial Relations Act provides a mechanism for claiming withheld pay that migrants in an irregular situation may also access provided an employment relationship can be proven.[194]

Table 4: Main international law provisions on fair remuneration

Instrument	Main provision	Ratification	Applicability to migrants in an irregular situation
UDHR, Article 23	"just and favourable conditions of work"; "right to equal pay for equal work"; "right to just and favourable remuneration"		Yes
ICESCR, Article 7	"fair wages and equal remuneration for work of equal value without distinction of any kind"	All 27 EU Member States[1]	Yes[2]
ICRMW, Article 25(3)	"employers shall not be relieved of any legal or contractual obligations [...] by reason of [the] irregularity" in the stay or employment of migrant workers	No EU Member States	Yes
ILO Convention No. 143 (1975), Article 9(1)	"Without prejudice to measures [...to ensure] that migrant workers enter national territory [...] in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits."	Cyprus, Italy, Portugal, Slovenia, Sweden	Yes
Revised European Social Charter, CETS No.: 163 (1996), European Social Charter, Article 4	"right of workers to a remuneration such as will give them and their families a decent standard of living"	All EU Member States[3] except the Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the UK	No

Notes: [1] *Belgium made the following interpretative declaration to the ICESCR: "With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies". Denmark made the following reservation to the ICESCR: "The Government of Denmark cannot, for the time being, undertake to comply entirely with the provisions of article 7(d) on remuneration for public holidays". Sweden made the following reservation to the ICESCR: "Sweden enters a reservation in connection with article 7(d) of the Covenant in the matter of the right to remuneration for public holidays".*

[2] *See CESCR (1990)* General Comment No. 3 The nature of States parties' obligations (Article 2(1)), *14 December 1990 in paragraph 10 and CESCR (2009)* General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2)), *10 June 2009, paragraph 30.*

[3] *As the Revised European Social Charter and the European Social Charter allow State Parties to select the articles by which they will be bound, the following countries have not signed up to different paragraphs of Article 4. Bulgaria: Article 4(1); Cyprus: has not accepted any paragraph of Article 4; Estonia: Article 4(1); Finland: Article 4(1) and Article 4(4); Hungary: has not accepted any paragraph of Article 4; Sweden: Article 4(2) and Article 4(5); Austria: Article 4(4); Czech Republic: Article 4(1); Denmark: Article 4(4) and Article 4(5); Germany: Article 4(4); Latvia: has not accepted any paragraph of Article 4; Luxembourg: Article 4(4); Poland: Article 4(1); UK: Article 4(3).*

Source: *FRA, 2011*

194 See www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8918&l=1.

Breaches of the Act, which also refers to fair pay, can be brought to the attention of the Department of Industrial and Employment Relation, the regulatory and enforcing body of Maltese labour law. The Department would accept any claim irrespective of whether or not the employment relationship is regular. It is authorised to refer, via the police, cases for criminal proceedings to the Court of Magistrates and request that the Court order payment of withheld salaries. Alternatively, the individual may institute proceedings in civil court through a lawyer. In both cases, fear of detection and proof of employment often constitute obstacles barring access to courts in practice.[195]

In several countries, the legal situation is confusing. In Denmark, for example, neither labour law nor collective agreements expressly exclude work on an irregular basis from their protective scope and trade unions are entitled, in case of breaches, to bring cases before the Labour Court. There have not yet been any rulings to date, however, on claims by migrants in an irregular situation.

In other EU Member States, the prohibition for migrants in an irregular situation to work appears to have priority over claims resulting from labour law. According to the respondents to the national authority surveys, four EU Member States (Czech Republic, Estonia, Lithuania, and Slovakia) seem not to recognise the right to compensation for withheld wages.[196] This situation will have to change with the transposition of the Employers Sanctions Directive. In Lithuania, for example, foreigners cannot currently claim unpaid wages if they are in an irregular situation. The law protects only those who are legally employed. However, the Ministry of Social Protection and Labour is drafting a law on the prohibition of irregular work, transposing Directive 2009/52/EB. When adopted by Parliament, employers will have the obligation to pay unpaid wages even to migrants in an irregular situation.[197]

Seeking justice by reporting an incident of underpayment or withheld pay is neither simple nor common. As noted by the FRA in its report on domestic workers, support by NGOs or trade unions is essential for this to happen. Italian trade unions have reported successful claims for back pay by migrants in an irregular situation.[198] Documented cases also exist in Germany[199] and, according to responses to the FRA civil society questionnaire, in Belgium, Ireland, Spain and the UK as well. In the UK, migrants in an irregular situation were able to obtain damages and back pay using anti-discrimination legislation rather than general labour law.[200]

When migrants in an irregular situation receive lower wages, it is sometimes difficult to assess if this is due to their status or to the features of a particular economic sector.[201] Domestic services, for example, are sectors with generally low pay. Usually, an hourly pay rate is informally negotiated between employee and employer.[202] In order to set minimum protection standards for domestic workers, a Convention supplemented by a non-binding Recommendation was adopted in June 2011 by the ILO.[203] The resulting standards are, at least in part, also applicable to migrants in an irregular situation employed in the domestic sector.

In practice, one of the main obstacles to obtaining unpaid wages is the **difficulty in proving a work relationship.** Civil society survey respondents in 15 out of the 27 EU Member States argue that the lack of an employment contract is one of the main obstacles to successful claims on withheld or unfair wages.[204] Labour contracts are typically verbal agreements. As indicated by NGOs in Austria and Spain, when recruitment is informal or the recruiter is not the real employer, it may also be difficult to prove who the real employer is.[205]

In other cases, the dispute is not on the existence of a contract but on the actual number of hours worked. For example, getting an employment contract is not particularly difficult for domestic workers in Spain, even if their status is irregular. However, the contract

195 Response by the government of Malta on 5 August 2011.
196 FRA national authorities questionnaire, responses from the Czech Republic, Estonia, Latvia, and Slovakia.
197 Information provided to the FRA by the European Migration Network, National Contact Point for Lithuania in June 2011.
198 According to Italian trade unions interviewed by the FRA, there have been many cases where courts have ordered companies to pay workers even if they are irregular.
199 For example, a migrant worker in an irregular situation supported by a trade union successfully claimed compensation from the labour court and obtained it via an out-of-court settlement before the proceedings started. See Diakonie Hamburg (2009) *Leben ohne Papiere: Eine empirische Studie zur Lebenssituation von Menschen ohne gültige Aufenthaltspapiere in Hamburg*, Hamburg, Diakonisches Werk Hamburg.
200 Response from NGO in London, UK. UK, Employment Appeal Tribunal, *Mehmet t/a Rose Hotel Group v. Aduma*, UKEAT/0573/06/CEA, UKEAT/0574/06/CEA, 30 May 2007.
201 European Foundation for the Improvement of Living and Working Conditions (Eurofound) (2007) *Employment and Working Conditions of Migrant Workers*, Dublin, Eurofound, pp.34-35.
202 FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, p. 24; Eurofound (2001) *Employment in Household Services*, Luxembourg, Office of Official Publications of the European Communities, pp. 54-55.
203 ILO, Convention No. 189. Decent work for domestic workers, 16 June 2011, and Recommendation R201 concerning Decent Work for Domestic Workers, 16 June 2011.
204 Austria, Belgium, Cyprus, Czech Republic, Estonia, Germany, France, Hungary, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain and the UK.
205 Responses from NGOs in Austria and Spain.

corresponds to basic conditions (e.g. maximum of 40 work hours a week without counting additional hours that are negotiated to, for example, tend to a sick person overnight). So, in reality the migrant may work longer hours without being paid accordingly. Recourse to labour inspectors or courts is possible but difficult in practice.[206]

In these cases, witnesses are often not willing to testify since they are in the same situation as the claimants, or they fear losing their jobs, particularly if their legal stay depends on the continuation of their employment. Where there is a close relationship between the employer and the employee, such as in the domestic work sector or due to ethnic affinity, studies show that seeking judicial redress is often seen as inappropriate or avoided for fear of reprisals.[207]

Promising practice

Guaranteeing wages left unpaid

The wage guarantee fund pays salaries left unpaid because of bankruptcy and compensates for losses, up to a maximum calculated by a formula that multiplies three times the minimum daily wage, including *pro rata* extraordinary payments, by the number of days of salary unpaid up to a maximum of 150.[208] The fund covers all workers who have a contract, except domestic workers and cooperative members, without distinguishing on the basis of migration status. It is financed by companies' regular social security contributions.

In 2010, a total of €1 billion was paid out for salary losses and compensation in cases of bankruptcy. This benefitted 232,722 workers and 68,017 companies.[209] No specific data on migrant workers in an irregular situation could be found. They are, nevertheless, likely to be significantly affected as small companies may use bankruptcy to circumvent the legal proceedings they might face in case of formal claims against them.

206 See FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, pp. 27-29 and 37ff.

207 Anderson, B. (2000) *Doing the Dirty Work? The global politics of domestic labour*, London, Zed Books; Anderson, B. (2007) 'A Very Private Business. Exploring the Demand for Migrant Domestic Workers', *European Journal of Women's Studies*, Vol. 14, No. 3, pp. 247-64; Lutz, H. (2007) 'The 'Intimate Others' - Migrant Domestic Workers in Europe', in Berggren, E., Likic-Brboric, B., Toksöz, G. and Trimikliniotis N., *Irregular Migration, Informal Labour and Community: A Challenge for Europe*, Maastricht, Shaker Publishing, pp. 226-41; Maroukis, T. (2009) 'Economic immigration in Greece: labour market and social inclusion', *Series: Sociology and Work*, Athens, Papazisis (in Greek).

208 Information provided to the FRA in June 2011 by the General Directorate for the Integration of Immigrants of the Spanish Ministry of Labour and Immigration. See also www.mtin.es/fogasa/legislaciona33.html.

209 El Faro de Vigo (2011) 'El Fogasa pagó 1.287 milliones en indemnizaciones en 2010', 21 January 2011, available at: www.farodevigo.es/economia/2011/01/21/fogasa-pago-1287-millones-indemnizaciones-2010/511155.html.

4.2 Compensation for work accidents

This second section focuses on access to compensation or benefits in case of work accidents by migrants in an irregular situation. The need for mechanisms to compensate for work accidents payable through social security or by the employer derives from international human rights and labour law instruments.

Article 27 of the 1964 ILO Convention No. 121 on Employment Injury Benefits states that: "Each Member shall within its territory assure to non-nationals equality of treatment with its own nationals as regards employment injury benefits". This also applies to migrants in an irregular situation depending on the definition of an employee according to national law. So far Belgium, Croatia, Cyprus, Germany, Finland, Ireland, Luxembourg, the Netherlands, Slovenia and Sweden have ratified this convention. In addition, relevant provisions include Article 9 (1) of the 1975 ILO Convention No. 143 on Migrant Workers, Article 9 of the ICESCR and Article 23 of the UDHR.

While not dealing directly with compensation, the importance of safe working conditions is acknowledged by EU law. Article 31 of the EU Charter of Fundamental Rights underlines the right to working conditions which respect workers' health, safety and dignity. The 1989 Directive on Safety and Health of Workers introduces measures to encourage improvements in this field.[210] According to Article 6 (1) of the directive, employers are obliged to take the necessary measures for the safety, health and protection of workers. Workers are defined in the directive in an inclusive manner: any person employed by an employer.[211] This does not require regular employment, and EU law relating to compensation for work accidents has to be applied accordingly.

National practices regarding compensation for work accidents of migrants in an irregular situation vary. Often the legal situation is unclear. For example, according to the national authority survey in Estonia, there seems to be no right to claim compensation for work accidents, and, at the same time, no case law exists. In contrast, in Belgium, undocumented workers are in principle covered by accident insurance which has to be paid by the employer, and in case the employer is not insured, can be paid by the public Industrial Accidents Fund.[212] Similarly, in Germany, all employers have to have accident insurance for their employees. The accident

210 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183/1.

211 Domestic servants are, however, excluded from the definition of workers (Article 3 of the directive).

212 Organisation for Undocumented Migrant Workers (OR.C.A.) (2009) *Undocumented Workers: a guide to rights*, Brussels, OR.C.A., p. 63.

Table 5: Main international law provisions on compensation for work accidents

Instrument	Main provision	Ratification	Applicability to irregular migrants
UDHR, Article 23	"just and favourable conditions of work"; "other means of social protection"	Not applicable	Yes
ICESCR, Article 9	"right of everyone to social security, including social insurance"	All 27 EU Member States[1]	Yes[2]
ICRMW, Article 25	"other conditions of work [...], safety, health [...], "equality of treatment"; "employers shall not be relieved of any legal or contractual obligations [...] by reason of irregularity" in the stay or employment of migrant workers"	No EU Member States	Yes
ILO Convention No. 143 (1975), Article 9(1)	"Without prejudice to measures [... to ensure] that migrant workers enter national territory [...] in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits"	Cyprus, Italy, Portugal, Slovenia, Sweden	Yes
ILO Convention No. 121 (1964), Article 27	"assure to non-nationals equality of treatment with its own nationals as regards employment injury benefits"	Belgium, Cyprus, Finland, Germany, Ireland, Luxembourg, the Netherlands, Slovenia, Sweden	Yes[3]

Notes: [1] *France made the following reservation to the ICESCR: "The Government of the French Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits". Belgium made the following interpretative declaration to the ICESCR: "With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies".*

[2] *See CESCR (1990)* General Comment No. 3, the nature of States parties' obligations (Article 2(1)), *14 December 1990 at paragraph 10; CESCR (2007)* General Comment No. 19, the right to social security (Article 9), *23 November 2007, paragraphs 44-46 and 59; and CESCR (2009)* General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2)), *10 June 2009, paragraph 30.*

[3] *Applicable if irregular migrants are regarded as employees under national law.*

Source: *FRA, 2011*

insurance is in the employer's name and can therefore also be purchased for migrants in an irregular situation.[213]

Even where there is an entitlement to compensation for work accidents, pursuing such a claim is usually difficult in practice. By and large, the same obstacles that prevent claiming back pay apply. Civil society respondents cite the requirement to prove the existence of a labour relationship as the main obstacle.[214] A typical example is the Czech Republic, where the law stipulates that all workers have the right to claim compensation for workplace accidents. Nonetheless, civil society respondents indicated that in practice accessing courts is extremely rare, because the migrants' lack of status would be reported to the police, putting them at risk of deportation.

213 Ver.di, *FAQs - Fragen und Antworten zu Arbeitsrechten von Illegalisierten* (online), p. 3.

214 This is the case in Austria, Belgium, Cyprus, Czech Republic, France, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Spain and the UK (FRA civil society questionnaire).

Promising practice

Compensating irregular migrants for work-related injuries

In the United States, the New York State Court of Appeals awarded compensation to a migrant in an irregular situation who had been injured while working at his construction job due to an unsafe work environment.[215] This was followed in 2009 by court settlements in the amount of USD 3.85 million for three other irregular workers:[216] the largest award, USD 2.85 million, went to a Mexican plumber who was scalded over large portions of his body by an exploding pipe; awards of USD 750,000 and USD 600,000 went, respectively, to a Mexican injured through a steel beam falling on his foot and to an Ecuadorean worker whose hip was fractured when three tresses collapsed on him.

Examples of successful claims for compensation from industrial accidents also exist in the EU. NGOs and/or trade unions in Italy, Belgium, Ireland, Cyprus and Spain mentioned such cases. In Valencia, for example, a migrant in an irregular situation who was not assisted after a work accident filed a claim in labour court with the support of a trade union. He received €11,340 compensation from the employer as well as regularisation on humanitarian grounds for himself and his wife.[217] Similarly, in Cyprus, a South Asian worker who suffered a work accident received treatment and a permit to stay as a result of the publicity surrounding the case.[218]

4.3 Access to justice

Access to courts is a basic human right which is derived from a number of international and regional instruments. Access has to be provided to everyone, without discrimination. This also concerns employment-related claims. This section deals with access to justice for labour law violations, building on the specific comments made with regard to the right to claim back pay and compensation. It focuses on access to courts and obstacles to do so as well as on the role of trade unions. The research did not collect information on the role of extra-judicial alternative conflict mediation procedures at company level (for example work councils) or labour inspectors in facilitating access to justice for migrants in an irregular situation, except for the domestic work sectors, where these are of limited relevance.[219] Other institutions typically involved in the protection of fundamental rights, such as equality bodies or national human rights institutions seem to play a secondary role in labour law matters.

Article 10 of the UDHR and Articles 14 and 26 of the ICCPR state that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[220] Article 9 (1) and (2) of the 1975 ILO Convention No. 143 on Migrant Workers (ratified by Cyprus, Italy, Portugal, Sweden, Slovenia) further stipulates that irregular migrant workers should have the possibility to present their cases to a competent body, either directly or through a representative. The right to an effective remedy also features prominently in the ECHR, namely in Articles 6 (right to a fair trial) and 13 (right to an effective remedy). Article 24 of the CRC obliges states to ensure children's access to healthcare as well as appropriate antenatal and postnatal healthcare for mothers.

At the EU level, the Employers Sanctions Directive contains provisions which are intended to facilitate access to justice by victims of abusive or exploitative labour conditions. In the context of the obligation of EU Member States to provide effective mechanisms through which irregular third-country workers can lodge complaints against their employers, the directive obliges Member States to ensure grounds for third parties, such as trade unions or NGOs, to assist migrants in an irregular situation in complaints procedures (Article 13). These provisions have been implemented and applied in accordance with the right to an effective remedy set forth in Article 47 of the EU Charter of Fundamental Rights.

National practices and obstacles

Turning to the situation within Member States, it seems that overall there are no express prohibitions in domestic law which would prohibit migrants in an irregular situation from accessing remedies for labour

215 New York State Court of Appeals, *Balbuena v. I.D.R. Realty L.L.C.*, 812 N.Y.S.2d 416, 21 February 2006.

216 Case handled by the New York law firm of O'Dwyer & Bernstien, L.L.P.. Information available at: www.odblaw.com/ where also other cases are listed.

217 FRA civil society questionnaire, response from Spain. The legal basis for resolving such cases is in Article 36(5) of Law 2/2009 of 11 December 2009 and Article 42(2) of the Royal Decree 84/1996 on social security. Article 36(5) established that: "The lack of a residence and work permit, without detriment of the consequences to which the employer may be liable, including those with respect to Social Security, shall not invalidate the work contract as regards the rights of the foreign worker, nor shall it be an obstacle to obtaining the benefits derived from situations addressed in international agreements on workers' protection or other benefits to which he might be entitled, provided they are compatible with his situation. However, a worker who does not hold a residence and work permit may not obtain unemployment benefits".

218 FRA civil society questionnaire, response from Cyprus.

219 FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental Rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, p. 38.

220 The ICRMW also lists this right among those that are applicable to all migrant workers, including those in an irregular situation. Articles 18 and 25 are both included in Part III of the Convention.

law violations.[221] In general, however, courts are usually seen as the last resort in disputes over labour rights. FRA interviews with domestic workers showed that, when there is a dispute, migrants in an irregular situation switch employers instead of confronting an abusive employer.[222]

In addition, a **number of obstacles** make it difficult for migrant workers in an irregular situation to claim their rights in court. In addition to fear of detection, there is limited or no security of residence, low rights awareness and the need to prove the existence of a work contract. These factors increase the migrants' dependency on employers and diminish the likelihood that they will denounce incidents of abuse or other labour law violations.

Fear of detection

Migrants in an irregular situation are unlikely to exercise their formal rights to go to court or apply for legal aid when courts and other authorities cooperate with immigration enforcement authorities. While most countries do not require that labour courts report a missing residence status to police, a high risk exists, according to civil society respondents in most countries, that an irregular status may come to the attention of immigration law enforcement, which can then lead to deportation. In this regard, a good practice was identified in Spain, where the Organic Law on Data Protection does not allow disclosure of personal data to the police, unless the case concerns a criminal offence punishable with imprisonment of more than one year.[223]

Security of residence

Insecurity of residence of victims or witnesses during legal proceedings is an important factor discouraging recourse to courts. The Employers Sanctions Directive might in part address this issue as it obliges Member States to define in national law the conditions under which they may grant permits of limited duration to third-country nationals who are victims of particularly exploitative working conditions or to illegally employed minors. This is, however, limited to individuals who collaborate with the justice system.[224] In its report on child trafficking, the FRA noted that some have criticised the practice of conditioning the granting of residence permits upon victims' cooperation in criminal proceedings.[225]

A smaller portion of migrants in an irregular situation are victims of trafficking in human beings. Following Directive 2004/81, virtually all EU Member States developed some protection systems against trafficking of human beings.[226] These protection mechanisms vary in scope and include specific residence permits granted to victims either on humanitarian grounds or permits tied to cooperation in criminal procedures against perpetrators. Their effectiveness is, however, limited.[227] Available figures show relatively low rates of prosecution of perpetrators in general and even lower rates in cases of trafficking for labour exploitation across Europe.[228] Permission to stay during court proceedings may also be granted for other crimes.[229]

According to civil society survey responses, although rare, migrants in an irregular situation may receive permission to stay for the duration of a court proceeding for labour dispute cases in Belgium, Cyprus, Czech Republic, Hungary, Ireland, Italy, Portugal, Spain and the UK. In Spain, it is possible to issue a residence permit on the basis of 'economic labour ties', provided the following requisites are fulfilled: proven stay of at least two years, proven work relationship during six months (an administrative or judicial decision is necessary in order to prove these two requisites) and

221 Responses received to the FRA questionnaires, however, do not allow a conclusive statement on this issue.

222 FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental Rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, p. 53.

223 Spain, Law 15/1999, 13 December 1999.

224 See Article 13(4).

225 FRA (2009) *Child Trafficking in the EU – Challenges, perspectives and good practices*, Luxembourg, Publications Office, pp. 16 and 147.

226 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L 261. On 5 April 2011, the Council and the Parliament adopted Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA. For an overview of the situation at the national level, see ICMPD (2009) *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States*, Vienna, ISMPD, available at: http://ec.europa.eu/home-affairs/doc_centre/crime/docs/evaluation_eu_ms_thb_legislation_en.pdf); ICMPD (2010) *Study on the assessment of the extent of different types of Trafficking in Human Beings in EU countries*, Vienna, ICMPD, available at: http://research.icmpd.org/1465.html.

227 In its recent report on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2010) 493 final, 15 October 2010, the Commission concluded that: "While the identified victims in some Member States number several hundred or even upwards of two thousand per year, the number of residence permits based on this Directive is rarely higher than twenty per year".

228 See ICMPD (2010) *Study on the assessment of the extent of different types of Trafficking in Human Beings in EU countries*, Vienna, ICMPD, pp. 49 and 67. In France, for example, 45 criminal cases with conviction concerning forced labour were reported from 2000 to 2006 (ICMPD (2010), p. 150). For France, see annual reports of the Committee against modern slavery (*Comité contre l'esclavage moderne*, CCME).

229 For an overview see EMN (2010), pp. 78-80 and 85-87.

no criminal record in Spain or in the country of origin or residence countries during the past five years. In Italy, the migrant is often expelled but, at his/her request, he/she can be allowed to return for the trial.

Low rights awareness

Lack of awareness of their rights is another obstacle preventing migrants in an irregular situation from claiming their rights. Such an obstacle does not necessarily relate to their irregular status but rather to the pathways of social integration and the general accessibility of labour courts.

According to studies by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), trade unions in many countries have campaigned in order to encourage migrants' access to unionisation and to improve their knowledge of their rights at the workplace.[230] Advocacy work by trade unions can give broad publicity to the situation of migrant workers in an irregular situation, which in turns increases their rights awareness.

Promising practice

Informing workers on international labour standards

The ILO Helpdesk provides both workers and employers with answers to questions they may have on workers' rights, practices and other labour issues. Within a day or two, an ILO expert team will respond to queries, drawing guidance from ILO policy documents, tools and normative instruments. This may be helpful in clarifying, for example, the extent to which migrant workers in an irregular situation are covered by certain ILO norms and policies. Questions can be submitted by email to assistance@ilo.org or by telephone at +41 22 799-6264 (fax +41 22 799-6354).

For more information on the services provided by the ILO Helpdesk go to www.ilo.org/empent/areas/business-helpdesk.

Evidence requirements

As outlined in the previous two sections on the right to claim back pay and compensation for work accidents, the need to present evidence of the existence of a work contract or about the number of hours worked is an important obstacle to accessing justice. In addition, the need to comply with procedural requirements or other formalities may require a certain degree of legal expertise.

230 Eurofound (2007) *Employment and Working Conditions of Migrant Workers*, Dublin, Eurofound, p. 38; Eurofound (2001) *Employment in Household Services*, Luxembourg, Office of Official Publications of the European Communities, p. 70.

The role of trade unions

Where they engage with migrants in an irregular situation, trade unions are a key vehicle to help them claim their rights. The right of workers and employers, without distinction whatsoever, to establish and join organisations or trade unions is also set forth in ILO Convention No. 87 (1948).[231] The ILO Committee on Freedom of Association has confirmed that the right to join trade unions is also applicable to migrant workers in an irregular situation.[232]

Policies regarding membership in trade unions differ. In most EU Member States, migrants in an irregular situation are not prohibited from joining trade unions.[233] In Spain, the 2000 Aliens Act[234] did not allow migrant workers in an irregular situation to join trade unions or to strike. Following a December 2007 constitutional court (*Tribunal Constitucional*) decision,[235] this provision was held unconstitutional and the law was amended in 2009 to provide migrant workers with the same rights as nationals.[236] In Greece, migrants in an irregular situation participate in trade unions even if there is no such explicit right.[237] In Cyprus, Latvia and Lithuania,[238] by contrast, a prohibition for migrants in an irregular situation to join trade unions was reported.

Individual trade union policies may be influenced by the drive to sanction irregular employment. Hence, some trade unions bar access to membership or even report migrants in an irregular status to the authorities. For example, trade unions in Cyprus vehemently oppose admitting migrants in an irregular situation or providing them with any support. Instead, they support reporting mechanisms for the employment of migrants in an irregular situation. Similarly, trade

231 ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948), ratified by all 27 EU Member States.
232 ILO Report No. 327, Case No. 2121.
233 See for an overview of 10 EU Member States, FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental Rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, pp. 35-36.
234 Spain, Law 4/2000 of 11 January 2000 on the rights and freedoms of foreigners in Spain and on their social integration.
235 Spain, Constitutional Court (*Tribunal Constitucional*), STC 259/2007, 19 December 2007.
236 Spain, Law 2/2009 of 11 December 2009, Article 11.
237 See FRA (2011) *Migrants in an irregular situation employed in domestic work: Fundamental Rights challenges for the European Union and its Member States*, Luxembourg, Publications office, p. 36.
238 In Cyprus, in order to register with a trade union an individual needs a Social Security Number and papers from an employer which migrants in an irregular situation do not have (information provided by Pancyprian Labour Federation, Trade Union to the FRA in June 2011). In Lithuania, Article 1 of the Law on Trade Unions states that only legal workers can join trade unions, available at: www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=375887; English text available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=381415. For Latvia, this information has been confirmed by the European Migration Network National Contact Point in June 2011.

unions in Austria continue to have an ambivalent practice, although they have abandoned their former position which called on employers to report migrant workers in an irregular situation to the police.[239]

The unionisation of migrant workers in an irregular situation is also hindered by sector effects. Migrant workers tend to concentrate in sectors with low union density, such as domestic or care work. Furthermore, participation in trade unions depends on the duration of irregular stay and on whether the immigrant group benefits from the support of a long-established community.[240]

Overall, there has been a trend in recent years for trade unions to become ever more involved with migrant workers in an irregular situation. This is illustrated by the situation in Germany. In the past, trade unions tended to ignore or report undocumented migrants to the police; today some unions are even making efforts to recruit migrants in an irregular situation as members.

Promising practice

Taking a stand against exploitation and abuse of irregular labourers

The General Workers Union (GWU) in Malta, the country's largest trade union, has taken a strong stand against the exploitation and abuse of irregular labourers in Malta. The Union acknowledged that providing irregular labourers with a fair wage and adequate working conditions would serve Malta and the union itself better by, for example, avoiding artificially low wages. Migrants in an irregular situation benefit the host society by taking jobs that the Maltese are unwilling to take, and are unfairly accused of causing unemployment.[241]

Promising practice

Lending irregular migrants legal support

In Hamburg, Ver.di, the principle German trade union for service occupations, established weekly consultation office hours for migrants in an irregular situation, providing legal advice and assistance. For example, Ver.di helped one migrant, who had returned to Serbia after having lived and worked irregularly in Germany, to claim his full payment of withheld wages via the courts.[242] The migrant had worked as a locksmith without a residence permit for seven years in Germany but never received his agreed-upon wages. He joined Ver.di, and, through its legal aid programme for migrants in an irregular situation (MigrAr), he brought an action before the Labour Court. At first, the employer rejected all allegations, even denying that the migrant had ever worked for him. Only after the court summoned 13 witnesses and scheduled four days of trial did the employer agree to a court settlement. The locksmith received €25,000 of withheld wages.

Advocacy, awareness raising, legal counselling and representation, as well as support in denouncing abuse in court cases, and encouraging union participation, are some of the most common forms of support provided by trade unions.

Examples of advocacy can be found in Spain, Italy and Ireland. The Spanish trade union UGT brought a complaint before the ILO Committee on Freedom of Association, invoking a violation of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, which led to a Constitutional Court decision which concluded that the legislator is not allowed to exclude migrant workers whose status is irregular from union membership.[243] Italian trade unions have viewed positively the adoption of more open immigration policies through employment-based quotas, family reunification schemes and regularisation programs.[244] In Ireland, a campaign led by the Migrant Rights Centre Ireland (MRCI) and the Irish Congress of Trade Unions (ICTU) led to the introduction of a scheme for undocumented migrant workers who had once held employment permits but had since become undocumented through no fault of their own. The scheme closed on 31 December 2009.

239 Haidinger, B. (2010) 'Verschlungene Wege durch Prekarität und Informalisierung: Arbeitsverhältnisse im Kontext von Migration', in Langthaler, H. (ed.) *Integration in Österreich. Sozialwissenschaftliche Befunde*. Innsbruck, Studienverlag. This was confirmed by FRA civil society questionnaire responses from Austria. See also PICUM (ed.) (2003) *Book of Solidarity Volume 3*, Antwerp, De Wrikker, pp. 39-40. The Austrian confederation of trade unions (*ÖGB*) in Vienna used to advise trade union members to report illegal employment due to so-called 'solidarity' towards Austrian workers who suffer from high unemployment rates, see PICUM (ed.) (2003) *Book of Solidarity Volume 3*, Antwerp, De Wrikker, pp. 39-40.

240 EMN (2007) *Illegally Resident Third-Country Nationals in EU Member States: state approaches towards them, their profile and social situation*, January 2007, p. 28.

241 See the General Workers Union, available at: www.gwu.org.mt/documents/Migrants_Workers_Paper_110908.pdf.

242 MigrAr, *Anlaufstelle für Papierlose*, Case Zoran, available at: http://besondere-dienste.hamburg.verdi.de/themen/migrar/zoran.

243 See Häusler, K. A. (2009) *Defenceless workers? The protection of irregular migrant workers in Europe with a focus on the situation in France and Spain*, Masters Thesis (unpublished), European Master's Programme in Human Rights and Democratisation of Institut de Droit Européen des Droits de l'Homme, Université de Montpellier I, France, pp. 58-59.

244 Watts, J. R. (1998) 'Italian and Spanish Labor Leaders' Unconventional Immigration Policy Preferences', *South European Society and Politics* 3, No. 3, pp. 129-48; PICUM (ed.) (2003) *Book of Solidarity Volume 2*, Antwerp, De Wrikker, p. 60.

Particularly important is the representation of workers in courts or tribunals. For example, FNV, one of the biggest trade unions in the Netherlands, offers advice and legal support to migrants in an irregular situation and provides them with the opportunity to lodge complaints concerning abuses at work.[245] CCOO, one of the main trade unions in Spain, provides a legal service supporting migrants.

Assisting with interpretation to overcome language barriers is another area of support. Although national law may provide for a right to an interpreter, it is commonly 'social interpreters' from migrant communities and active NGO involvement rather than state funds that fill any gaps.

Conclusions

Core labour rights also apply, according to international human rights and labour law instruments, to migrants in an irregular situation. Similarly, the employers' duty, deriving from international as well as EU law, to take measures for the protection of worker safety and health concerns all workers. In practice, the situation in EU Member States varies for the two rights examined in this chapter, namely the right to claim back pay and compensation for work accidents. Not all Member States entitle migrant workers in an irregular situation to claim these rights. When they are recognised, practical obstacles, such as difficulties in proving a work relationship or its duration, come into play.

When disputes arise, courts are only used as a last resort to access justice. Limited rights awareness and fear of detection and deportation are some of the obstacles that prevent migrants from seeking justice. A common strategy for migrants in an irregular situation is to switch employers and not to report mistreatment, discriminatory or abusive behaviour from employers.

The support of trade unions and NGOs is an essential tool in obtaining justice. In recent years in a number of Member States, there has been a trade union trend towards including migrant workers in an irregular situation in their activities.

FRA opinion

Access to justice is a crucial right since the enforcement of all other fundamental rights hinges upon it in the event of a breach. Trade unions, labour inspectors, civil society organisations, national human rights institutions and equality bodies play a vital role in making justice mechanisms more accessible. Practical barriers to access justice should be removed through the following actions by Member States:

Building on the Employers Sanctions Directive, establish effective mechanisms to allow migrant workers in an irregular situation to lodge complaints against abusive employers.

Ensuring, where possible, that any' personal data revealing migrants' identity or whereabouts are not shared with immigration enforcement bodies when migrants seek redress against abusive employers.

Provide the necessary financial or other appropriate support to trade unions, equality bodies and NGOs, so that they can effectively assist migrants in an irregular situation in seeking justice, including access to different forms of arbitration.

245 PICUM (ed.) (2002) *Book of Solidarity Volume 1*, Antwerp, De Wrikker, p. 60.

5

Adequate standard of living

Charter of Fundamental Rights of the European Union

Article 1 – Human dignity

Human dignity is inviolable. It must be respected and protected.

Many migrants in an irregular situation have been reported to live in precarious, inadequate or insecure accommodation without access to the most basic services such as running water, electricity and heating.[246] NGOs and humanitarian organisations play a central role in supporting the social needs of migrants in an irregular situation who are at risk of destitution.[247]

The right to a minimum standard of living includes access to basic food, clothing and shelter. Adequate housing often represents a pre-condition for the exercise of the other basic rights indispensable to leading a dignified life, such as the right to health.[248] In addition, inadequate housing may heighten the risk of sexual abuse, particularly for women.[249] Table 6 provides an overview of the main human rights provisions relating to adequate standards of living.

The right to adequate housing is defined by the CESCR as "the right to live somewhere in security, peace and dignity".[250] In this respect, adequate housing is not to be interpreted as simply a roof over one's head but rather as the right to a shelter which provides sufficient privacy, space and security. Whether the obligation to fulfil the right to adequate housing enshrined in international human rights law also includes the duty to provide adequate shelter to destitute migrants living in an irregular situation is controversial. However, a strong case can be made that such a duty exists at least for those persons whose removal cannot be carried out through no fault of their own, particularly where they are not granted access to the labour market.

Under the framework of the Council of Europe, the European Social Charter (ESC) guarantees social and economic rights, such as the right to housing, healthcare, education, legal and social protection. While the personal scope of the ESC covers only regular migrants who are nationals of other contracting parties, the European Committee of Social Rights has recently found in *Defence for Children International v. the Netherlands* that the right to shelter of irregular children is covered by the Charter. It is closely connected to the right to life and is crucial for the respect of every person's human dignity.[251]

246 See Carrera, S. and Merlino, M. (2009) *Undocumented Immigrants and Rights in the EU. Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?,* December 2009, CEPS, pp. 29-30, available at: www.ceps.eu/book/undocumented-immigrants-and-rights-eu-addressing-gap-between-social-sciences-research-and-polic. European Federation of National Organisations Working with the Homeless (FEANTSA) (1998) *Europe Against Exclusion. Housing for All: A Set of Practical Policy Proposals to Promote Social Inclusion and Ensure Access to Decent Housing for all Citizens and Residents of the EU*, Brussels, FEANTSA.

247 PICUM (2002-2003) *Book of Solidarity, Volume I-III: Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, PICUM, Brussels.

248 On the impact on the individual's state of health, see JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, pp. 19, 21, 142.

249 See for instance Viitanen, K. and Tähjä, K. (forthcoming) *Paperless People*.

250 CESCR (1991) *General Comment No. 4: The right to adequate housing (Art. 11 (1))*, 13 December 1991, paragraph 7.

251 ECSR, *Defence for Children International v. the Netherlands*, Complaint No. 47/2008, 20 October 2009.

Table 6: Main human rights provisions on adequate standards of living

Instrument	Main provision	Ratification	Applicability to irregular migrants
UDHR, Article 25(1)		Not applicable	Yes
ICESCR, Article 11(1)		All 27 EU Member States[1]	Yes[2]
ICERD, Article 5 e-iii	State Parties are obliged "to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of [...] the right to housing".	All EU Member States	Yes
CRC, Article 27	State Parties "[shall] provide assistance to parents and guardians of children and, support programmes "particularly with regard to nutrition, clothing and housing".	All EU Member States	Yes
ICRPD, Article 28(1)	Stipulates a right for persons with disabilities and their families to have an adequate standard of living and to "the continued improvement of living conditions".	17 EU Member States[3]	Yes
Revised ESC, Article 31	"the Parties undertake measures designed: 1. to promote access to housing [...]; 2. to prevent and reduce homelessness [...]; 3. to make the price of housing accessible to those without adequate resources."	All EU Member States[4] except Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain, UK	No, according to appendix, but case law departs from this[5]

Notes: [1] *France made the following reservation to the ICESCR: "The Government of the French Republic declares that articles 6, 9, 11 and 13 are not to be interpreted as derogating from provisions governing the access of aliens to employment or as establishing residence requirements for the allocation of certain social benefits". Belgium made the following interpretative declaration to the ICESCR: "With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies".*

[2] *See CESCR (1990)* General Comment No. 3, The nature of States parties' obligations (Article 2(1)), *14 December 1990, paragraph 10 and* General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2)), *10 June 2009, paragraph 30.*

[3] *All except Bulgaria, Cyprus, Estonia, Finland, Greece, Ireland, Luxembourg, Malta, the Netherlands and Poland.*

[4] *As the Revised European Social Charter allows State Parties to select the articles by which they will be bound, only the following countries have signed up to Article 31: Italy, Lithuania (except to Article 31(3)), Netherlands, Portugal, Slovenia, Sweden and France.*

[5] *See the findings of the ECSR: 'States' interest in foiling attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants', in ECSR,* Defence for Children International v. the Netherlands*, Complaint No. 47/2008, 20 October 2009.*

Source: *FRA, 2011*

The Facilitation Directive and the Return Directive are the two EU legal instruments primarily referred to in this Chapter. They must be implemented and applied in accordance with relevant provisions of the EU Charter of Fundamental Rights. These include Article 1 which affirms the inviolability of human dignity, Article 4 which prohibits inhuman or degrading treatment and Article 7 which enshrines the respect for private and family life.

The following section of this chapter relates to migrants in an irregular situation in general. It focuses on the possibility of renting private accommodation at migrants' own cost and of staying at housing facilities for homeless people. It analyses the impact on individuals of state practices to punish facilitation of irregular stay as prescribed by the Facilitation Directive. Section 3 reviews access by migrants in an irregular situation to facilities for homeless persons. Section 4 looks at migrants whose removal has been postponed or suspended and investigates safeguards for those pending return covered by the Return Directive. It analyses entitlements to basic social assistance, such as housing, financial support, food and clothing for persons who are not removed but are at risk of destitution.

5.1 Access to private accommodation

Frequently, migrants in an irregular situation rely on family, friends or others in their social network to find accommodation.[252] When this is not feasible, they turn to the private sector. The present section looks at whether they face obstacles or limits in accessing the private housing market.

The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime provides under Article 6(1)c for the duty to criminalise actions effected by illegal means which enable a person to remain on the territory of a state without complying with the necessary requirements. Measures taken to prevent smuggling can undermine the rights of migrants in an irregular situation, in particular the right to housing.

The EU Facilitation Directive imposes a duty on EU Member States to punish anyone who, for financial gain, intentionally assists a person, who is not a national of a Member State, to reside in breach of the laws of the State concerned on the residence of aliens.[253] The directive provides for the possibility not to sanction humanitarian action, but this may not necessarily apply to individuals renting accommodation to migrants in an irregular situation.

National legal framework

Contracts are legally binding for anyone signing them, regardless of their immigration status. Nevertheless, measures taken to punish facilitation of irregular stay may limit contractual freedom by imposing a prohibition or penalties when accommodation is rented to migrants in an irregular situation.

As shown in Figure 5, a zealous interpretation of these provisions has led four countries to punish the renting of accommodations to migrants in an irregular situation. In Cyprus and Greece, the law sets forth an explicit prohibition to rent property to migrants in an irregular situation.[254] Danish legislation establishes a fine or imprisonment of up to two years for intentionally assisting an alien working in Denmark without the required permit, by providing shelter.[255] In Estonia, concluding a residential lease contract with an irregularly staying foreigner is punishable by a fine of up to 300 units or for a legal entity up to EEK 50,000, or approximately €3,200.[256] In Italy, the Security Law of 15 July 2009 stipulates custodial sentences from six months to three years for any person who rents accommodation "for unfair profit", or allows its use by foreigners who, at the date of conclusion or renewal of the contract, are not staying regularly on Italian territory.[257]

In a second group of countries, persons renting accommodation to migrants in an irregular situation can be punished on the basis of general offences on facilitating irregular entry or stay. This appears to be the case in France, Lithuania, Malta, Romania, Sweden and the UK. In France, facilitation is punishable with a fine of €30,000 and imprisonment of up to five years.[258] GISTI, a French NGO working with migrants, notes that ambiguity in the French law has led in some

252 FRA civil society questionnaire, responses from Austria, Belgium, Germany and Spain.

253 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328/17, Article 1(1)b and 1(2).

254 For Cyprus, see ECRI (2011) *Report on Cyprus (fourth monitoring cycle)*, Strasbourg, Council of Europe, p. 24. See, for Greece, Law 3386/2005, Article 87(1).

255 Denmark, Danish Aliens Act, Article 59(7).

256 Estonia, Aliens Act, § 16, (last amended 24 April 2005), available at: www.legaltext.ee/text/en/X1019K13.htm. One fine unit currently amounts to €3.83 and depends on the average daily salary. Extracted from the Estonian State Portal website at: www.eesti.ee/est/oigusabi/kuriteost_ja_karistusest/mis_on_vaartegu_kus_ta_kirjas_on/.

257 Italy, Law No. 94, 15 July 2009, Article 13c, available at: www.asgi.it/public/parser_download/save/legge.15.luglio.2009.n.94.pdf.

258 France, *Code de l'entrée et du séjour des étrangers et du droit d'asile* (consolidated version 1 October 2010), Article L622-1.

cases to the conviction of persons doing humanitarian work. In 2009, for example, a legally residing Pakistani citizen was convicted by the Court of Appeal in Paris for having offered housing in his studio to a co-national in an irregular situation. He was ordered to pay a fine of €1,000.[259] In Lithuania, sheltering irregular immigrants constitutes an administrative offence and is punishable with a fine of LTL 1,000-to-2,000.[260] In Malta, it is a criminal offence to assist to reside or to harbour any person contrary to the provisions of the immigration legislation. By inference, sheltering persons without residence permits, visas or authorisations to land and remain in Malta may be considered an offence.[261] Harbouring an irregular migrant in Romania may be punishable by a fine of RON 2,000 to 3,000 (approximately €500-750),[262] or, if committed with intent, by imprisonment from six months to five years.[263] Similarly, intentionally assisting an alien to remain unlawfully in Sweden can be punished with a fine or up to two years imprisonment, if committed for financial gain.[264] In the United Kingdom, someone who knowingly facilitates a breach of immigration law by a non-EEA national (nationals of countries outside the European Economic Area (EEA)) may commit an offence under section 25 of the Immigration Act 1971 (as amended in 2002).[265] However, exceptions from restrictions are in place for pregnant women, unaccompanied children, and families with young children.[266]

In a third group of countries, renting accommodation to migrants in an irregular situation is normally not considered facilitation of irregular stay, although there seems to be a lack of general consensus on this. In Germany, sheltering a foreigner without authorisation to stay would normally not be considered an offence under Section 96(1) of the Residence Act. For example, the Higher Regional Court of Karlsruhe *(Oberlandesgericht)* decided that a person assisting a foreigner in an irregular situation by providing shelter may not be liable if the migrant was determined to prolong his/her stay independently of the help received.[267] German NGO respondents to the civil society questionnaire did not, however, exclude the possibility that landlords could be punished. Similarly, NGO respondents indicated that in the Czech Republic and Finland, persons who shelter migrants in an irregular situation can in theory be punished.[268]

Sheltering migrants in an irregular situation for financial gain does not appear to be punishable in other countries (including Austria, Belgium, Bulgaria, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain),[269] unless it is done under exploitative conditions. The following table provides a broad overview of existing national policies.

Practical obstacles

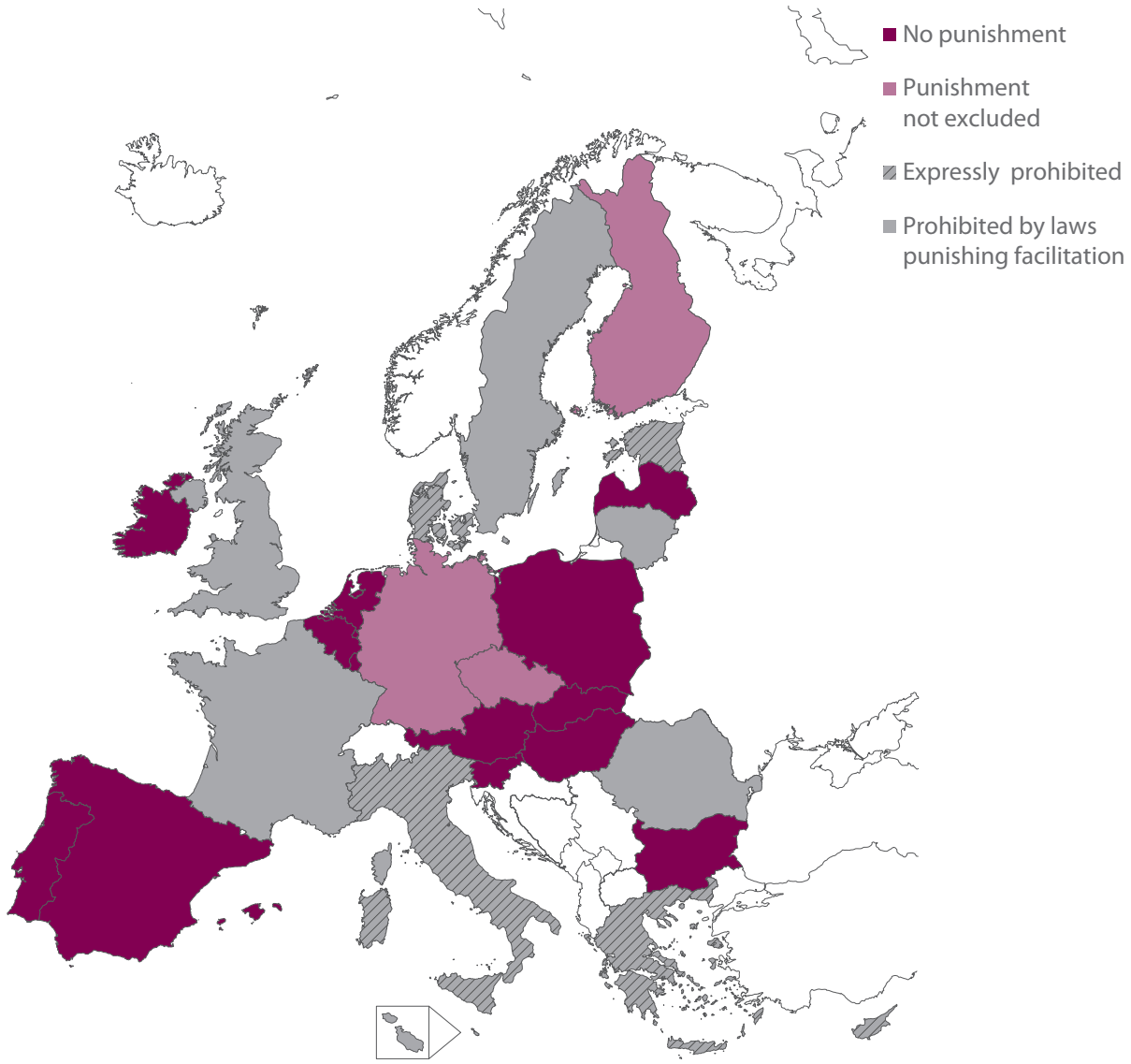
Even if the law does not explicitly prevent migrants in an irregular situation from concluding lease contracts, a number of practical obstacles to renting accommodation can be identified in the majority of EU Member States. Depending on the circumstances, these may make it difficult for migrants in an irregular situation to find housing.

Frequently, tenants have to be registered with the local population registration offices or tax authorities. This is the case in Austria, Germany, Greece and Ireland.[270]

Furthermore, in countries such as the Czech Republic, Germany, Italy and Spain, police must be notified of the presence of foreigners in accommodations, which in practice makes it difficult to legally host, sublet or rent to migrants in an irregular situation.[271] Dutch law contains a provision which obliges persons who shelter migrants in an irregular situation to inform the authorities. Not fulfilling this obligation is punishable under the law, although this rarely occurs in practice.[272]

259 List of convictions from 1986 to 2009, available at: www.gisti.org/spip.php?article1621.
260 Ziobiene, E., Bieksa, L., and Samuchovaite, E., *Thematic National Legal Study on rights of irregular immigrants in voluntary and involuntary return procedures: Lithuania* (unpublished).
261 Malta, Immigration Act, Article 31(1)(a).
262 Romania, Law on Foreigners, 5 June 2008, Article 134(16).
263 *Ibid.,* Article 141.
264 Sweden, Swedish Aliens Act, Chapter 20, Section 7.
265 UK, Nationality, Immigration and Asylum Act 2002, 7 November 2002, available at: www.legislation.gov.uk/ukpga/2002/41.
266 Response from the UK European Migration Network (EMN) Contact Point to the fundamental rights of irregular immigrants national authority questionnaire.
267 Germany, Oberlandesgericht (*Higher Regional Court*), Decision 2 Ss 53/08, Karlsruhe, 14 January 2009.
268 Sanctions would be based on Sec. 171d of the Czech Criminal Code, and Article 185 Finnish Aliens Act.
269 This information is drawn from unpublished national reports produced by Fralex in the context of the FRA project 'Protecting, respecting and promoting the rights of irregular immigrants in voluntary and involuntary return procedures'. This information, however, dates from the middle of 2009.
270 See PICUM (2004) *Report on the Housing Situation of Undocumented Migrants in Six European Countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain*, March 2004, p. 20, available at: http://picum.org/picum.org/uploads/file_/PICUM_Report_on_Housing_and_Undocumented_Migrants_March_2004.pdf. This has been confirmed by responses to the FRA local authority questionnaire in Greece and Ireland, and to the FRA civil society questionnaire in Austria and Germany.
271 *Ibid.*, p. 18-19. The response by the Czech Republic to the FRA national authority questionnaire has confirmed this. In Germany and Spain, FRA civil society questionnaire raised this issue.
272 Netherlands, *Vreemdelingenbesluit* 2000, Article 4(40). The sanction is up to six months detention or a fine of €3,350.

Figure 5: Punishment for renting shelter to migrants in an irregular situation, EU27



Source: FRA, 2011, based on a review of national legislation and FRA's national authorities questionnaire

Promising practice

Providing guidance to those who work with irregular migrants

A group of French NGOs – CIMADE, Emmaus, FEP, FNARS and Secours Catholique – prepared a brochure to provide guidance to those who work with migrants in an irregular situation. The brochure, entitled *What should I do? Reception for those without papers and police intervention (Que dois je faire? Accueil des sans papiers et interventions policières)* provides answers to questions relating to the provision of social services to migrants who are in an irregular situation.

The brochure is available at: www.cimade.org/publications/29.

In order to conclude a lease agreement, tenants may be asked to provide certain documents that are not readily available to those in an irregular situation. These may include, for example, a passport and tax identification number in Greece or a social security number in Finland.[273] Landlords also frequently request proof of income,[274] which is nearly impossible for migrants who are not authorised to work to provide.

273 Responses to the local authority questionnaire from Finland and Greece.

274 This has been noted by respondents to the FRA civil society questionnaire in Belgium and Spain. See, furthermore, PICUM (2004) *Report on the Housing Situation of Undocumented Migrants in Six European Countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain*, March 2004, p. 20.

Further practical obstacles to finding decent accommodation in the private sector often mentioned by civil society experts include difficulties deriving from the structure of the market itself, e.g. the scarcity of dwellings available for rent, such as in Spain.[275] Migrants in an irregular situation may share a flat with several other people, often in overcrowded circumstances or rent beds in shifts, frequently at unfair prices.[276] In Spain, an NGO reported that landlords at times charge migrants for registering them as tenants in the population register.[277] In Sweden, there have been reports that a black market in fake addresses exists, an apparent response to requirements for a fixed address to conduct private transactions and access public services and other administrative procedures.[278]

Restricted access to accommodation increases the vulnerability and marginalisation of migrants in an irregular situation. NGOs sometimes provide support, by mediating between landlords and migrants or by directly renting flats and then running them as private shelters. Some examples of such NGOs include: Ingen människa är illegal in Stockholm, the Association for Human Rights and Democracy in Africa (AHDA) in Vienna and other similar NGOs in Barcelona and Madrid.[279]

Overall, the civil society survey indicates that migrants in an irregular situation are often discriminated against, exploited and forced to pay high rent for accommodation that is sometimes of inadequate quality. High rental costs are also one of the reasons why migrants incur a high level of debt.

5.2 Access to shelter for homeless people

Homeless shelters are mostly a last resort, whether for nationals, legal migrants or migrants in an irregular situation. Only when the social network – including family, friends, ethnic or religious communities – has been exhausted or the migrants have been unable to rent private accommodation, do they seek help at homeless facilities. Shelters for homeless people are primarily a short-term option for migrants in an irregular situation who are in search of accommodation.

Although homeless service providers in some countries are reportedly faced with increased demand from undocumented migrants,[280] there is a notable lack of reliable data on the number and profile of migrants staying in the EU irregularly who are homeless.[281] According to responses to the civil society survey, NGOs consider the share of migrants in an irregular situation among the homeless population as rather high in Belgium, Cyprus, Denmark and Italy. In addition, homelessness has been documented in Greece.[282] Homelessness was, in contrast, considered low in Austria, the Czech Republic, Ireland, the Netherlands, and Portugal.

National legal framework

The rules by which homeless shelters are run depend by and large on the organisations administering them, in line with their priorities, scope of activities, available space and financial means. In principle, the law does not prevent migrants in an irregular situation from accessing housing facilities for homeless people in a majority of EU Member States. Non-profit organisations offering humanitarian assistance, including housing in shelters for the homeless, are usually not actively targeted by legislation penalising facilitation of irregular entry or stay.

Practices

Typical conditions for staying in long-term shelters are to have a residence permit and a source of income (usually social security).[283] Priority may be given to national homeless citizens or documented migrants.[284] Few state-owned homeless shelters accept migrants in an irregular situation. In Austria, Ireland and the Netherlands, civil society experts reported that private facilities are also often reluctant to do so, either because they do not want to jeopardise their funding from local or central public sources or because they

275 FRA civil society questionnaire, response from Spain.
276 FRA civil society questionnaire, response from Belgium and Spain. See also PICUM (2004) *Report on the Housing Situation of Undocumented Migrants in Six European Countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain*, March 2004, pp. 18-20, footnote 295.
277 FRA civil society questionnaire, response from Spain.
278 JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, p. 121.
279 Responses to the FRA civil society questionnaire. See also PICUM (ed.) (2003) *Book of Solidarity Volume 2,* Antwerp, De Wrikker, pp. 56-57, available at: http://picum.org/picum.org/uploads/file_/bos2en.pdf, PICUM (ed.) (2003) *Book of Solidarity Volume 3,* p. 38, available at: http://picum.org/picum.org/uploads/file_/bos3.pdf.
280 See, for instance, information from the NGO *La Strada* in Brussels quoted in PICUM Newsletter July 2009, p. 86.
281 FEANTSA (2002) *Immigration and Homelessness in Europe*, Brussels, FEANTSA, p. 7, available at: www.feantsa.org/files/immigration/imm_rept_en_2002.pdf.
282 See also Amnesty International (2010) *The Dublin II trap: Transfers of asylum seekers to Greece*, London, Amnesty International, available at: www.amnesty.eu/static/documents/2010/GreeceDublinIIReport.pdf. Although the report focuses on asylum seekers, the same considerations are valid for those who have not submitted an asylum claim.
283 FRA civil society questionnaire, responses from Austria, Germany, Ireland, Portugal and Spain.
284 FRA civil society questionnaire, response from Spain.

want to discourage police raids.[285] At times, shelters are available to migrants in an irregular situation only upon the condition that they work on legalising their situation or prepare for an eventual return to their country. To this end, the shelters may offer specially trained volunteers or employees who provide appropriate counselling.

In some EU Member States, access to homeless shelters for migrants in an irregular situation depends upon or leads to their registration with the authorities. Reporting obligations increase the risk of deportation. For instance, in Austria, all publicly funded shelter organisations are expected to report their clients' data to social services.[286] In Germany, it is not only illegal for official agencies to assist migrants in an irregular situation, they must inform the authorities when such people come to their notice, though school, nursery and educational authorities have recently been excluded from this requirement.[287] Dutch law also includes an obligation to notify the police.[288]

Another reason long-term shelters and homeless organisations are reluctant to open up their services to migrants in an irregular situation has to do with the traditional scope of their activities. Such organisations do not only focus on providing shelter but also aim to help homeless people reintegrate into society and a profession. Furthermore, the profile of migrants differs from that of the homeless: while migrants in an irregular situation usually do not have behavioural or antisocial problems, other homeless people often receive help to regain a certain sense of stability. [289]

Exceptions can be made for migrants in an irregular situation who are considered to be in a particularly vulnerable condition, such as people with severe medical conditions, victims of trafficking, pregnant women, unaccompanied minors[290] or families with small children. For instance, in Austria, separated children awaiting repatriation are placed in the care of a facility (*Drehscheibe*) run by the municipal youth welfare authority in Vienna.[291] Similarly, in Malta, unaccompanied minors are placed under the care of the Minister and are accommodated in shelters dedicated specifically to them, while pregnant and lactating women are accommodated at open centres housing families or women.[292]

Overall, from the responses received to the civil society survey, access to emergency and overnight shelters tends to be somewhat easier for migrants in an irregular situation than longer-term homeless shelters, especially for those who are undetected. These services are often based on anonymity and the main constraint in providing access to emergency shelters is the availability of space.[293] Some respondents pointed to the lack of emergency shelters in some countries, such as in Cyprus, the Czech Republic and Spain.[294]

5.3 Housing and social assistance for non-removed migrants

This section deals with access to accommodation as well as to other forms of social assistance, such as financial or material support for those migrants whose removal has been suspended, but who have not been granted a residence permit.

Article 14 of the Return Directive provides a general, albeit rather vague, set of safeguards for irregularly staying third-country nationals pending return in regards to family unity, healthcare, education and protection of vulnerable persons. Article 3(1) of the directive clarifies that vulnerable persons are: minors, disabled or elderly people, pregnant women, single parents with minor children and persons who have been subject to serious forms of violence. However,

285 FRA civil society questionnaire, response from Austria. See also PICUM (2004) *Report on the Housing Situation of Undocumented Migrants in Six European Countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain*, March 2004.

286 FRA civil society questionnaire, responses from Austria. PICUM (2004) *Report on the Housing Situation of Undocumented Migrants in Six European Countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain*, March 2004, p. 31.

287 FEANTSA (2002) *Immigration and Homelessness in European Union*, October 2002, Brussels, FEANTSA, p. 13, available at: www.feantsa.org/files/immigration/imm_rept_en_2002.pdf. The exemption of schools from reporting duties required a change of the Residence Act, Section 87 (2), which was approved by the second chamber (*Bundesrat*) on 23 September 2011 (Drucksache 481/11).

288 See the Netherlands, *Vreemdelingenbesluit* 2000, Article 4(40). Similar obstacles were mentioned by NGOs responding to the FRA civil society questionnaire in Spain.

289 PICUM (2004) *Report on the Housing Situation of Undocumented Migrants in Six European Countries: Austria, Belgium, Germany, Italy, the Netherlands and Spain*, March 2004, p. 34.

290 See also PICUM (2008) *Undocumented children in Europe: Invisible Victims of Immigration Restriction*, Brussels, PICUM, pp. 80-84, available at: http://picum.org/picum.org/uploads/file_/Undocumented_Children_in_Europe_EN.pdf.

291 FRA civil society questionnaire, response from Austria.

292 FRA (2010) *Detention of third-country nationals in return procedures*, Luxembourg, Publications Office; as well as UN Working Group on Arbitrary Detention, see UNDOC A/HRC/13/30/Add.2; Human Rights Council, 13th Session, *Report of the Working Group on Arbitrary Detention*, Mission to Malta, 19-23 January 2009.

293 FRA civil society questionnaire, responses from Belgium.

294 FRA civil society questionnaire, responses from Cyprus, the Czech Republic and Spain. The most recent survey on centres for homeless people, conducted by the Spanish National Institute of Statistics, showed that in 2008 there were 615 centres for homeless people, which offered 13,650 places of accommodation per day, and recorded an average occupancy rate above 85%. Of these centres, 65.2% were located in municipalities with over 100.000 inhabitants, while only 12% were in towns of 20,000 inhabitants. Most were privately owned, 76.9%, but they were funded by public administrations, which is their main or only source of funding in up to 75.8% of the cases. This contribution has rapidly increased in recent years.

the directive does not define the type of protection that should be accorded to vulnerable groups and whether it includes housing and/or other forms of social assistance. Recital 12 of the directive indicates that "basic conditions of subsistence should be defined according to the national legislation".

The Reception Conditions Directive (2003/9/EC)[295] defines in more concrete terms the minimum treatment to accord to asylum seekers. An express reference to Directive 2003/9/EC can be found in the Commission proposal on the Return Directive[296] which was, however, dropped during the negotiations. In spite of this, it does constitute an important reference point, because its wording is more concrete than that of the Return Directive. Article 13(2) of the Reception Conditions Directive obliges Member States to provide reception conditions (in the form of either material or financial assistance) in order to "ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence". Article 14(1) foresees that when housing is provided in kind this can take place in "accommodation centres which guarantee an adequate standard of living" or in "private houses, flats, hotels or other premises adapted for housing applicants".

This section focuses on policies. However, even when a right is granted by law, there are a number of obstacles that can prevent migrants from enjoying it. Housing options, for example, may not suffice to cater to all those in need. In other cases, removal is often granted de facto rather than formally and thus leaves migrants without the accompanying rights. In Austria, for instance, although the 'Basic Care Agreement', entitles those with a suspension of removal to minimum social support, NGOs noted that the suspension of removal is often only granted de facto. Individuals seldom receive written confirmation of the suspension and therefore cannot qualify for support provided by the law to those formally tolerated.[297] Moreover, a lack of knowledge of the rights granted by law to this category of people on the part of both migrants and service providers renders access by non-removed migrants to their basic social assistance entitlement more difficult.[298]

On a positive note, parents who reside in the Netherlands irregularly, whether they have been in return procedures or not, have recently become entitled to claim child support, and may do so retrospectively, as long as a portion of their residence was regular.[299]

Access to housing

This section deals with accommodation of migrants in an irregular situation whose removal has been suspended or postponed but who were not granted a residence permit. It includes accommodation in various types of open facilities. Detention facilities are not covered in this report.

Provision of housing for persons who are not removed can come in the form of private houses, flats or hotels.[300] More frequently, they are housed in collective accommodation centres. These can range from specialised immigrant reception centres to facilities where they are accommodated together with other groups, for instance, asylum seekers. Given that such housing is usually intended for temporary stay, accommodation centres may not always meet the definition of 'adequate' housing when individuals are placed there for longer periods, housed in large groups and with generally limited privacy.

Access to housing for migrants who are not removed varies across the EU Member States both in law and in practice. Access to public accommodation is not necessarily determined by the existence of formal toleration mechanisms, although differences can exist within countries, depending on the status held by the person concerned. It is nonetheless possible to divide Member States into two broad categories: those where persons who are not removed are provided with some

295 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18.

296 European Commission (2005) *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, COM(2005) 391 final, Brussels, 1 September 2005.

297 FRA civil society questionnaire, response from Austria.

298 For further information on this issue see JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, pp. 41-47; PICUM (2003) *Book of Solidarity, Volume 3: Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, Brussels, PICUM; Cholewinski, R. (2005) *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg, Council of Europe Publishing.

299 Ruling by the Central Appeals Tribunal 08/6595 AKW enz., 15 July 2011 available at: http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR1905&u_ljn=BR1905. The ruling makes references to the non-discrimination clause at Article 14 ECHR and applies this with regards to child benefits as protected under Article 8 of the Convention.

300 By private housing we mean the accommodation of migrants in houses owned and managed by the state, also known as social or public housing, or privately owned houses with state-subsidised rents.

form of accommodation and those Member States where no right to housing is foreseen.[301]

Accommodation provided

In the majority of EU Member States, non-removed persons may be provided with accommodation. This affects persons granted a formal toleration as well as those tolerated de facto.

Persons granted a formal authorisation to stay may also receive state-funded accommodation in seven EU Member States. In Austria, persons whose removal has been suspended for technical or legal reasons are entitled to basic social support, which can include accommodation.[302] In Germany, holders of a toleration card under Section 60a of the Residence Act are generally obliged to stay in assigned accommodation centres within a certain area (*Residenzpflicht*). Only in exceptional circumstances are they allowed to stay in private houses.[303] In Bulgaria and Hungary, persons released from detention who are not removed are placed in open accommodation centres.[304] Lithuania provides those with an authorisation to stay access to accommodation centres or homeless facilities.[305] Similarly, in Slovenia, third-country nationals who are issued a 'permission to remain' due to the impossibility of removal on the basis of Article 52 of the Aliens Act, are entitled to housing, normally in accommodation centres.[306] In the case of Malta, if migrants are released from detention, they are placed in open accommodation centres.[307]

In Finland and Sweden, migrants who are not removed may be provided with a temporary residence permit and with accommodation. Sweden houses individuals with authorisation to stay in long-term accommodation centres, while Finland accommodates them in facilities for the homeless.

Six other EU Member States do not grant non-removed persons a right to stay but nevertheless provide access to accommodation centres. Belgium allows for de facto suspension of removals in exceptional cases (such as advanced pregnancy). In such circumstances, housing in accommodation centres is possible.[308] In Denmark, stay in accommodation centres is a precondition to access other forms of social assistance. In Luxembourg, persons whose removal is not implemented are provided access to accommodation centres.[309] All persons present in Portugal may benefit from social assistance, which includes access to social services and facilities.[310] In Spain, individuals who cannot be removed are in theory eligible to access accommodation if they register with the municipality. The data obtained from the survey conducted by the National Institute of Statistics (*Instituto Nacional de Estadística,* INE) from homeless people's centres in 2008 show that the group most frequently assisted were immigrants (62.7%) although the survey does not specify their administrative situation in Spain.[311] In the UK, in some instances, accommodation may be provided to persons released from detention on bail or failed asylum seekers, if they are destitute.[312]

No accommodation provided

Authorisation to stay following suspension of removal does not always lead to access to housing. In Greece, migrants in an irregular situation, who are not removed, have the authorisation to remain and may be allowed to work, but they do not have the right to access housing. Similarly, tolerated persons in Romania can stay on Romanian territory but are not provided with housing.[313] In Slovakia, in cases where removal is suspended, the foreigner is granted a tolerated stay and provided with confirmation of the suspension; however, the law does not provide for any kind of public support for those individuals.[314] In Cyprus and Poland, migrants who are not removed for technical or

301 Given contradictory information, the Czech Republic, France and Latvia have not been included in either of the two groups.
302 Basic Care Agreement *(Grundversorgungsvereinbarung),* Article 2(6) also applies to persons who have received a suspension of removal according to Aliens Police Act Section 46a.
303 JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, pp. 31-32.
304 FRA national authorities questionnaire, response of the Hungarian Ministry of Justice and Law Enforcement and from the Bulgarian Ministry of Interior.
305 Response to the FRA national authorities questionnaire.
306 JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, p. 155.
307 *Ibid.*, pp. 69-70.
308 In Belgium, 'Leave to stay due to exceptional circumstances' or a 'leave to stay due to medical reasons' may be granted. In both cases non-removable people are entitled to the same rights as beneficiaries of subsidiary protection, including the right to accommodation. See ECRE (2009) *Complementary Protection in Europe*, 29 July 2009, pp. 22-25, available at: www.unhcr.org/refworld/docid/4a72c9a72.html.
309 FRA civil society questionnaire, responses from Luxembourg.
310 Portugal, Social security framework law, Law 4/07, 16 January 2007, Article 4. According to a National Social Security internal guideline, social assistance should be granted in the light of the principle of human dignity, as incorporated in the Portuguese Constitution and in the relevant international conventions signed by Portugal.
311 National Statistical Institute (*Instituto Nacional de Estadística*), "Centros que atienden prioritariamente a determinados grupos de población por población prioritaria, titularidad del centro y tipo de indicador", extracted from: www.ine.es/jaxi/tabla.do?path=/t25/p454/e01/a2010/l0/&file=01005.px&type=pcaxis&L=0.
312 UK, Immigration Act 1999, Section 4.
313 The right to stay is granted for an initial period of six months and may be extended by additional six-month periods, until the reasons which led to the 'toleration' cease to exist. See Emergency Ordinance, 5 June 2008, Article 104(4).
314 Slovakia, *Zákon 48/2002*, 13 December 2001, Article 43. The tolerated stay is only a temporary form of stay and its purpose is to bridge the period until the impediment to the foreigner's departure is lifted. The tolerated stay permit was granted to 280 people in 2008 and 322 in 2009.

humanitarian reasons can be provided with temporary residence but not with accommodation.[315] In Poland, however, they have access to overnight shelters.[316]

In Ireland, Italy, Latvia and the Netherlands, migrants in an irregular situation who have not been removed are not provided with either an authorisation to stay in the country or with accommodation. In Latvia, when released, non-removed persons are given a pass but are not granted any status nor entitled to any housing rights.[317] Ireland and the Netherlands do not issue those whose removal has been suspended for technical reasons with formal documentation.[318] They remain under the obligation to leave the country and receive no right to housing. Finally, non-removed persons in Italy are granted no rights to housing with the exception of those granted a temporary residence permit on humanitarian grounds.

Financial and material assistance

In order to ensure the right to an adequate standard of living, migrants in an irregular situation who are not removed may be in need of other forms of basic support besides housing. This section examines practices concerning the provision of financial assistance in the form of one-off payments, monthly subsidies or food vouchers as well as material assistance (such as goods and services like food, clothing and transport).

Non-removed persons granted a residence permit receive in many EU Member States social entitlements which come close to those of refugees. Examples include holders of 'discretionary leave' in the UK[319] and holders of residence permits in Denmark, Finland and Sweden. Finland provides financial aid to those in need[320] and Sweden provides a small allowance to persons with a formally suspended removal who can house themselves with, for example, relatives.

However, some forms of support also exist for persons whose removal has been suspended but where no temporary or permanent residence permit is granted. Provisions for housing, access to food, clothing and financial support by migrants whose removal is formally suspended for technical or humanitarian reasons are highly heterogeneous across the EU.

Although differences exist within countries depending on the legal status granted, three broad categories of EU Member States can be distinguished: EU Member States providing minimum forms of social assistance to non-removed persons; Member States providing minimum social assistance only to individuals residing in accommodation centres; and Member States which do not provide any form of social assistance to non-removed persons. Examples of Member States falling under each of these three groups are mentioned in the following paragraphs:

Minimum social assistance provided

Access to basic social rights for non-removed persons is granted in Austria, Belgium, the Czech Republic, Germany, Luxembourg, Portugal and Spain. In Austria, persons whose removal has been suspended for technical or legal reasons[321] are entitled to basic social support.[322] The 'Basic Care Agreement' foresees a financial contribution for food (up to €180 a month for an adult or unaccompanied minor and up to €80 for each child), pocket money of €40 and non-cash or cash benefits for clothing.[323] However, this assistance is rarely granted in practice as there are very few cases of formally suspended removals.[324] In Belgium, the Court of Cassation ruled in 2000 that access to public social assistance should also be granted to migrants who, for circumstances beyond their control, cannot leave the country.[325] More limited forms of social assistance are provided in the Czech Republic, where individuals with a toleration visa are eligible to apply for a limited financial contribution under specific conditions.[326] In Germany, holders of a toleration status

315 Cypriot Alien's and Migration Regulation, Regulation 15 (4). FRA civil society questionnaire, response from Cyprus.
316 Poland, Dz.U.04.64.593 with amendments, 12 March 2004, Article 5(2)(b).
317 European Migration Network ad-hoc query: Practices followed concerning third-country nationals whose compulsory removal is impossible. Compiled in April 2009. The possibility to get a residence permit for humanitarian reasons is foreseen by law (Immigration Law, Section 23.3). There are no statistics, however, available on residence titles granted and apparently there are very few cases, some 10 to 15 per year.
318 This excludes those in the Netherlands whose removal has been postponed on the grounds of health (Aliens Act 2000, Section 61-62) and those in Ireland granted 'Leave to remain' (Immigration Act 2003, Section 3(6)).
319 Except for family reunion, entitlements granted to persons with Discretionary Leave in the UK are comparable to those granted refugees.
320 Finland, *Laki toimeentulotuesta* (*lag om utkomststöd*) 1412/1997, Section 2.
321 Austria, Aliens Police Act Section 46a, Asylum Act 2005, Section 10(3).
322 Austria, Basic Care Agreement *(Grundversorgungsvereinbarung)*, BGB1 80/2004, Article 2(6).
323 According to the Basic Care Agreement the federal state covers 60% of the costs, with the remaining 40% covered by the federal provinces (Article 10 of the Basic Care Agreement).
324 Removals will only be postponed in cases of pregnancy or severe illness. Usually the postponement is granted de facto and the persons concerned rarely receive any written confirmation. This means that they are excluded from the provisions of the Basic Care Agreement.
325 Belgium, Court of Cassation (2000), *Pas.* 2000, I / *Arresten van het Hof van Cassatie*, p. 697.
326 Czech Republic, Act No. 111/2006 Coll. - law on material distress.

are entitled to access to minimum social assistance.[327] Besides having access to shared accommodation centres, non-removed persons in Luxembourg also receive food and financial help.[328] Although Portuguese and Spanish law do not grant a specific legal status to non-removed persons, in Portugal they are entitled to social assistance if in need,[329] and in Spain they may receive some basic social assistance from regional authorities and municipalities.

Minimum social assistance provided only to those in accommodation facilities

The following EU Member States are examples of a more restricted access to social assistance for non-removed persons, as provisions for basic social rights such as food and clothing are conditional upon residence in accommodation centres: Denmark, Hungary, Bulgaria, Lithuania and Malta. The Danish Immigration Service provides financial aid and food to those with no other means for relief, but requires them to stay in accommodation centres.[330] In the case of Hungary, once the maximum detention period of six months has passed, non-removed migrants are placed in so-called 'community shelters', maintained by the Office of Immigration and Nationality, where they are provided with basic material assistance such as food and clothing.[331] In Bulgaria and Lithuania, individuals with a suspension of removal are not provided with any form of minimum social assistance unless they remain in accommodation centres.[332] In Malta, at the end of the detention period, non-removed persons may stay in accommodation centres where they are entitled to financial support, which is managed by the Agency for the Welfare of Asylum Seekers (AWAS) which falls under the remit of the Ministry of Justice and Home Affairs.[333]

No social assistance provided

Several Member States may grant non-removed persons some form of authorisation to stay in the country on the basis of their formal suspension of removal. However, not all provide persons in this category with access to social assistance. Such is the case in Cyprus, Greece, Italy, Latvia and Slovakia. In Greece, for instance, except for vulnerable persons, individuals with suspension of removal can be granted the right to work, rather than access to social assistance.[334] Similarly, Slovakia and Cyprus, which grant those who cannot be removed a right to stay, do not provide any kind of social support.[335] In the case of Italy and Latvia, once released from detention centres, persons who are not removed have no access to accommodation or to any other form of social assistance.[336]

Conclusions

In addition to the obstacles in accessing adequate housing faced by migrants in general (for example, discrimination) or destitute persons, there are other specific difficulties which stem from their irregularity. States have a negative obligation to respect the right to an adequate standard of living by not interfering in the enjoyment of rights set forth in the ICESCR. Measures to penalise facilitation of irregular stay taken on the basis of the Facilitation Directive may restrict or bar the option for migrants in an irregular situation to rent housing in the private market. This can force them into accepting precarious and insecure accommodation, sometimes at exploitative conditions.

Whether the obligation to fulfil the right to adequate housing enshrined in international human rights law also includes the duty to provide adequate shelter to destitute migrants living in an irregular situation is controversial. Negative obligations should be mentioned here: the state should not, for example, place unjustified administrative or documentation burdens on the enjoyment of the right to housing or penalise service providers. However, a strong case can be made that such a duty exists at least for those persons whose removal cannot be carried out through no fault of their own, particularly where they are not granted access to the labour market. The degree of

327 Besides the right to accommodation, the Asylum Seekers' Social Benefit Act entitles tolerated persons the right to food and financial support (€20 per month up to 14 years of age; €40 per month from the age of 15). See JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, p. 33.

328 FRA civil society questionnaire, response from Luxembourg.

329 Information provided to the FRA in May 2011 by the EMN National Contact Point for Portugal.

330 Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants, *Country update: Denmark*, available at: www.ifrc.org/Global/Publications/migration/perco/perco-update-denmark.pdf.

331 FRA national authorities questionnaire, response of Ministry of Justice and Law enforcement as well as FRA civil society questionnaire, response from Hungary.

332 FRA national authorities questionnaire, responses of the Bulgarian State Agency for Refugees and from the European Migration Network National Contact Point for Lithuania.

333 JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe, p. 69.

334 Greece, Law 3907/2011, Article 37(5).

335 Information provided to the FRA in 2009 by the Fralex focal points working on the FRA project on the rights of irregular immigrants in voluntary and involuntary return procedures. In Slovakia, municipalities might provide public support (including food, accommodation, and other material support) for persons in need, but there is no legal entitlement for such assistance.

336 FRA national authorities questionnaire, response of the EMN National Contact Point for Italy. In Latvia, according to Section 3 of the Law on Social Services and Social Assistance, only citizens of Latvia, non-citizens, aliens with a personal identity number (except for those who have received temporary residence permits) are entitled to social services and social assistance.

access to housing and social assistance by migrants who are not removed varies considerably from one country to another and is often determined by the type of status held. Minimum standards of treatment with regards to housing and social assistance are not included in the Return Directive, except possibly in an indirect way for vulnerable persons.

FRA opinion

The Facilitation Directive should be revised, making it compulsory for EU Member States to prohibit the penalisation of actions committed with a humanitarian aim. The wording of the directive should be revised so as to exclude the punishment of persons who rent accommodation to migrants in an irregular situation, unless this is done for the sole purpose of preventing removal.

Until such a rewording has taken place, EU Member States should, in order to reduce the risk of exploitative or abusive situations, apply the directive in a way that does not curtail the possibility of migrants in an irregular situation from renting housing on the free market.

Current safeguards set forth in the Return Directive as regards housing and social assistance for destitute migrants or persons who belong to vulnerable groups should be strengthened, taking into account the duty to respect human dignity set forth in Article 1 of the EU Charter of Fundamental Rights as well as good practices existing in Member States.

6

Healthcare

Charter of Fundamental Rights of the European Union

Article 35

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities.

In its report, *Poverty, social exclusion in the WHO European Region: Health systems respond*, the World Health Organization underlined that poverty and social exclusion are driving forces of health inequities and recommends sustainable financing for health system interventions addressing specific situations of social exclusion, such as those faced by Roma and migrant populations.[337]

Among migrants, those who are in an irregular situation are particularly at risk of being excluded from healthcare with possible consequences for their own as well as public health. If a considerable group of persons living in a country are excluded from healthcare, this raises a public health issue. Furthermore, if access to primary or preventive healthcare services is excluded or limited, this is likely to increase costs for emergency healthcare.

Every person has the right to the highest attainable standard of health.[338] The most inclusive definition of the right to health can be found in the ICESCR. Article 12 stipulates that states shall ensure "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Acknowledging the abstract level of this right, the CESCR clarified that, as a minimum, states must guarantee access to 'essential primary healthcare'[339] and to 'primary and emergency medical care'.[340] "Denying or limiting equal access for all persons", including migrants in an irregular situation, to "preventive, curative, and palliative health services", would, according to General Comment No. 14/2000, be a breach of the covenant.[341]

337 WHO (2010) *Poverty and social exclusion in the WHO European Region: health systems respond*, Geneva, WHO Regional Office for Europe, pp. 2 and 15. On migration and health in the EU see Mladovsky, P. (2007) *Migration and health in the EU*, Research note for EC Directorate-General Employment, Social Affairs and Equal Opportunities.

338 See for a basic explanation of the right to health see joint factsheet WHO/OHCHR/323, on the right to health, August 2007, available at: www.who.int/mediacentre/factsheets/fs323_en.pdf.

339 CESCR (1990) *General Comment No. 3: The nature of States parties obligations (Article 2(1))*, 14 December 1990; and CESCR (2000) *General Comment No. 14 The right to the highest attainable standard of health (Article 12)*, 11 August 2000.

340 CESCR (2008) *General Comment No. 19: The right to social security (Article 9))*, 4 February 2008, paragraph 37.

341 CESCR (2000) *General Comment No. 14: The right to the highest attainable standard of health (Article 12)*, 11 August 2000, paragraph 34 on 'Specific legal obligations'.

Table 7: Main human rights provisions relating to healthcare

Instrument	Main provision	Ratification	Applicability to irregular migrants
UDHR, Article 25(1)	"right to a standard of living adequate for the health and well-being of himself and of his family, including [...] medical care [...]"		Yes
ICESCR, Article 12	"highest attainable standard of physical and mental health"; General Comments No. 3 and No. 14: "essential primary health care" as a minimum	All EU Member States[1]	Yes[2]
CEDAW, Article 12(2)	grant women "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."	All EU Member States[3]	Yes[4]
ICERD, Article 5(e)(iv)	eliminate racial discrimination as regards the "right to public health, medical care, social security and social services"	All EU Member States	Yes
CRC, Article 24	"highest attainable standard of health"	All EU Member States[5]	Yes
ICRMW, Article 28	"right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health [...]"	No EU Member States	Yes
ESC/revised ESC, Article 13(4)	"To apply the provisions of Article 13 (1) on an equal footing with nationals granting effective exercise of the right to social and medical assistance for persons without adequate resources"	All EU Member States[6] except Bulgaria, Cyprus, Estonia, Lithuania, Poland, Romania, Slovakia, Slovenia	No, according to appendix, but case law departs from this[7]

Notes:

[1] *Belgium made the following interpretative declaration to the ICESCR: "With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies".*

[2] *CESCR (2000)* General Comment No. 14: The right to the highest attainable standard of health (Article 12), *11 August 2000, paragraph 34: "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services". See also CESCR (1990)* General Comment No. 3: The nature of States parties' obligations (Article 2(1)), *14 December 1990, paragraph 10; and CESCR (2009)* General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2)), *10 June 2009, paragraph 30.*

[3] *Malta made the following reservation to the CEDAW: "The Government of Malta interprets paragraph 1 of Article II, in the light of provisions of paragraph 2 of Article 4, as not precluding prohibitions, restrictions, or conditions on the employment of women in certain areas, or the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Malta".*

[4] *Such rights can be considered as part of those basic human rights that the Committee established by the CEDAW considers must be guaranteed to all, including undocumented migrant women. See CEDAW (2008)* General recommendation No. 26 on women migrant workers, *5 December 2008.*

[5] *Belgium made the following interpretative declaration to the CRC: "With regard to article 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals. This concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies".*

[6] *The revised European Social Charter and the European Social Charter allow State Parties to select the articles by which they will be bound.*

[7] *Although the scope of the European Social Charter does not in principle cover irregular migrants, the European Committee of Social Rights held in* FIDH v. France *(paragraph 32) that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter".*

Source: *FRA, 2011*

Article 168 of the TFEU highlights that a "high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities." Action by the EU "shall complement national policies" and "be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health".

In implementing EU law, Member States must respect Article 35 of the EU Charter of Fundamental Rights, which reaffirms the right of every person to access "preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws".

References to healthcare of migrants in an irregular situation are also contained in secondary EU law. Article 14 of the EU Return Directive specifically provides that "emergency healthcare and essential treatment of illnesses" must be provided to those migrants in an irregular situation during the period given for voluntary departure and for those where removal has been postponed.[342]

In February 2011, the European Parliament addressed for the first time the fundamental right to health of migrants in an irregular situation. In a resolution on health inequalities, it acknowledges that healthcare is not guaranteed, either in practice or in law, for undocumented migrants. It calls on the EU Member States to assess the feasibility of supporting healthcare for migrants in an irregular situation by providing a definition based on common principles for basic elements of healthcare as defined in their national legislation. It also calls on Member States to ensure that all pregnant women and children, irrespective of their status, are entitled to and actually receive social protection as defined in their national legislation.[343]

In sum, being able to access certain basic forms of healthcare is a core right which cannot depend on the legal status of a person. However, there is no overall consensus on the minimum level of entitlements. Clearly, in emergency situations denial of treatment would not be compatible with the right to life and the prohibition of degrading and inhuman treatment set forth in the ECHR. Similarly, the denial of care to children and of necessary antenatal, delivery and post-natal care would be difficult to justify in light of the CRC and CEDAW. The global standard set by the Committee on Economic and Social Rights is to ensure essential primary healthcare to every person in the territory.[344] However, a clear definition of what essential primary healthcare services would encompass is open to interpretation.

This chapter builds on the FRA thematic report on access to healthcare by migrants in an irregular situation in the EU. This report deals with the issues studied in 10 EU Member States in the thematic report[345] providing basic information for all 27 EU Member States. It also summarises some of the main challenges and obstacles described in the thematic report.

In addition to relying on the research undertaken for the thematic report, the present report also draws on the feedback received from questionnaires. It also builds on research conducted by PICUM,[346] Médecins du Monde,[347] the Health for Undocumented Migrants and Asylum seekers (HUMA) network,[348] and the NowHereLand project,[349] as well as comparative studies on the situation of migrants in an irregular situation in general.[350] The chapter first provides an overview of healthcare entitlement in the 27 EU Member States in general and for specific groups, followed by a description of the main obstacles to implementing the right to healthcare *in practice*.

6.1 The right to healthcare in the 27 EU Member States

Healthcare systems can be insurance-based or tax-based or a combination of both. Depending on the type of health system, the requirements to access public health services (e.g. citizenship, residence, membership to insurance scheme) vary, as do the range of health services available to the beneficiaries.[351] In all systems, access to healthcare beyond emergency

342 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2088 L348/98, Article 14(1b) and Article 16(3).

343 See European Parliament Resolution 2010/2089(INI) on reducing health inequalities in the EU, 8 February 2011, at AD, 5 and 22.

344 CESCR (2008) *General Comment No. 19: The right to social security (Article 9)*, 4 February 2008, paragraph 37.

345 FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.

346 PICUM (2007) *Access to healthcare for undocumented migrants in Europe*, Brussels, PICUM; PICUM (2008) *Undocumented children in Europe: Invisible Victims of Immigration Restriction*, Brussels, PICUM; PICUM (2009) *Undocumented and seriously ill: residence permits for medical reasons in Europe,* Brussels, PICUM.

347 *Médecins du Monde*, European Observatory on Access to Healthcare (2009) *Access to healthcare for undocumented migrants in 11 European countries*, Paris, Médecins du Monde.

348 HUMA network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde.

349 Access to healthcare in NowHereLand: www.nowhereland.info/.

350 JRS (2010) *Living in Limbo: forced migrant destitution in Europe*, Brussels, JRS – Europe.

351 Mossialos, E., Allin, S. and Figueras, J. (eds.), European Observatory on Health Systems and Policies (2006) *Health Systems in Transition Template,* Cornwall, WHO, available at: www.euro.who.int/__data/assets/pdf_file/0019/108820/E88699.pdf.

care is typically linked to some kind of documented status (e.g. legal residence status, insurance status, registered employment, registration in local registry), which may exclude some categories of migrants in an irregular situation from accessing healthcare services beyond life-saving measures.[352]

Some countries have introduced express legal provisions relating to access to healthcare for migrants in an irregular situation.[353] However, the degree of formal access to healthcare services by migrants in an irregular situation does not necessarily depend on whether explicit provisions in this regard exist. These may, however, contribute to legal clarity.

In order to compare the degree of access to healthcare by migrants in an irregular situation, the FRA has categorised EU Member States into three broad groups, depending on whether migrants in those states are entitled to emergency, primary or secondary healthcare services (and beyond). Emergency care includes life-saving measures as well as medical treatment necessary to prevent serious damage to a person's health. Primary care includes essential treatment of relatively common minor illnesses provided on an outpatient or community basis (e.g. services by general practitioners). Secondary care comprises medical treatment provided by specialists and, in part, inpatient care.[354]

Figure 6 provides a broad visual overview. For this figure rules on general entitlements alone have been considered. Broader entitlements to healthcare for specific categories of persons, such as children, or certain communicable diseases, such as tuberculosis, are not taken into account. Neither are programmes for groups with specific needs (e.g. homeless persons, migrants) established by local authorities or NGOs which may also target undocumented migrants directly or indirectly.[355]

Emergency care

In 19 out of 27 EU Member States migrants in an irregular situation are entitled to emergency healthcare only (although other public healthcare services may be accessible against full payment).[356]

The German situation is unique. In Germany, migrants in an irregular situation are afforded by law the same access to healthcare as asylum seekers. In principle, this coverage extends beyond emergency services;[357] in practice, however, coverage is limited to emergency services because the procedure to reimburse migrants for the costs of emergency care is confidential, while the one used for non-emergency care is not. For emergency care reimbursements, the healthcare provider applies post-treatment to the social welfare office, a process which extends medical confidentiality

352 Karl-Trummer, U., Novak-Zezula, S. and Metzler, B. (2010) 'Access to healthcare for undocumented migrants in the EU: A first landscape of NowHereLand', *Eurohealth*, Vol. 16, No.1, p. 13.

353 See, for example, Germany, *Asylwerberleistungsgesetz*, BGBl. I S. 2022 (1997), Section 1; Greece, Law on 'Entry, residence and social integration of third-country nationals in the Hellenic Territory', No. 3386/2005 (2005), Article 84(1). Ireland, Immigration, Residence and Protection Bill, Bill Number 2 of 2008 (2008); Italy, Legislative Decree 1998/286 (*Decreto Legislativo 25 luglio 1998, n. 286*), as amended, Article 35(3); in Sweden, specific rules exist for children whose asylum application is rejected and for rejected asylum seekers who remain at the disposal of the authorities, see Law on health and medical services for asylum seekers and others, 2008:334, Article 4 Act; France, Loi n° 98-657 (1998) (law against social exclusion); Spain, *Ley Organica 4/2000 sobre derechos y libertades de los extranjeros en Espana y su integracion social* (2000); Belgium, Loi organique des CPAS (1976).

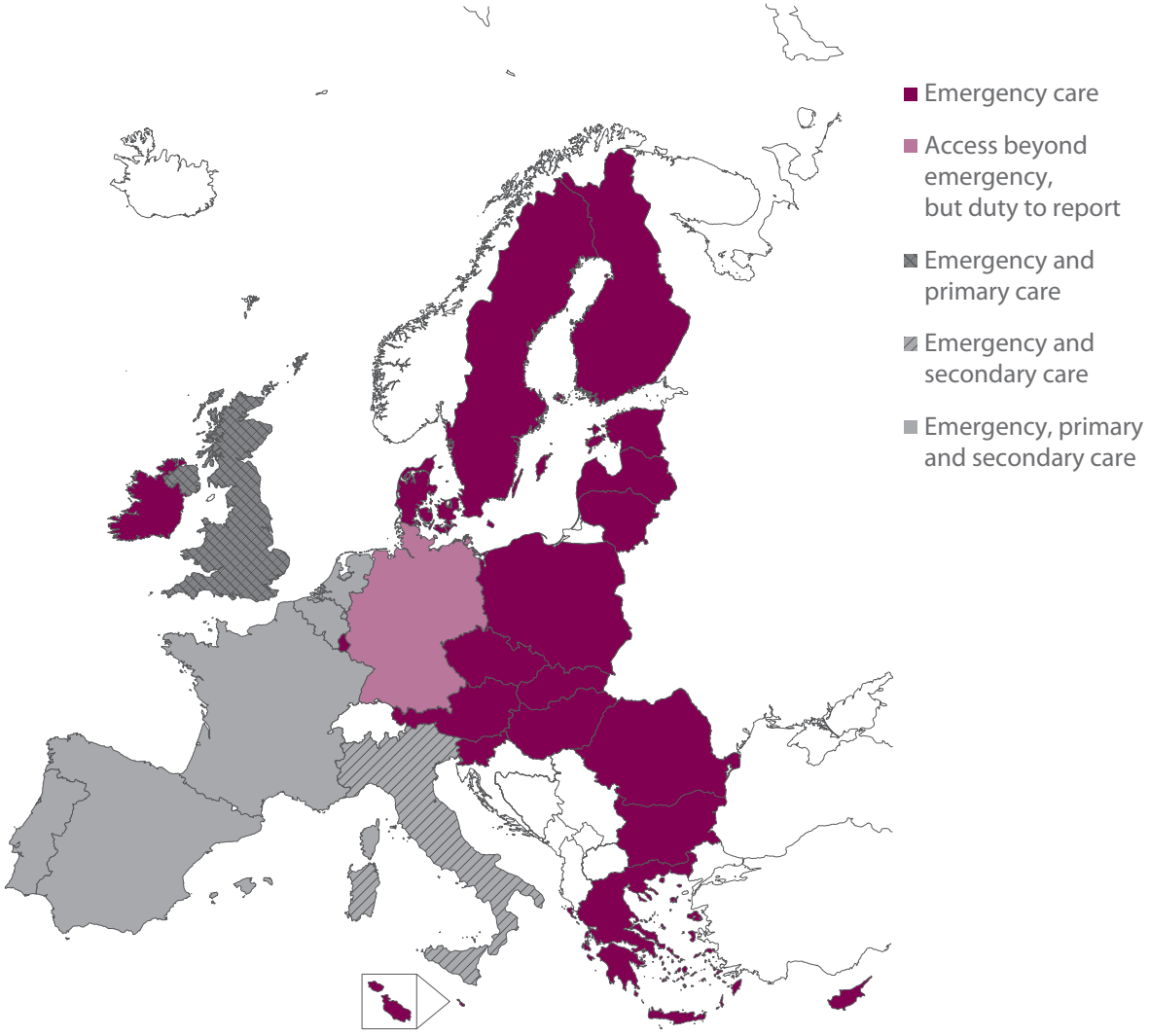
354 See WHO (2009) *Health Promotion Glossary*, Geneva, WHO, available at: www.who.int/hpr/NPH/docs/hp_glossary_en.pdf, as well as the CESCR (2000) *General Comment No. 14: The right to the Highest Attainable Standard of Health (Article 12)*, 11 August 2000, in its footnote 9. Other projects use different categorisations based on a slightly different rationale, see for example the HUMA Network (2009) or the NowHereLand project at: www.nowhereland.info/.

355 See for more details FRA (2011) *Migrants in an irregular situation: access to healthcare in European Union Member States*, Luxembourg, Publications Office.

356 Austria, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia and Sweden. This list has been based on country reports for the Health Care in NowHereLand project available at: www.nowhereland.info/?i_ca_id=369. Entitlements for emergency healthcare are set forth as follows: Austria, Federal Hospitals Act, Section 22 (4); Bulgaria, 2004 law on healthcare, Articles 99(1) and 100(1); Cyprus, administrative circulars; see HUMA Network (2011) *Access to healthcare and living conditions of asylum seekers and undocumented migrants in Cyprus, Malta, Poland and Romania*, Paris, Médecins du Monde, pp. 18 and 60; Czech Republic, Act No. 20/1966 Collection of Laws on Care for the People's Health, Section 30 and 55 (2)c; Denmark, Health Care Act, Section 80; Estonia, Health Services Organisation Act, Article 6(2); Finland, Social Insurance Institution of Finland (Kela), referring to national legislation, www.kela.fi/in/internet/english.nsf/NET/090508160025HS?OpenDocument; Greece, Law on 'Entry, residence and social integration of third-country nationals in the Hellenic Territory', No. 3386/2005, 23 August 2005, Article 84(1); Hungary, Act on Health, Act CLIV of 1997, Articles 94(1) and 142(2) and Regulation 52/2006; Ireland, 1991 Health (Amendment) Act, Sections 45 (1) and 47A (provision of urgent necessary treatment); Latvia, Medical Treatment Act, Article 16; Lithuania, Law on Health Insurance (as amended in 2009), Article 8; Poland, Law on Healthcare Services Financed by Public Funds, 27 September 2004; Romania, Health Reform Law, 95/2006, Article 211; Slovakia, Act No. 576/2004 on Healthcare and Healthcare Related Services, Section 11 and Act No. 580/2004 on Health Insurance; Slovenia, Health Care and Health Insurance Act, Article 7; Sweden, Law on Health and medical services for asylum seekers and others 2008:344, Article 4. For Luxembourg and Malta see the following report produced in the frame of the Nowhereland project: Cuadra, C. B. (2010) *Policies on Health Care for Undocumented Migrants in EU27, Country Report for Luxembourg*, April 2010, p. 9, and Cuadra, C. B. (2010) *Policies on Health Care for Undocumented Migrants in EU27, Country Report for Malta*, April 2010, p. 10.

357 Germany, Asylum Seekers Benefit Act *(Asylbewerberleistungsgesetz)*, BGBl. I S. 2022, 5 August 1997, Section 1.

Figure 6: General healthcare entitlements for migrants in an irregular situation, EU27



Source: FRA, 2011, based on national legislation

to the welfare office.[358] For non-emergencies, migrants in an irregular situation seeking reimbursement must themselves approach the social welfare office, whose staff then have a duty to report such migrants to the police. That risk renders access to non-emergency healthcare meaningless.

In 11 out of the 19 EU Member States migrants in an irregular situation are entitled to emergency healthcare but have to pay for it. This means that not only will they be billed but that healthcare providers may also require verification of ability to pay before treating the individual. These countries are Austria, Bulgaria, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Latvia, Poland and Sweden.[359] As an illustration, in Greece, although migrants in an irregular situation are by law entitled to receive emergency treatment until their health stabilises, they are at the same time required to pay the full costs of the treatment.[360] Similarly in Ireland, access to emergency

358 See German Residence Act (*Aufenthaltsgesetz*), BGBl. I p. 162, 30 July 2004, Section 88 (2) and Regulation on the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz*, VwV-AufenthG), GMBl. I p. 878, 26 October 2009, Section 87.1.5 and 88.2.3.

359 In Bulgaria, foreigners who are not enrolled in any insurance scheme are required to pay for emergency services (see European Observatory on Health Systems and Politics (2007) 'Health Systems in Transition, Bulgaria', *Health System in Transition*. Vol. 9, No. 1, p. 109, available at: http://www.euro.who.int/__data/assets/pdf_file/0006/80592/E90023.pdf; for Greece, Law on 'Entry, residence and social integration of third-country nationals in the Hellenic Territory', No. 3386/2005 (2005), Article 84(1); for Hungary, see Decree 87/2004 (X.4.) ESZCSM on the regulations for healthcare of people staying in Hungary lists categories of persons entitled to compulsory insurance, which is needed to receive healthcare free of charge. For Ireland, Immigration, Residence and Protection Bill, Bill Number 2 of 2008 (2008); and for Poland, Law on Healthcare Services Financed by Public Funds (2004); for Austria, Czech Republic, Denmark, Latvia, Finland, Sweden, see: NowHereLand (2008) *Country Reports*, available at: www.nowhereland.info/?i_ca_id=369.

360 National authority questionnaire, response from Greece GR 3-7.

treatment is not granted free of charge, but payment depends on the provider's discretion.[361] In Hungary, if a patient cannot afford payment of emergency care, the payment is qualified as non-returnable and the healthcare provider can be reimbursed by the state.[362]

Other Member States – among the 19 listed above which only provide emergency care – address the cost issue more proactively. In Cyprus, Estonia, Romania and Slovakia emergency care is to be provided by law free of charge to every patient.[363] In Lithuania, persons who are not covered by the obligatory health insurance are exempted from payment for emergency care.[364] In Luxembourg, although migrants in an irregular situation are not exempted from paying for medical treatment, they may apply for post-treatment cost reimbursement from a fund dedicated to covering treatment costs for uninsured patients, which explicitly includes migrants in an irregular situation.[365] In Malta, virtually all persons who enter in an irregular manner are detained upon arrival. Living in hiding is difficult due to the small size of the islands. Detained foreigners are entitled to healthcare services, but the law is silent about their healthcare rights once released. In practice, migrants in an irregular situation are provided with emergency care for free within the national health system upon showing an ID card they are issued after their release from detention centres.[366] In some cases, no access conditions are required for emergency care, such as in the Netherlands, but also in France, where it is provided via special hospital units (*Permanences d'Accès aux Soins de Santé*).[367]

In Sweden, the limitation of healthcare services to emergency services only has raised questions which led the Government to undertake an inquiry on how to more effectively regulate healthcare services for asylum seekers and migrants in an irregular situation.[368] The terms of reference for the inquiry are limited to proposals which do not encourage irregular migration. The results of the inquiry were presented in May 2011. The inquiry proposes that asylum seekers and undocumented migrants, regardless of age, be offered subsidised health and medical services by the county council of the area where they are living or staying. The care should be offered to the same extent and under the same conditions as it is offered to permanent residents. The government is currently studying the proposals.

Primary care

The United Kingdom has established provisions by which migrants in an irregular situation may also access healthcare in situations that do not pose an immediate threat to a person's life or health. They are entitled to receive primary healthcare within the national health system.[369] Access to healthcare for migrants in an irregular situation is regulated by the health provider: individuals have access to general practitioners (GP) or local health centres that offer services at the primary care level. These services are provided free of charge, as they are for the entire population.

A potential barrier to receiving care is the requirement to be registered on a patient list of a GP. GPs may register patients whose status is irregular but are not obliged to do so. Evidence shows that, in practice, there are cases where undocumented migrants are refused by GPs on the basis of their legal status.[370]

Migrants in an irregular situation must pay the full costs for inpatient treatment in hospitals or care provided by specialists, except for treatment in an accident and emergency department, treatment for certain communicable diseases, compulsory psychiatric treatment and family planning services.[371]

Secondary care and beyond

In six countries (Belgium, France, Italy, Netherlands, Portugal and Spain) undocumented migrants'

361 Cuadra, C. B. (2010) *Policies on Health Care for Undocumented Migrants in EU 27: Country Report Ireland*, April 2010, p. 11, available at: http://files.nowhereland.info/661.pdf.

362 Information provided to the FRA in June 2011 by the Department of Public Health of the Hungarian Ministry of National Resources.

363 See for Cyprus, Romania see HUMA Network (2011) *Access to healthcare and living conditions of asylum seekers and undocumented migrants in Cyprus, Malta, Poland and Romania,* Paris, Médecins du Monde; for Estonia, Hungary and Slovakia see NowHereLand (2008) *Country Reports*.

364 Lithuanian, Law on Health Insurance (as amended in 2009), Article 8.

365 Commission Nationale d'Éthique (2007) *Les limites de l'access aux soins au Grand-Duché de Luxembourg*, p. 61, available at: www.cne.public.lu/publications/avis/Avis_20.pdf.

366 Information received from the Ministry for Justice and Home Affairs (2010); PICUM (2010) *Undocumented Migrants' Health Needs and Strategies to Access Health Care in 17 EU countries. Country report Malta*, available at: www.nowhereland.info/?i_ca_id=389, p. 8.

367 According to French law against social exclusion, every hospital must establish accessible emergency facilities without specific requirements, Loi n° 98-657 (1998).

368 A committee of inquiry is committee appointed to look into the preconditions for a possible government action. When the committee has completed its work, it writes a report which is published in the Swedish Government Official Reports series, (*Statens Offentliga Utredningar*, SOU). The results of this inquiry are available at SOU 2011:48 www.regeringen.se/content/1/c6/16/98/15/1ce2f996.pdf, which has an extended summary in English.

369 United Kingdom, Regulation 4 of the National Health Service (Charges to Overseas Visitors) Regulation 1989 (amended in 2004).

370 PICUM (2010) *Undocumented Migrants' Health Needs and Strategies to Access Health Care in 17 EU countries. Country report United Kingdom*, available at: www.nowhereland.info/?i_ca_id=389, p. 7.

371 HUMA Network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde, pp. 165-75.

entitlement to healthcare covers primary and secondary care, specialist and inpatient treatment.[372] In Italy, migrants in an irregular situation may access secondary care but not register with a family doctor, which hinders access to specialist treatment.[373]

The detailed scope of services available to migrants in an irregular situation varies among these EU Member States. The terms used in national legislation to define the scope of their entitlements to healthcare – 'urgent', 'necessary' or 'essential' care – usually encompass a broad range of preventive, primary and secondary healthcare services in all of the countries grouped here.[374] In Belgium and the Netherlands, however, a medical professional must assess and certify the 'necessity' of care prior to treatment on a case-by-case basis[375] – a system that awards health providers large discretionary powers.

Typically, certain conditions need to be fulfilled in order to qualify for primary and/or secondary healthcare. As described in the thematic report on healthcare, these may include the need to present an ID, prove factual residence and/or to show insufficient financial means.[376] Fulfilling these conditions may present a significant obstacle to accessing healthcare for migrants in an irregular situation.

As an example, in Portugal, migrants in an irregular situation are granted access to the national health system provided that they have resided in Portugal for more than 90 days, obtain a confirmation of residence from the district administration and register as a temporary patient at a local health centre.[377] Those who have resided in Portugal for fewer than three months may access only emergency healthcare, maternal care and care for communicable diseases.[378] Migrants in an irregular situation are in principle required to cover the full costs of treatment,[379] but they may apply for an exemption of payment if they can prove that they lack the necessary financial means to pay for care. The FRA thematic report on healthcare provides information on practices in the other countries.

Regulations on payment are decisive for the accessibility of healthcare services in practice, but they vary across the Member States. The FRA found an interesting approach in the Netherlands, where it is the health providers' duty to produce evidence that a patient cannot cover treatment expenses. According to the Law on the Reimbursement of Costs of Care to Illegal Aliens, specially contracted health providers may apply for cost reimbursement at the National Board of Health Insurances (*College voor zorgverzekeringen*) if they can prove that the irregular migrant cannot pay the treatment costs on his/her own.[380] To do so, however, health providers usually send migrants in an irregular situation the full invoice for the care received, which may create anxiety among them. As the regulation is quite new, it is still unclear who should cover the remaining 20% – whether it would be the health provider or the irregular migrant.

Access to healthcare for migrants in an irregular situation may vary significantly between regions, localities, and even institutions and, if no regulations are in place, often depends on the goodwill of the attending medical professionals. Civil society programmes often assist in addressing gaps. In Finland, for example, the Helsinki Deaconess Institute recently opened a clinic providing basic services for migrants in an irregular situation, which one can visit without fear of expulsion. The clinic is run voluntarily by some 80 doctors, nurses, midwives and students.[381]

As a result of existing obstacles, migrants in an irregular situation are often not able to fully benefit from their right to healthcare, or may even be denied the minimum right to emergency care. In this context, NGOs or low-threshold medical services (e.g. walk-in centres) take on an indispensable role both in informing

372 Belgium, *Loi organique des centres public d'aide social*, 8 July 1976, Article 57; France, Loi n°98-657, 29 July 1998 (Law against social exclusion); Italy, Legislative Decree 1998/286 (*Decreto Legislativo 25 luglio 1998, n. 286*), as amended, Article 35(3); Portugal, *Despacho n.o 25 360/2001 at point 4*, available at: www.acss.min-saude.pt/Portals/0/25360_2001.pdf; Spain, *Ley Organica 4/2000 sobre derechos y libertades de los extranjeros en Espana y su integracion social*.

373 HUMA Network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde, p. 18.

374 In Italy, for example, those services considered 'essential' that must be provided to all citizens and to irregular migrants are defined in the Essential Levels of Assistance (*Livelli essenziali di assistenza*), available at: www.salute.gov.it/programmazioneSanitariaELea/paginaInternaMenuProgrammazioneSanitariaELea.jsp?menu=lea&id=1301&lingua=italiano.

375 PICUM (2010) *Undocumented Migrants' Health Needs and Strategies to Access Health Care in 17 EU countries. Country report Netherlands*, April 2010, available at: www.nowhereland.info/?i_ca_id=389 at p. 8. For Belgium, see FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.

376 A description of the requirements that need to be fulfilled in Belgium, France, Italy and Spain is presented in FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.

377 Portugal, *Despach do Ministerio da Saude* number 25 360/2001; and *Decreto Lei* number 135/99 (1999).

378 HUMA Network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde, pp. 123-24.

379 Everyone who does not pay taxes in Portugal is required to pay for the services provided by the national health system (see Fonseca, M. L., Silva, S., Esteves, A. and McGarrigle, J. (2009) *MIGHEALTHNET, Information Network on Good Practice in Health Care for Migrants and Minorities in Europe*, Portuguese State of the Art Report, Departamento de Geografia/Centro de Estudos Geográficos, University of Lisbon, p. 28).

380 Netherlands, Amendment to the Health Insurance Act *(Zorgverzekeringswet: Tegemoetkoming in de kosten voor de zorg voor illegale vreemdelingen)* 31249 (2008), Article 122.

381 Information provided by the Finnish Immigration Service to the FRA in May 2011. Examples of other initiatives at local level are described in FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.

migrants in an irregular situation about their rights and also in acting as mediators between migrants and health providers.

6.2 Entitlements for specific groups

Healthcare for persons whose removal has been suspended

As described in Chapter 3, national policies for person who are not removed diverge considerably. Depending on the circumstances, non-removed persons may receive a temporary residence permit, or an authorisation to stay or they may simply be tolerated de facto. It is beyond the scope of this report to describe in a comprehensive manner healthcare entitlements for these persons.

Information collected through the national authority questionnaire and the civil society survey indicate that in general terms once provided with an authorisation to stay or with a temporary residence permit, non-removed persons have, in a number of countries, broader entitlements to healthcare. As an illustration, in the Czech Republic toleration visa holders are entitled to primary healthcare services.[382] In Austria and Luxembourg, persons who are not removed but who are registered with immigration authorities and stay in close contact with them, may be registered with health insurance and thus access healthcare services encompassed by insurance schemes.[383] Similarly, in Sweden, rejected adult asylum seekers are excluded from health coverage unless they remain in contact with authorities.[384]

By contrast, in other countries, no specific regulations for non-removed persons could be identified (e.g. Bulgaria, Greece, Latvia, Poland and Slovakia), apart from a general duty to provide emergency care or regulations pertaining to persons in detention. In Slovenia, emergency care only is provided.[385]

In some countries (e.g. Denmark, Hungary or Lithuania), non-removed persons are entitled to healthcare beyond emergency services if they are accommodated in alien or asylum centres.[386] In the UK, an amendment is expected to exempt from charge failed asylum seekers when they are assisted by the UK Border Agency under Sections 4 or 95 of the 1999 Immigration Act.[387]

Child healthcare

Human rights instruments acknowledge that children have a special need for protection.[388] Building on Articles 23, 24 and 39 of the CRC, the Committee on the Rights of the Child concluded that: "States are obligated to ensure that unaccompanied and separated children have the same access to healthcare as children who are [...] nationals [...]".[389]

In spite of their particular vulnerability, irregular migrant children up to a certain age are entitled to the same level of access to healthcare as nationals in four countries only, namely Greece, Portugal, Romania and Spain. In Greece, all children up to the age of 14 have the right to free medical services no matter whether or not it is urgent and irrespective of the legality of their stay.[390] Healthcare is provided at special children's clinics. In Romania, healthcare is free for all children under 18 regardless of their citizenship or their parents' insurance status.[391] In Portugal, in order to ensure healthcare coverage of all children, the High Commissioner for Immigration and Intercultural Dialogue (ACIDI) introduced in 2004 a specific register for foreign minors.[392] Finally, in Spain, all children up to the age of 18 are granted healthcare access without having to fulfil any requirements.[393]

382 Czech Republic, Act. No. 325/1999 Coll. on Asylum, Article 88.
383 For Luxembourg, see Collectif Réfugiés (2008) *Guide à l'accès aux soins médicaux*; the legal basis in Austria is defined in Basic Care Agreement (*Grundversorgungsvereinbarung*), BGBl. I Nr. 80/2004 (2004).
384 Sweden, Law 2008:344 on Health Care for Asylum Seekers and others (*Lagen om Hälso- och sjukvård åt asylsökande m.fl.*), Section 4, last paragraph.
385 Slovenia, Asylum Act, Official Gazette of the Republic of Slovenia No. 61/99; Aliens Act, Official Gazette of the Republic of Slovenia No. 14/99.
386 Denmark, Aliens (Consolidation) Act, No. 785 (2009), Article 14(1)b (basic treatment is provided if the migrant is registered at an asylum centre or with the Danish Immigration Service); Hungary, Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, Article 139 (primary care if hosted in aliens centres); Lithuania, Order of the Minister of Interior No. IV-340, 4 October 2007, "On approving the conditions and order of temporary accommodation of aliens in the Aliens' Registration Center" at 17. See also Austria, Basic Care Agreement *(Grundversorgungsvereinbarung)*, BGBl. I Nr. 80/2004 (2004), Article 2 (6) (health insurance coverage if registered at asylum centres or in contact with immigration authority).
387 Information provided to the FRA by the UK Border Agency in May 2011.
388 UDHR, Article 25; CRC, Articles 23, 24 and 39.
389 Committee on the Rights of the Child (2005) *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2009, paragraph 46.
390 Greece, Law No. 3386/2005 (2005), Article 84(1).
391 Romanian Law on the protection and promotion of the rights of the child/ 272/2004, Article 43; Romania, Law 95/2006 on healthcare reform, Article 213, and Cuadra, C. B. (2010) *Policies on Health Care for Undocumented Migrants in EU27: Country Report Romania*, April 2010, available at: http://files.nowhereland.info/670.pdf.
392 Portugal, *Despacho do Ministério da Saúde* number 25 360/2001; *Decreto Lei* Number 135/99, 22 April 1999.
393 Spain, *Ley Organica 4/2000 sobre derechos y libertades de los extranjeros en Espana y su integracion social* (2000).

In Germany, migrants in an irregular situation have access to child healthcare. However, the fact that they would be reported to immigration authorities often prevents them from seeking healthcare, except for emergency care, where there is no risk of reporting.[394]

In the Netherlands and Denmark, all children are granted free access to certain preventive treatment, examinations and dental check-ups.[395] In Estonia and Poland, access to healthcare is provided for all children who attend school, regardless of status. In Estonia, children attending school under 19 years of age and students of up to 24 years of age are treated in the same way as insured persons, regardless of their legal status.[396] The situation in Poland is similar.[397]

Seven countries (Belgium,[398] Cyprus,[399] France,[400] Italy,[401] Lithuania,[402] Luxembourg[403] and the UK[404]) provide free healthcare or a health insurance specifically for unaccompanied minors, albeit certain conditions might need to be fulfilled. In France, for example, irregular unaccompanied children are covered by mainstream health insurance under the Universal Health Coverage Act (CMU), while irregular children with families must qualify for the state medical aid system designed for low income persons and migrants in an irregular situation (AME).[405] In Belgium, most unaccompanied children stay in reception or welfare centres, where medical care is paid for by the administration of the facility. If they are living outside a centre, they are covered by health insurance if they have been attending school in Belgium for at least three months. Otherwise, they are treated like adult migrants in an irregular situation.[406] As a result, irregular migrant children who live with their families face considerable difficulties in accessing basic preventive or follow-up care in these countries.

Another group of countries (Austria, Czech Republic, Luxembourg and Sweden) grants healthcare only to children whose removal has been suspended or postponed. In Sweden, children whose asylum applications have been rejected are the only group of migrants in an irregular situation who are granted access to healthcare by law. In Austria, the Czech Republic and Luxembourg, adult migrants whose removal has been postponed or suspended are also granted access to healthcare, but in some of these countries children may receive a wider range of treatments than adults.[407]

In a final group of countries, no specific provisions on healthcare for migrant children in an irregular situation could be identified. It is therefore assumed that in Bulgaria, Finland, Hungary, Ireland, Latvia, Malta, Slovakia and Slovenia the same regime applies as for adults, meaning that children are entitled only to emergency healthcare. In some cases, efforts are underway to improve the situation. In Cyprus, for example, (where only unaccompanied minors receive healthcare under the 2000 refugee law), the Commissioner for Children's Rights asked – after having received the views of the office of the General Attorney of the Republic – the Ministry of Health to issue a circular clarifying that all children, including those in an irregular situation, should be entitled to healthcare. The Ministry of Health has not, however, issued any instructions and parents of children in need of medical treatment continue to be charged, except in emergencies.

The following table provides an overview of access to healthcare for migrant children in an irregular situation in the 27 EU Member States.

394 Germany, Asylum Seekers Benefit Act *(Asylbewerberleistungsgesetz),* BGBl. I S. 2022 (1997); German Residence Act (*Aufenthaltsgesetz*), BGBl. I S. 162 (2004), Sections 87(2), 88(2) and Regulation on the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz,* VwV-AufenthG), GMBl. I S. 878 (2009), 87.1.5. and 88.2.3.

395 Cuadra, C. B. (2010) *Policies on Health Care for Undocumented Migrants in EU27: Country Report Denmark*, April 2010, available at: http://files.nowhereland.info/654.pdf; Netherlands, *Zorgverzekeringswet: Tegemoetkoming in de kosten voor de zorg voor illegale vreemdelingen/ 31249* (Amendment to the Health Insurance Act) (2008).

396 Estonia, Health Insurance Act § 5(4)s.

397 See FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.

398 *Ibid.*

399 In Cyprus, all unaccompanied children are registered as asylum seekers and are under the care of the Social Welfare Office, which, under the 2000 Refugee Law, ensures their access to free healthcare.

400 France, Social Action and Family Code *(Code de l'action sociale et des familles),* Article L111-2.

401 Free healthcare is provided under the national healthcare systems. See FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.

402 Cuadra, C. B. (2010) *Policies on Health Care for Undocumented Migrants in EU27: Country Report Lithuania*, April 2010, available at: http://files.nowhereland.info/664.pdf.

403 In Luxemburg, all unaccompanied minors appear to be in the asylum procedure and are, therefore, granted access to healthcare as asylum seekers under Article 32 of the Code of Social Insurance *(Code des assurances sociales)*. No case of unaccompanied minors outside the asylum procedure is known to the FRA. However, in theory, the National Ethical Commission concluded that above-mentioned Article 32 is applicable mutatis mutandis to children who have no permit or authorisation to stay; see Commission Nationale d'Ethique (2007) *Les limites de l'access aux soins au Grand-Duché de Luxembourg*. Avis 20, p. 60, available at: www.cne.public.lu/publications/avis/Avis_20.pdf.

404 This applies to separated children who are taken into the care of the Local Authority. They will be considered ordinarily resident there and entitled to free national health insurance based on such ordinary residence. Information provided to the FRA by the UK Ministry of Justice in May 2011.

405 HUMA Network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde, p. 51.

406 PICUM (2009) *Undocumented children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, PICUM, available at: http://picum.org/picum.org/uploads/file_/PICUM_conference_report.pdf, p. 50-51.

407 Czech Republic, Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic, Article 48. Austria, Basic Care Agreement (*Grundversorgungsvereinbarung, GVV*), Article 7, BGBl. I Nr. 80/2004 (2004). This may also be the case in Luxembourg (see footnote 403).

Table 8: Free healthcare entitlements for irregular migrant children

Country	Same access as nationals	Same access as nationals for some services	Similar to nationals for unaccompanied minors	Access beyond emergency care for some categories	Emergency care only
Austria				Formally tolerated children	
Belgium			✔		
Bulgaria					✔
Cyprus			✔		
Czech Republic				Formally tolerated children	
Denmark		✔			
Estonia				Children in schools	
Finland					✔
France			✔		
Germany				Tolerated children*	
Greece	✔				
Hungary					✔
Ireland					✔
Italy			✔		
Latvia					✔
Lithuania			✔		
Luxembourg			✔	Failed asylum seekers	
Malta					✔
Netherlands		✔			
Poland				Children in schools	
Portugal	✔				
Romania	✔				
Slovakia					✔
Slovenia					✔
Spain	✔				
Sweden				Failed asylum seekers	
United Kingdom			✔		

Note: ** Although legally entitled to healthcare, children not provided with a toleration to stay risk being reported to immigration law enforcement.*

Source: *FRA, 2011, based on information from PICUM and HUMA Network*[408]

408 The table was established on the basis of PICUM (2009) *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, PICUM and HUMA Network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde; unless other sources are given in the narrative of this subsection.

Maternal care and birth

Women require specific healthcare services, particularly in relation to maternal and reproductive care. These include a range of antenatal and post-natal services as well as assistance in case of delivery. Acknowledging such need, the CRC as well as CEDAW contain specific provisions on reproductive and maternal care. Article 24 of the CRC obliges states to take appropriate measures "to ensure appropriate prenatal and postnatal healthcare for mothers". Article 12(2) of the CEDAW specifically requires states to grant women "appropriate services in connection with pregnancy, confinement and the postnatal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation". The protection of irregular migrant women in need of obstetric care, however, is not systematically guaranteed.

The type of care provided to women may vary across the EU Member Statesand depends on the general services provided to pregnant women or mothers under the general health system. Typically, such healthcare services include, in addition to assistance during delivery, ante- and post-natal counselling, access to tests (e.g. ultrasound, urine or blood test), regular gynaecological visits as well as assistance during delivery.

According to the FRA survey of public authorities as part of its access to healthcare research, only 10 EU Member States have a policy to provide maternal care (basic ante- and post-natal screenings, pregnancy consultations) as well as medical assistance in case of birth to irregular migrant women.[409] However, the questionnaire did not differentiate between delivery and antenatal/post-natal care.

Evidence collected by the FRA for the 10 countries covered by the thematic report on healthcare[410] shows that **delivery** is considered an emergency. Medical staff may not refuse treatment to irregular migrant women who are in labour.

Having to pay for the care provided presents a major obstacle as giving birth can become quite unaffordable. In Sweden for example, the price for giving birth amounts to some €2,600.[411]

In Sweden, migrant women in an irregular situation are generally presented a bill for hospital costs and in Ireland, this depends on the healthcare provider. In Poland and Hungary, the situation regarding payment remains unclear. In Hungary delivery is on the list of 31 situations which are to be treated as emergencies:[412] evidence collected from the migrant interviews suggests that migrant women in an irregular situation are expected to pay the costs of delivery. If a patient cannot afford it, however, the payment is qualified as non-returnable and the healthcare provider can be reimbursed by the state. In the United Kingdom, maternity treatment would not be delayed or refused, but irregular migrant women have to pay for childbirth, except if the service was provided by midwives in community health centres.[413]In countries where migrants are billed, there may be systems to write off the costs in case of non-payment.

Only very few countries grant full access to **ante- and post-natal healthcare** to migrant women in an irregular situation. In Spain and Portugal, they are granted unconditional and free access to maternal and reproductive care under the same conditions as nationals. In Italy, they are granted free access to ante- and postnatal care upon obtaining a special code for temporary foreign residents (*Stranieri Temporaneamente Presenti*, STP), which is an anonymous code issued by a medical professional or administrative staff. The STP code is valid for six months and can be renewed. Irregular migrants holding such a card can even access preventative care. In the Netherlands, costs for maternal care and birth are fully covered by the national Board of Health Insurances. In France, migrant women in an irregular situation, as well as women not registered in the mainstream insurance scheme, may access antenatal examinations and birth assistance in hospital emergency units that are open to all persons irrespective of legal status, length of stay or income.[414]

Promising practice

Giving guidance on maternity rights

In the UK in April 2009, the organisation Medact published an information sheet with guidance on maternity rights and benefits for undocumented pregnant women and new parents. It provides information on maternity, primary and secondary healthcare, including on cost coverage as well as information on employment issues.

The information note is available at: www.medact.org/content/reaching_out/undocumentedmigrantsinfosheetaprilo9.pdf.

409 These countries are Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal, Spain, Sweden and the UK.

410 See FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office. The report covers Belgium, France, Germany, Greece, Hungary, Ireland, Italy, Poland, Spain and Sweden.

411 Sweden, Public Authority Interview.

412 Hungary, Regulation 52/2006.

413 HUMA Network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde.

414 PICUM (2010) *Undocumented Migrants' Health Needs and Strategies to Access Health Care in 17 EU countries: Country report France*, June 2010, available at: http://files.nowhereland.info/708.pdf.

In some countries pregnancy constitutes a reason to be awarded temporary suspension of removal (e.g. Germany and Greece). This does not, however, automatically include the right to healthcare. In Greece, for example, pregnant women may be granted suspension of removal for a specified period before and after giving birth, but at the same time, they are not granted free access to maternal care during this period.[415] In Germany, migrants with a tolerated status (*Duldung*) are entitled to access healthcare services during and after pregnancy.[416]

6.3 Obstacles to accessing healthcare

A study conducted by the European Observatory on Access to Healthcare based on a survey of more than one thousand migrants in an irregular situation in 11 countries (Belgium, France, Germany, Greece, Italy, Netherlands, Portugal, Spain, Sweden, UK and Switzerland) found that a majority of migrants in an irregular situation do not benefit adequately from healthcare services.[417] It revealed that 14% of migrants in an irregular situation were refused the last time they sought care. The migrants had sought care for cardiovascular, digestive or gynaecological complaints. Refusal was not uncommon for healthcare during pregnancy.[418]

The FRA thematic report *Migrants in an irregular situation: access to healthcare in 10 European Union Member States* provides a more detailed overview of practical obstacles in accessing healthcare services.[419] Interviews conducted as part of this FRA research project with migrants in an irregular situation, healthcare providers, public authorities and civil society, identified five main barriers. Some are common also to other groups of persons who are uninsured and/or destitute, whereas other obstacles derive from the irregularity of status. These obstacles further contribute to the fact that migrants in an irregular situation often seek healthcare too late and generally show a poorer health status than other groups of the population with similar demographic characteristics.[420]

Unclear rules with regard to expenses covered for services provided to migrants in an irregular situation create uncertainties for health staff. Hospitalisation, or laboratory fees, for example, can be rather high. If the service provider has no mechanisms to cover such expenses (as the patient is neither insured nor covered by public funds), health providers may be reluctant to treat those for whom they do not have a budget line to charge the costs to.

Both health staff and migrants were often found to be lacking information on healthcare entitlements of migrants in an irregular situation. Unawareness of entitlements is partly linked to complex legislation and access procedures for migrants in an irregular situation.

Discretion of healthcare staff (doctors, nurses, receptionists) in determining whether to provide care is another important factor. It is the healthcare provider who decides what is and what is not an emergency as well as what can be classed as 'acute', 'urgent', 'necessary' or 'essential' under their national laws.

Another important factor that prevents migrants in an irregular situation from accessing treatment, including when urgently required, is the existence of an active duty by service providers to report such migrants to immigration authorities. In Germany, the Ministry of Interior recently clarified that health staff's duty to maintain professional secrecy is of greater weight than their duty to report.[421] As a result, health staff and hospital accountancy units are exempt from reporting because they receive access to personal data under medical confidentiality. In this context, the medical confidentiality is extended to the social welfare office.[422] Migrants in an irregular situation thus may access all care that needs immediate medical attention. A reporting duty continues to be in force for social welfare offices if the irregular migrant lodges an application for cost coverage, which would be the

415 Response, National Authority Questionnaire GR 3-7.
416 Germany, Asylum Seekers Benefit Act *(Asylbewerberleistungsgesetz)*, BGBl. I S. 2022 (1997), Section 4.
417 Médecins du Monde, European Observatory on Access to Healthcare (2009) *Access to healthcare for undocumented migrants in 11 European countries*, Paris, Médecins du Monde, pp. 10-12.
418 *Ibid.*, pp. 10, 96-97.
419 FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office.
420 Médecins du Monde, European Observatory on Access to Healthcare (2009) *Access to healthcare for undocumented migrants in 11 European countries*, Paris, Médecins du Monde, pp. 10-12.
421 The duty to report is laid down in the German Residence Act *(Aufenthaltsgesetz)*, BGBl. 1 I (2004), Section 87, the clarifications have been provided in the Administrative Decree on the Residence Act issued by the Ministry of Interior on 26 October 2009.
422 See German Residence Act *(Aufenthaltsgesetz)*, BGBl. 1 I (2004), Section 88 (2) and Administrative Decree on the Residence Act, 87.1.5. and 88.2.3.

case for non-emergency treatment.[423] In Ireland, Section 8 of the Immigration Act 2003 contains a duty for public authorities to share information concerning non-nationals for the purposes of implementing the law on entry and removal. In October 2003, an interface between the information technology system of the Department of Social and Family Affairs and that of the immigration authorities was established.[424]

Even when no reporting duty has been introduced, data exchanges may take place between social service providers and immigration law enforcement. Public discussion may also trigger fear. This occurred in Italy, where a proposal to introduce a reporting obligation for health staff was debated in 2009 but was not introduced in the end.[425] The public debate around this issue stirred fears among the irregular migrant community and discouraged many of them from accessing healthcare services.[426] In Cyprus, although there is no legal obligation to inform immigration authorities, service providers are encouraged to report migrants who are in an irregular situation to the police.[427]

Promising practice

Clarifying requirements for reporting on irregular migrants

Following the criminalisation of irregular entry and stay in Italy, there was a certain degree of confusion among healthcare providers and local authorities on whether they would need to report migrants in an irregular situation to the police. To clarify the issue, in November 2009, the Ministry of Interior issued a circular explaining the prohibition on reporting migrants in an irregular situation to the police.

Conclusions

Healthcare entitlements of migrants in an irregular situation vary considerably across Europe and range from emergency treatment only to equal access to the health system at the same level as nationals. Similarly, maternal care and child healthcare is unequally provided. In addition, even where there is an entitlement, practical obstacles preventing access, such as reporting duties or data exchange with immigration enforcement authorities, need to be addressed.

FRA opinion

The fundamental right to healthcare for migrants in an irregular situation is unevenly protected in the Member States. The fear of being detected, based on the real or perceived exchange of data between healthcare providers and immigration enforcement, means that irregular migrants delay seeking healthcare until an emergency arises, delays which have negative consequences both for the health of the individual as well as for that of the society at large.

Migrants in an irregular situation should, as a minimum, be entitled by law to access necessary healthcare services . Such healthcare should not be limited to emergency care only, but should also include other forms of necessary healthcare, such as the possibility to see a general practitioner or receive necessary medicines. The same rules for payment of fees and exemption from payment should apply to migrants in an irregular situation as to nationals.

EU Member States should disconnect healthcare from immigration-control policies. They should not impose a duty to report migrants in an irregular situation upon healthcare providers or authorities in charge of healthcare administration. The absence of this duty to report should be clearly communicated to them.

423 Katholisches Forum ‚Leben in der Illegalität' (2010) *Erläuterung zu ausgewählten Vorschriften aus der Allgemeinen Verwaltungsvorschrift zum Aufenthaltsgesetz vom 18.09.2009* (Drucksache 669/09), Berlin, Katholisches Forum ‚Leben in der Illegalität'.

424 See Quinn, E. and Hughes, G. (2005) *Illegally Resident Third-County Nationals in Ireland: State Approaches Towards Their Situation*, Dublin: ESRI, p. 20, available at: www.esri.ie/pdf/BKMNEXT073.pdf.

425 See national campaign 'Forbidden to denounce' (*Campagna nazionale "Divieto di segnalazione"*), available at: www.immigrazioneoggi.it/documentazione/divieto_di_segnalazione-analisi.pdf.

426 For more information on the law and its effect on irregular migrants and accessing healthcare in Italy, see: PICUM (2010) *Undocumented Migrants' Health Needs and Strategies to Access Health Care in 17 EU countries. Country Report Italy*, June 2010, available at: http://files.nowhereland.info/713.pdf, p. 9; LeVoy, M. and Geddie, E. (2009) 'Irregular Migration: Challenges, Limits and Remedies', *Refugee Survey Quarterly*, Vol. 28, No. 4.

427 See HUMA network (2009) *Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice*, Paris, Médecins du Monde, p. 55. The report mentions the case of hospital authorities informing immigration police about a woman's irregular status, when she sought treatment for pregnancy (information extracted from an article in the *Cyprus Mail*, 22 May 2010).

7

Education

Convention on the Rights of the Child

Article 28 – Right to education

1. States Parties recognize the right of the child to education, and [...] shall, in particular:
(a) Make primary education compulsory and available free to all;
(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; [...]
1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.

Universal primary education is one of the Millennium Development Goals adopted by the United Nations to address poverty. By 2015, "children everywhere, boys and girls alike, will be able to complete a full course of primary schooling".[428] In the EU, this goal remains relevant for certain groups, including migrants in an irregular situation. Access to education by non-citizens is covered in a number of reports by international organisations[429] and NGOs.[430]

Education represents the children's principle introduction to society. How many children there are in an irregular status in need of primary or secondary education in the EU is unknown. In 2010, some 41,500 children in an irregular situation were apprehended in the 26 EU Member States for which data are available, including more than 16,000 children under 14.[431] However, no information is available on the time they stayed in the territory of an EU Member State.

The right to education is enshrined in a number of international and European human rights instruments. The right to free primary education is applicable to all children, regardless of immigration status. The following table summarises the most relevant human rights provisions in this regard.

428 See www.un.org/millenniumgoals/education.shtml.

429 OHCHR (2006) *The Rights of Non-citizens*, HR/PUB/06/11, New York and Geneva, United Nations; Sabates-Wheeler, R. (2009) UN Economic and Social Council, Report of the United Nations High Commissioner for Human Rights (2010), 1 June 2010, E/2010/89; Sabates-Wheeler, R. (2009) *The Impact of Irregular Status on Human Development Outcomes for Migrants*, Research Paper 2009/26, UNDP; Schapiro, K. A. (2009) *Migration and Educational Outcomes of Children*, Research Paper 2009/57, UNDP; Wickramasekara, P. (2007) *Globalization, International Labour Migration and Rights of Migrants Workers*, Geneva, ILO.

430 PICUM (2002) *Platform for International Cooperation on Undocumented Migrants, Book of Solidarity Volume 1-3*, Brussels, PICUM; PICUM (2009) *Platform for International Cooperation on Undocumented Migrants*, Brussels, PICUM; PICUM (2008) *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, PICUM.

431 See Eurostat, Enforcement Immigration Statistics, extracted on 14 September 2011.

Table 9: Key human rights provisions on education

Instrument	Main provision	Ratification	Applicability to irregular migrants
UDHR, Article 26(1)	"everyone has the right to education"	Not applicable	Yes
ICERD, Article 5(e-v)	"right to education and training"	All EU Member States	Yes[1]
ICESCR, Article 13(1, 2), 14	"right of everyone to education"	All EU Member States[2]	Yes[3]
CRC, Article 28(1), 29(1)	"right of the child to education" "primary education compulsory and available free to all"	All EU Member States[4]	Yes[5]
ICRMW, Article 30	"basic right of access to education on the basis of equality of treatment with nationals"	No EU Member States	Yes
UNESCO Convention against discrimination in Education, Article 3	"no discrimination in the admission of pupils to educational institutions"; "give foreign nationals resident within their territory the same access to education as that given to their own nationals"	All EU Member States[6] except Austria, Belgium, Estonia, Greece, Ireland and Lithuania	Yes[7]
ECHR, Protocol I, Article 2	"no person shall be denied the right to education"	All EU Member States	Yes
Revised ESC, Article 17(2)	"free primary and secondary education"	All EU Member States[8] except Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the UK	No, according to appendix[9]

Notes:

[1] *UN, CERD (2004)* General Recommendation No. 30: Discrimination Against Non-Citizens*, 10 January 2004, paragraph 30, whereby State Parties should "ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in [their] territory".*

[2] *Belgium made the following interpretative declaration to the ICESCR: "With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies".*

[3] *CESCR (1999)* General Comment No. 13: The right to education (Article 13)*, 8 December 1999, paragraph 34 as well as Committee on the Rights of the Child (2005)* General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2009, paragraphs 41-43.*

[4] *Belgium made the following interpretative declaration to the CRC: "With regard to article 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals. This concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies".*

[5] *The CRC is applicable to all children "***without discrimination of any kind** *irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or* **other status***" (bold added). The Committee on the Rights of the Child has stressed that the rights protected under the CRC, if not explicitly stated otherwise, apply to all children regardless of their status. Committee on the Rights of the Child (2005)* General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2009.*

[6] *Bulgaria, Cyprus, Latvia, Spain and the United Kingdom have accepted the Convention, which has the same legal effect as ratification.*

[7] *'Same access' for foreign nationals does not necessarily mean free of charge: according to the debate in the Working Party, the Convention foresees full equality of treatment for primary education but not for secondary education; UNESCO (2005)* Commentary on the Convention Against Discrimination in Education*, France, UNESCO, available at: http://unesdoc.unesco.org/images/0014/001412/141286e.pdf; see note 5 to Table 6, footnote 251 and note 7 to Table 7.*

[8] *The Revised European Social Charter allows State Parties to select the articles by which they will be bound, Bulgaria has not signed up to Article 17(1) and Cyprus has not signed up to Articles 17(1) and 17(2).*

[9] *The scope of the Social Charter is limited to "foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". In two cases, the European Committee of Social Rights made exceptions relating to children and where compatibility with the CRC was an issue; see note 5 to Table 6, footnote 251 and note 7 to Table 7.*

Source: *FRA, 2011*

In 2011, in a judgment concerning a long-term resident in Bulgaria who had lost his right to stay and therefore was required to pay for secondary education, the ECtHR made a distinction between primary, secondary and university education. It noted that a state's margin of appreciation in imposing fees to access education increases with the level of education: "Thus, at the university level, which so far remains optional for many people, higher fees for aliens – and indeed fees in general – seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy – as well as integration into and first experiences of society – and is compulsory in most countries." Secondary education was found by the Court to fall between these two extremes, recognising, however, that those equipped with no more than basic knowledge and skills will face greater hurdles in their personal and professional development and may suffer far-reaching consequences to their social and economic well-being.[432]

According to Article 165, the Union "shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action". Specific provisions concerning education of children have been adopted by the EU for asylum seekers[433] as well as for migrant children in an irregular situation who are not removed. Article 14(1) of the Return Directive obliges EU Member States to provide children whose removal has been postponed "with access to the basic education system for minors subject to the length of their stay".

FRA PUBLICATION

Report on separated, asylum-seeking children

Separated children who have applied for asylum face great difficulties enrolling in school. Adults working with separated children interviewed by the FRA mentioned as examples that schools may only enrol new students at the beginning of a school year. More generally, they may be reluctant to take foreign children or they may lack the space or the resources to provide the special support that separated children require.[434] Children in an irregular situation are likely to face similar, if not greater difficulties, enrolling in school than separated children.

This chapter presents an overview of access to education for children who are in an irregular situation in the 27 EU Member States. It first reviews national legal provisions and subsequently identifies some of the obstacles which render access difficult in practice in spite of existing entitlements.

7.1 The right to education in national law

In recent years, there has been a move towards granting the right to education to migrant children in an irregular situation. These changes have, however, given rise to uncertainty among relevant national authorities, educational institutions and civil society actors alike, an uncertainty manifest in the ambiguous responses to questionnaires from civil society and national authorities.

In the majority of EU Member States, as illustrated in Table 10, the right to education is provided to all children in the country, hence implicitly also to children staying irregularly. Legislation in Belgium, Spain, Italy and the Netherlands expressly mentions their right to primary and secondary education.

In five countries, Bulgaria, Hungary, Latvia, Lithuania and Sweden it appears that migrant children in an irregular situation are not always entitled to free state schooling. In Bulgaria, although the Constitution provides for free and compulsory primary and secondary education (Article 53), the Public Education Act entitles only those children with a residence permit, persons with international protection needs as well as EU and Swiss national children to free education. Children without a permit who stay in Bulgaria can only access state schools on a payment basis.[435] Similarly, in Hungary, access to state schools for children who do not have a residence permit is only granted if they pay full fees. In Lithuania, the state guarantees and finances compulsory primary education for Lithuanian citizens as well as foreigners who possess a temporary or permanent residence permit. Undocumented children have access to education only if they are staying at an aliens centre.[436]

In Latvia, according to Article 3 of the Law on Education, an under-age third-country national or stateless person who does not have legal grounds to stay in Latvia, has the right to basic education within a period

432 ECtHR, *Ponomaryov v. Bulgaria*, No. 5335/05, 21 June 2011, violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1 to the ECHR.
433 Reception Conditions Directive, Article 10.
434 FRA (2010) *Separated, asylum-seeking children in European Union Member States*, Luxembourg, Publications Office, p. 37.
435 Bulgaria, Public Education Act, as amended on 15 September 2009, Article 4(2) and 4(3).
436 Lithuania, Law on Education, 17 March 2011, Article 22(2). See also Order of the Minister of Interior No. 1V-340 of 4 October 2007, "On approving the conditions and order of temporary accommodation of aliens in the Aliens' registration centre", Article 17 subsection 16. The order is available in Lithuanian at: www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=305952&p_query=&p_tr2=.

specified for voluntary departure, or during the period for which removal has been postponed, as well as during his/her detention.[437] It can be concluded that irregular migrants who are not among the categories listed (such as undetected persons) do not have the right to attend state schools.

In Sweden, if an application for asylum is rejected and the child is obliged to return, the child will be able to attend school until the day of the enforcement of the return decision. In addition to this, Swedish municipalities are free to accept in their schools children who have been de-registered by the Migration Board (absconded children), but related costs would have to be covered by the municipality, which would not be reimbursed by the central government. In 2010, a government inquiry[438] analysed the conditions for extending the right to schooling and access to preschool and school-age childcare to apply to children staying in the country without a permit. The inquiry established that the basic premise should be that all children residing in the country should have a right to education, preschool activities and school-age childcare. This should also apply to children and young people without a permit for their stay in Sweden, irrespective of the reason for this, except for those whose stay in the country will be short. The government is currently studying the proposal.[439]

Some EU Member States, for example, the Czech Republic, Estonia, and Poland, guarantee access only to primary education and not to secondary education.[440] For instance, in the Czech Republic, secondary education is limited to children who reside legally in the country.[441] In France, access to secondary education is provided; however, children over the age of 16 can be rejected from secondary schools based on school capacity.[442]

The higher the levels of education and the older the child, the more the right to education is restricted. Generally, adults who are in an irregular situation do not have access to vocational training or tertiary education. Individuals with no legal status cannot typically access vocational training, which is often treated as 'on-the-job training' with the majority of EU Member States requiring a work permit for it.[443]

In the recent past, there has been a tendency to expand access to compulsory education for migrant children who are in an irregular situation. As an illustration, in November 2007, the Spanish Constitutional Court ruled in a landmark case that undocumented children up to the age of 18 have the right to non-compulsory education. In addition, financial support should also be provided for such individuals, if necessary.[444] Similarly, in Cyprus, the Ministry of Education and Culture reminds headmasters of public education institutions at the beginning of each school year that it is their obligation to enrol all students irrespective of their parents' status. The ministry also requires them to report the contact details of all migrant children.[445] In Germany, a dispute over the right to education has emerged in recent years.[446] Only the states of Bavaria and North Rhine-Westphalia require 'all children' to attend school. In the state of Baden-Württemberg, in 2008, the parliament passed an amendment to the state school law expanding mandatory schooling to children whose asylum application is pending and those with a toleration status for suspended removal.[447]

In Portugal, attending preschool, primary school, secondary or professional education is grounds for the legalisation of minors born in Portugal.[448] A special programme has been drawn up for this purpose.

437 Latvia, Law on Education, Section 3(3) as amended on 4 March 2010.

438 Sweden, Official Investigations of the Government (2010) Report SOU 2010:5.

439 Information provided to the FRA by the Ministry of Justice in May 2011. See also Education Act, 1 July 2011, chapter 7, section 3 and chapter 29, sections 2 and 4.

440 National authority questionnaire, responses from the Czech Republic, Estonia and Poland.

441 National authority questionnaire, response from the Czech Republic.

442 FRA civil society questionnaire, response from France. See also GISTI (2009) *Sans-papiers mais pas sans droits, Les notes pratiques (5e édition)*, Paris, GISTI, available at: www.gisti.org/IMG/pdf/np_sans-pap-pas-sans-droits_5e.pdf.

443 This issue was also raised by the MIPEX project, see www.integrationindex.eu.

444 Sentence of the Constitutional Court (*Sentencia del Tribunal Constitucional* - STC 236/2007, 7 November 2007), appeal of unconstitutionality number 1707-2001, lodged by the Parliament of Navarre against Organic Law 8/2000, of 22 December, reforming Organic Law4/2000); see also Casas Baamonde, E. M. (2008) *El Tribunal Constitucional ante el fenómeno de la extranjeria,* text presented at a Joint Conference of the Spanish, Portuguese and Italian Constitutional Courts, 25-27 September 2008, available at: www.tribunalconstitucional.es/actividades/artico59_discurso.html; Sotés-Elizalde, M. A. (2010) 'Human rights and immigration - The right to education of foreigners in Spain', *Procedia Social and Behavioral Science*, Vol. 2, pp. 2808–12.

445 Information provided to the FRA by the Ministry of Education and Culture in May 2011.

446 Mohr, M. (2009) 'Zur Schule ohne Angst vor Abschiebung', *Der Spiegel*, 2 October 2009, available at: http://www.spiegel.de/schulspiegel/wissen/0,1518,652817,00.html; Vogel, D. and Aβner, M. (2010) *Kinder ohne Aufenthaltsstatus - illegal im Land, legal in der Schule,* Studie für den Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR), Hamburg, Institute for International Economics; Deutscher Bundestag (2006), *Stellungnahme des Katholischen Forums Leben in der Illegalität, Protokoll der Sitzung des Innenausschusses, Nr. 16 und 15*, 26 June 2006; Sekretariat der Deutschen Bischofskonferenz (2010) *Leben in der Illegalität in Deutschland - eine humanitäre und pastorale Herausforderung*, 21 May 2001, available at: http://www.dbk.de/fileadmin/redaktion/veroeffentlichungen/kommissionen/KO_25.pdf.

447 For an overview of the access to education in Germany, see Cremer, H. (2009) *Das Recht auf Bildung für Kinder ohne Papiere*, Bonn – Berlin, German Institute for Human Rights.

448 Portugal, Law 23/07, Article 122(1)(b).

Table 10: The right to education for undocumented children, EU27

Country	Right		Limited right	National legislation
	Explicit	Implicit		
Austria		x		Law on Compulsory Education, Sections 1 and 17, BGBl. 76/1985, last amended by BGBl I 113/2006 (24 July 2006)
Belgium	x			Constitution, Article 24, paragraph 3; Article 40 of the Decree of 30 June 1998 as amended under the Decree of 27 March 2002
Bulgaria			x	Public Education Act, Article 4(3) – access only upon payment
Cyprus		x		Constitution, Article 20
Czech Republic		x		Constitution, Article 33(1); Amendment of the Act on School Education, Act No. 343/2007 (*Zákon č. 343/2007 Sb, kterým se mění školský zákon*)
Denmark		x		Law on State Schools , Section 32, Act No. 1049 of 28 August 2007; Aliens Act, Section 42g
Estonia		x		Education Act (10 April 1992), Riigi Teataja I, 12, 192
Finland		x		Constitution, section 16
France		x		Preamble of French Constitution; National Education Code, Article L131-1and L.131-4; a circular of the Ministry of National Education (20 March 2002)
Germany		x		Constitution, Article 7, paragraph 1 GG
Greece		x		Law 3386/2005 as amended, Article 72§1
Hungary			x	2003 Public Education Act, Article 110 – access only upon payment
Ireland		x		Constitution, Article 42
Italy	x			Constitution, Article 34; Pursuant to Article 38 of Italy/Dlgs 286/98; Pursuant to Article 45 of Italy/D.p.r. 394/99
Latvia			x	Law on Education, Section 3 (3)
Lithuania			x	Only for children staying in centres, 2011 Law on Education, Article 22 (2); Order of the Minister of Interior No. 1V-340 of 4 October 2007, "On approving the conditions and order of temporary accommodation of aliens in the Aliens' registration centre", paragraph 17.16
Luxembourg		x		*Loi du 9 février 2009 relative à l'obligation scolaire*, Memorial A-N° 20 (16 February 2009), Articles 2 and 7
Malta		x		Constitution, Article 10; Laws of Malta, Act XX of 2000, The Refugees Act; Legal notice 259/2002 entitled migrant workers (Child Education) regulations
Netherlands	x			Law of Primary Education (2 July 1981), Article 41; Law of Secondary Education (14 February 1963)
Poland		x		Constitution, Article 70; Act of 21 December 2000 amending the Act on the Education System
Portugal		x		Constitution, Articles 13, 15, 73 and 74
Romania		x		Law on Foreigners, Article 132 (5 June 2008)
Slovakia		x		Constitution, Chapter 2, Section V, Article 42 (1)
Slovenia		x		Aliens Act 71/08 (14 July 2008), Article 55; Aliens Act, Article 60
Spain	x			Immigration Law, Article 9; Education Law Article 4(1)
Sweden			x	Education Law 2011, Chapter 29, Section 4
United Kingdom		x		Education Act 1996; Education and Inspections Act 2006

Source: FRA, 2011

Promising practice

Encouraging irregular migrants to send their children to school

Portugal's Aliens and Borders Service (SEF) (*Serviço de Estrangeiros e Fronteiras)* launched a go-to-school programme (*Programa SEF vai à escola*), involving national immigration authorities and schools. The project is designed to regularise young migrant children who were born in Portugal and attend state schools, but who are not lawfully staying in the country. Residence permits for both the children and their parents are granted or renewed directly at school, on the same day, avoiding bureaucracy. This project also includes local awareness-raising activities aimed at all actors of each school community. The programme considers education an inclusion factor and encourages migrants in an irregular situation to place their children in school.

In conclusion, in a few countries not all children can attend state schooling free of charge. Most EU Member States implicitly grant the right to education for undocumented children through the right to education for 'all children'. This implicit right causes confusion among those concerned. School administrations are often uncertain about the situation of migrant children who are in an irregular situation and sometimes hesitate or refuse to enrol undocumented children. They may turn down applications, citing the children's and family's irregular stay in the country.

In other cases, enrolment is prevented by practical obstacles. It was reported that, for example, some school administrations in the Netherlands rejected irregular migrant children on the basis that school trips abroad would become unfeasible.[449] The most common practical obstacles are described in the next section. Such barriers can make attendance difficult even in cases where enrolment was possible.

Access to education of persons who are not removed is generally less controversial, although the scope and preconditions differ among Member States, and often the same practical obstacles apply as for undetected migrants in an irregular situation.

7.2 Obstacles preventing access to schools in practice

A number of barriers still need to be dismantled for migrant children in an irregular situation to access schooling. These may be linked to documentation required to enrol in schools, the way schools are funded or children's or parents' fears of detection. The barriers are summarised in this section.

Documentation

The right to access primary education can be undermined by documentation requirements during enrolment. Such documents most often serve to provide evidence of identity, residence or birth. They may, however, concern other aspects, such as the child's health.

In almost all EU Member States, some sort of documentation is mandatory in order to enrol children at school. According to information provided by civil society representatives, Belgium, Italy, the Netherlands and Poland are the sole EU Member States in which no documents are formally required for registration, although, in practice, documents are occasionally requested.

Responses received from civil society experts indicate that presenting identity documents for children's parents is a condition of enrolment in five Member States (Austria, France, Ireland, Spain and in parts of Germany). In Germany, the situation varies by region. North Rhine-Westphalia and 2009 Hamburg prohibited school administrations from requiring students to provide proof of residence or identification documents in March 2008 and June 2009, respectively.[450] Hungarian school administrations explicitly require a residence permit if the child is not a Hungarian national.[451]

Almost a dozen countries require proof of address or local place of stay. According to civil society survey responses this includes Austria, the Czech Republic, France, Germany, Hungary and Spain. Some countries, like Austria, Cyprus, France, Germany, Luxembourg, and Spain, usually require a birth certificate.

Where no documentation is formally required, practice may also differ. A Belgian NGO, for example, reported that passports of children's parents were occasionally required during the enrolment process.

The need to present medical documents may also constitute an obstacle, as these may not always be easy to procure. German and Hungarian schools,

449 Netherlands, ASKV, Defence for Children, JOB, Letter of 26 February 2009 'Stichting Kinderpostzegels Nederland LAKS, Stichting LOS, LOWAN en UNICEF to the Minister of Education, Culture and Science', see http://ilegaalkind.nl/.

450 Germany, Ministry of Interior *(Bundesministerium des Innern)* (2007) *Bericht des Bundesministeriums des Innern zum Prüfauftrag „Illegalität": Illegal aufhältige Migranten in Deutschland*, Datenlage, Rechtslage, Handlungsoptionen, Ausschussdrucksache 16 (4) 306 des Innenausschusses des Deutschen Bundestages, Berlin.

451 FRA civil society questionnaire, response from Hungary.

for example, require a child's medical records.[452] In France[453] and Spain,[454] respondents to the civil society survey noted that it is necessary to present a document attesting that the child has completed the vaccinations compulsory for her/his age.

Finally, in Bulgaria, school administrations demand the presentation of a document certifying the acquired level of education in the country of origin and the successful sitting of a Bulgarian language examination.[455]

Promising practice

Giving guidance on enrolment[456]

In response to queries from schools, the New York state Education Department issued an instruction on 30 August 2010 to clarify to all school administrators that any person over five and under 21 years of age who has not received a high school diploma is entitled to attend state schools, in the district in which he/she is residing, without the payment of tuition. The guidance says that this also applies to undocumented migrants. In order not to discourage their enrolment, schools should avoid asking any questions related to immigration status or that might reveal such status. Any data that must be gathered pursuant to state or federal law should only be collected following enrolment.

Reporting obligations and police access to student data

When school administrations report the presence of migrants in an irregular situation to the police parents are discouraged from sending their children to school for fear of detection and removal. A similar risk exists if migrants perceive that immigration authorities have access to pupils' data stored with the school or the local administration.

Although in the majority of EU Member States school authorities are not required to report the presence of migrant children in an irregular situation to the police or immigration authorities, this is not always the case. In Cyprus, the Ministry of Education and Culture issued a circular in 2004 requiring headmasters of educational institutions to communicate to the Civil Registration and Migration Department the contact information of migrant children (and hence also of those whose parents are in an irregular situation).[457] Similarly, in Slovakia, school administrations are required to report foreigners attending or leaving a school on the basis of the Act on Stay of Aliens (Article 53(3)).[458] This duty also applies to migrants in an irregular situation.

It is, however, in Germany that reporting duties have been a particular focus of discussion. At the federal level, a general 'duty to report' existed under the Residence Act, Section 87. A recent decision by the Federal Parliament explicitly abolishes this duty for schools, nurseries and educational facilities while maintaining it for other public services.[459] Even before this change, several federal states enacted legislation or issued administrative instructions that exempted school authorities from this general duty, such was the case in North Rhine-Westphalia.[460] A legislative amendment was proposed in the Federal State of Hessen in an attempt to abolish the 'duty to report', but the amendment was rejected in September 2008.[461] In Hamburg and Berlin, when school registration systems were set up in the form of databases, parents' associations campaigned against the move and activists supporting data protection boycotted the database.[462] In response to the concerns raised by the civil rights movement, the legislative proposal was revised and softened.[463]

In some EU Member States, regulations do not explicitly contain a duty by school administrators to report on the presence of migrant children in an irregular situation. However, general obligations to notify offences may lead – where irregular stay is punishable – to notifications on undocumented children. In Estonia, for instance, the Ministry of Interior referred to close cooperation among the Police and Border Guard Board and educational institutions,

452 Local authority questionnaire, responses from Germany and Hungary.
453 FRA civil society questionnaire, responses from France.
454 FRA civil society questionnaire, response from Spain.
455 Information provided to the Bulgarian Fralex focal point in May 2009 by two Bulgarian NGOs working with separated children undertaken for the FRA project on the rights of irregular immigrants in voluntary and involuntary return procedures.
456 See the State Education Department, The University of the State of New York, Student Registration Guidance, 30 August 2010, available at: www.p12.nysed.gov/sss/pps/residency/studentregistrationguidance082610.pdf, which is based on a U.S. Supreme Court decision recognising that undocumented children cannot be denied free public education, if they are, as a factual matter, district residents. See *Plyer v. Doe*, 457 U.S. 202.
457 Information provided to the FRA by the Ministry of Education and Culture in May 2011. See also the recent, Council of Europe, ECRI (2011) *Report on Cyprus (fourth monitoring cycle)*, Strasbourg, Council of Europe, 31 May 2011, p. 21.
458 Local authority survey, response from Slovakia.
459 See the changes to Section 87 (2) of the German Residence Act, adopted by the Parliament (*Bundestag*) on 6 July 2011 and approved by the second chamber (*Bundesrat*) on 23 September 2011 (see Chapter 3, footnote 176).
460 Germany, Section 34 (6), s.1, SchG NRW; Ordinance by the Ministry of Education North-Rhine Westphalia (2008).
461 Germany, *Hessischer Landtag*, Drucksache 17/188.
462 For more details see www.fluechtlingsrat-berlin.de/print_pe.php?sid=424.
463 Berlin, *Gesetz zur automatisierten Schülerdatei (Artikel I SchulG-Änderung) vom 2. März 2009 (GVBl. S. 62)*, see: www.berlin.de/imperia/md/content/sen-bildung/schulorganisation/egovernment/gesetz_schuelerdatei_64a_64b.pdf?start&ts=1307711296&file=gesetz_schuelerdatei_64a_64b.pdf#.

and said that, increasingly, reporting of migrants in an irregular situation is encouraged.[464]

According to the responses to the civil society survey and the authorities' questionnaires enforcement authorities do not usually have general access to national or regional school registers and student records held by individual schools in the EU. If criminal investigations are ongoing concerning a particular individual, enforcement authorities may, under certain conditions, request access to such records.

Enforcement practices

Problematic enforcement practices that undermine irregular migrant children's rights to education were reported from some EU Member States. Enforcement operations on or near school premises were reported by civil society survey respondents in Cyprus, France, Germany, Ireland, Luxembourg and Spain. Furthermore, some NGOs in Spain referred to police checks at the entry and exits of trains which were frequently used by school children and their parents.[465]

Funding

Indirect costs (e.g. for school materials) apart, compulsory education at state schools is free of charge. In a few instances minor administrative fees need to be covered. In Spain and Belgium, for instance, the minor administrative fees are the same for all children, and in Spain, children of irregular migrants are eligible to apply for scholarships or social aid.[466] Normally, direct costs are covered by public funds including migrants in an irregular situation. In some countries, funding also covers school materials. For instance, in the Netherlands, migrant children in an irregular situation, like all other children, have the right to funds totalling of €316 for school materials.[467]

Hungary offers a different example. According to the 2003 Public Education Act, children without residence permits are entitled to attend public elementary and secondary schools on the condition that they pay the costs of their education, which may be reduced or waived by the principal of the institution.[468]

More generally, in many countries a practical issue arises. School budget allocations are calculated on the basis of the resident population and not on the actual number of children going to school. In these cases, financial implications may discourage school administrations from accepting migrant children in an irregular situation.

School diploma

When children attend school, this does not automatically mean that they will also receive an official diploma certifying the results of their studies. According to the responses received from civil society experts, a school diploma is handed out to children in an irregular situation in at least half of EU Member States. These include Belgium, Cyprus, the Czech Republic, Denmark, Estonia,[469] Finland, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal and Spain.[470] In the other half, diplomas are not granted, in some cases because children in an irregular situation have no access to state schools, or because the FRA received unclear, conflicting or no information from civil society respondents.

However, even in those countries where diplomas are issued, in practice irregular migrant children may face obstacles in obtaining these. NGOs in Ireland reported, for instance, that after completing official examinations, birth certificates and social security numbers are required, which migrants in an irregular situation may have difficulties procuring. In Poland, before they can sit examinations, migrant children in an irregular situation must present a personal identification number, which is formally only available after regularisation.[471]

7.3 Civil engagement

Legal provisions and regulations often differ from the practices that can be found at 'street level'. The above-mentioned requirements on documentation potentially undermine the right to education. Yet, in practice, school principals often admit undocumented children in the same way as native or legally residing children. Hungarian school administrations, for instance, often ignore the requirement of the residence permit, NGOs

464 Estonia, *Siseministeerium* (2009), No. 11-1-1/3385, Thematic Study *(Teemauuring)*, p. 6.
465 FRA civil society questionnaire, response from Spain.
466 FRA civil society questionnaire, responses from Belgium and Spain.
467 This amount refers to the academic year 2008-2009. For more details: www.ib-groep.nl or www.gratisschoolboeken.nl.
468 Hungary, Public Education Act 1993. évi LXXIX. törvény, 3 August 1993, Articles 3, 6 and 110.
469 For Estonia, the information was provided to the FRA by the European Migration Network National Contact Point for Estonia in May 2011.
470 This information has been confirmed to the FRA by the Ministry of Education (Cyprus) and the Aliens and Borders Service (Portugal), respectively, in May 2011.
471 Information provided to the FRA by the Fralex focal point for Poland in the context of the project on rights of irregular immigrants in voluntary and involuntary return procedures.

reported.[472] Such humanitarian approaches make access to education possible.

Different civil engagement initiatives emerged to support access to schools for migrants in an irregular situation. In Berlin, parents' associations and data protection activists opposed the introduction of a 'pupils database'.[473] A wide range of German civil society actors also advocated for the abolishment of reporting duties for schools, nurseries and educational facilities. In France, the Network Education Without Borders (*Réseau Education Sans Frontières,* RESF) raises public awareness of the rights and protection of undocumented children.[474] It offers seminars on legal issues, provides advice to families and youth in irregular situations on their rights and helps them to fill out official documents.

Conclusions

The right to education enshrined in the CRC applies to all children without discrimination. Most, but not all, EU Member States explicitly or implicitly provide for a right to education of migrant children who are in an irregular situation. In practice, however, there are still major uncertainties among school administrations, teachers, parents and NGOs. The right to education remains ambiguous in many EU Member States.

FRA opinion

Legal provisions should explicitly address the right to education of irregular migrant children, thereby safeguarding their access to education. In addition, EU Member States should take the following steps to remove practical obstacles to accessing primary and secondary education:

Instruct school authorities not to require documentation for school enrolment which migrants in an irregular situation cannot procure.

Prohibit the reporting of irregular migrant children to immigration law enforcement bodies and the exchange of information with such bodies.

Implement information campaigns in cooperation with civil society to raise more awareness amongst migrants and educational authorities about entitlements to education of migrant children in an irregular situation.

472 FRA civil society questionnaire, response from Hungary.
473 See Flüchtlingsrat Berlin (2009) 'Flüchtlingsrat lehnt geplante Schülerdatei ab – Verbot der Datenübermittlung gefordert', Press release, 29 January 2009 (see Chapter 3, footnote 177).
474 See www.educationsansfrontieres.org/.

8

Family life

Charter of Fundamental Rights of the European Union

Article 7 – Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Families as a whole or individual family members might find themselves in an irregular situation. There could be several reasons for this. First, migrants in an irregular situation might move with other family members or join already resident family members. Second, legally staying migrants or citizens might resort to spontaneous family reunification with family members outside the formal legal framework for family reunification. Third, migrants in an irregular situation may establish a family in their new country of residence, forming a family with another irregular migrant, a legal migrant or a citizen. Despite a general trend towards complementary *ius soli* citizenship in the EU,[475] children born to parents in an irregular situation in some Member States may inherit the status of their parents or their mother and will thus be born into irregularity.

The right to the protection of family life is a core human right and is enshrined in a number of instruments under international law, including the UDHR,[476] the ICESCR,[477] the ICCPR,[478] the CRC,[479] the ECHR and subsequent protocols,[480]and the (Revised) European Social Charter.[481] Typically, international human rights instruments provide for a general protection of family life and the family, while specifically protecting the right to marry and establish a family. Instruments relating to the rights of migrants include specific provisions to facilitate family reunification, although none of them expressly establishes such a right.[482] The ECHR has been by far the most relevant human rights instrument in regard to family issues. The extensive ECtHR case law relating to respect for private and family life (Article 8 ECHR) has not only had an important impact on immigration law in individual European countries but has also served as a standard for the elaboration of EU legislation on family reunion.

Generally, case law on Article 8 stresses that the right to respect for private and family life involves the rights

475 This means citizenship provided to a child according to his/her country of birth. See http://eudo-citizenship.eu/docs/brochure_June2.pdf.

476 Article 16 of the UDHR.

477 Article 23, ICSECR.

478 Article 10, ICCPR.

479 The preamble of the CRC frames the rights of the child as an element of the protection of the family.

480 Article 8, European Convention on Human Rights.

481 Article 16, European Social Charta (revised 1996).

482 Article 13, ILO Migrant Workers (Supplementary Provisions) Convention (C143 of 1975); Article 12, European Convention on the Legal Status of Migrant Workers (ETS No. 93 of 1977); and the International Convention on the Protection of the Rights of All Migrant Workers and their Family Members (1990). In addition, Article 19(6) of the European Social Charter (revised) and Articles 9(1) (prohibition of separation against the will of the parents), 10(1) (family reunification) and 20(1) (protection of unaccompanied minors) of the CRC contain specific provisions for migrants. While Article 12 of the European Convention on the Legal Status of Migrant Workers (ETS No. 93 of 1977) establishes a right to family reunion, the personal scope of the Convention is limited to nationals of signatory states and thus does not establish a universal right to family reunification.

of family members to live together.[483] In considering claims to protection from expulsion, states need to weigh, in each case, public interests against the personal interests of migrants. In *Boultif*, the ECtHR lists the criteria to be used to assess what constitutes a fair balance between the two.[484] ECtHR case law relates primarily to foreigners who were at one time residing legally but lost their right to stay, typically because of criminal convictions, although there are exceptions.[485]

In the EU context, the Charter of Fundamental Rights calls for respect for private and family life in Article 7, includes the right to marry and establish a family in Article 9 and has a provision on legal, economic and social protection of the family in Article 33.

Common European rules exist for family reunification with third-country nationals staying lawfully in the EU (Family Reunification Directive)[486] as well as for EU citizens living in an EU Member State other than that of their nationality (Citizens Directive).[487] EU law on the right to family reunification is broader for family members of EU citizens who enjoy freedom of movement rights as compared to family members of third-country nationals.

EU rules on family reunification do not apply to EU citizens who live in their own country. Their right to family reunification is regulated by national legislation, except in exceptional circumstances when, for example, they have recently lived in another EU Member State and bring a third-country family member back to their country of citizenship,in whichcase Directive 2004/58/EC applies. This is no different for dual nationals. As the CJEU recently clarified, family reunification for persons holding the nationality of another EU Member State is outside the scope of applicability of Directive 2004/58/EC and remains regulated at a national level.[488]

In addition to the two directives, the CJEU established some limited residence rights of third-country nationals on the basis of primary EU law. In the *Zambrano case,* the CJEU recently clarified, that Article 20 TFEU on EU citizenship precludes a Member State from refusing a right to residence to a third-country national who has a dependent minor child holding EU citizenship. A refusal of a residence and work permit is not allowed if it would deprive such children of the genuine enjoyment of the substance of the rights attached to EU citizenship.[489]

This chapter provides an overview of the main reasons for and patterns of irregularity as seen by civil society organisations, investigates practices in EU Member States regarding access to a legal status for family members in an irregular situation and reviews access to marriage.

8.1 Reasons for irregularity involving families

Irregularity of individual family members is a significant issue in a number of EU Member States. Many EU Member States have foreseen legal provisions to issue a residence permit to persons in an irregular situation on family grounds. In France, more than 85,000 persons were regularised on grounds of personal and family reasons between 2002 and 2006.[490] In Spain, family considerations are one of three key criteria (in addition to a minimum length of residence and employment) to be met under the so-called 'arraigo social' regularisation mechanism. In 2006 alone, 6,619 of 22,958 applicants were regularised under this provision.[491] In Sweden, some 27,000 migrants were granted a residence permit from 2005 to 2007 on the grounds of being in 'exceptionally distressing condition[s]', with families making up an important share of applicants.[492] Finally, in the UK, some 22,000 persons were given 'indefinite leave to remain' status from 2003 to 2007 on the basis

483 ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* [Plenary], No. 9214/80; No. 9473/81; and No. 9474/81, 28 May 1985, paragraph 62, second indent. Protection against expulsion based on Article 8 can also occur in cases where there are no family ties with a host country national, but instead where this is required to protect private life. See ECtHR, *Slivenko et al. v. Latvia* [GC], No. 48321/99, 9 October 2003; *Sisojeva et al. v. Latvia* [GC], No. 60654/00, 15 January 2007. Both cases concern former Soviet citizens who had strong ties to Latvia.

484 ECtHR, *Boultif v. Switzerland*, No. 54273/00, 2 August 2001, paragraph 48. See Chapter 2.

485 The ECtHR judgement *Rodrigues Da Silva & Hoogkamer v. the Netherlands* concerned an individual who had never had an authorisation to stay in the Netherlands. The Court concluded that no fair balance was struck between the interests at stake, effectively granting the applicant a right to stay in the Netherlands. ECtHR, *Rodrigues Da Silva & Hoogkamer v. the Netherlands*, No. 50435/99, 31 January 2006, paragraph 44.

486 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251.

487 Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 229/35.

488 CJEU, C-434/09, *McCarthy*, 5 May 2011.

489 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 8 March 2011.

490 Kraler, A. (2009) 'Regularisations: A misguided option or part and parcel of a comprehensive policy response to irregular migration?', *IMISCOE Working Paper No. 24*, p. 28, available at: http://dare.uva.nl/document/138178 .

491 Information provided to the FRA by the Ministry of Labour and Immigration in May 2011. The OECD refers to some 20,000 persons regularised under this provision in OECD (2009) *International Migration Outlook. Annual Report 2008*, Paris, OECD.

492 Kraler, A. and Reichel, D. (2009) 'Sweden' in: Baldwin-Edwards, M. and Kraler, A. (eds.) *REGINE. Regularisations in Europe*, Amsterdam, Amsterdam University Press, p. 461.

of the so-called long residence rule, again presumably involving many family members.[493]

In addition, several EU Member States have undertaken regularisation programmes specifically, or to an important degree, targeting migrant families with children, including Belgium (2000),[494] France (1997 and 2006),[495] Sweden (2007) and the case resolution programme in the United Kingdom in 2003 and 2006.[496] In the UK, some 52,500 principle applicants and 86,000 dependants received a right to stay in the framework of the two main 'case resolution' programmes implemented between 2003 and 2008, some of which were specifically aimed at migrants with families. In other programmes, migrants with dependants were more likely to be regularised and thus made up the majority of those regularised.

Three recurrent elements have been found to limit the ability of family members to access a legal status: technical obstacles arising from the obligation to apply for a residence permit from abroad, such as the inability to cover travel costs, lack of travel documents or security risks in case of return; resource requirements requested from the sponsor and/or applicant, such as income thresholds, fees, accommodation requirements or the need to prove a stable and long-term employment; spontaneous reunifications by persons not entitled to family reunification or resulting from delayed formal processes or due to a lack of understanding of the procedure. On the latter point, it is worth noting, that the right to family reunification of third-country nationals is limited to the core family (spouse and minor children) and does not therefore include all family members with whom there is a dependency relationship or a particularly strong bond.[497]

Civil society representatives were asked to evaluate the main reasons for irregularity of family members.[498] As Figure 7 shows, responses are fairly evenly spread. In the 14 EU Member States for which civil society organisations' assessments are available, the main reason is resource requirements:[499] across countries and when weighing responses from all surveyed countries equally, more than 40% of respondents see resource requirements as the greatest obstacle to achieving a legal status for family members. Nearly 30% of respondents in the 14 countries rate spontaneous reunification and technical obstacles, such as the need to submit an application from abroad, as the most important reasons for irregularity. While these numbers are quite close to each other, the rating becomes meaningful on a country level in cases when several respondents agree on an equal rating.

Analysing responses at country level, spontaneous family reunification outside of formal procedures is seen as the main reason for irregularity in two out of the 14 countries for which responses to the above question were received (Belgium and Spain), both of which showed a relatively high degree of agreement among several respondents on this issue. Spontaneous reunifications are considered to be a main reason (along with other reasons) in five additional countries (France, Hungary, Ireland, Luxembourg and the UK[500]). Inability to comply with resource requirements (income and accommodation) are seen as a main reason for irregularity in four countries (Cyprus, Denmark, Netherlands and Portugal), while in three more countries (Hungary, Luxembourg and the UK) resource requirements and spontaneous family reunification are seen as equally important. Finally, technical obstacles such as the need to apply for family reunification from abroad are considered as the most important reason in three countries (Austria, the Czech Republic and Germany), while in Austria and Germany, agreement on this factor appears to be particularly strong. In two more countries (France and Ireland) technical obstacles

493 See Gordon, I., Scanlon, K., Travers, T. and Whitehead, C. (2009) *Economic impact on London and the UK of an earned regularisation of irregular migrants in the UK*, London, Greater London Authority (GLA), p. 26, available at: http://legacy.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-report.pdf.

494 In Belgium, at least 37,900 persons were regularised following the regularisation programme in 2000, including many dependents. The 2006 'Case resolution' is still ongoing at the time of writing and expected to be completed in 2011. See Kraler, A., Bonjour, S. and Dzhengezova, M. (2009) 'Belgium' in: Baldwin-Edwards, M. and Kraler, A. (eds.) *REGINE. Regularisations in Europe*, Amsterdam, Pallas Publications, p. 193.

495 Circular of the Minister of Interior (1997) *Circulaire NOR: INTD9700104C du 24 juin 1997 relative au réexamen de la situation de certaines catégories d'étrangers en situation irrégulière, JO num. 147*, 26 June 1997; Circular of the Minister of Interior (2006) *Circulaire NOR:INTK0600058C du 13 juin 2006 relative aux mesures à prendre à l'endroit des ressortissants étrangers dont le séjour en France est irrégulier et dont au moins un enfant est scolarisé depuis septembre 2005*. In the French regularisation of 1998, some 87,000 persons were regularised, mostly on family-related grounds. In the 2006 regularisation specifically focusing on families with children at school, almost 7,000 persons were regularised. Sohler, K. (2009) 'France' in: Baldwin-Edwards M. and Kraler, A. (eds.) *REGINE. Regularisations in Europe*. Amsterdam, Pallas Publications, p. 281.

496 Gordon, I., Scanlon, K., Travers, T. and Whitehead, C. (2009) *Economic impact on London and the UK of an earned regularisation of irregular migrants in the UK*, London, Greater London Authority (GLA), p. 26, available at: http://legacy.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-report.pdf.

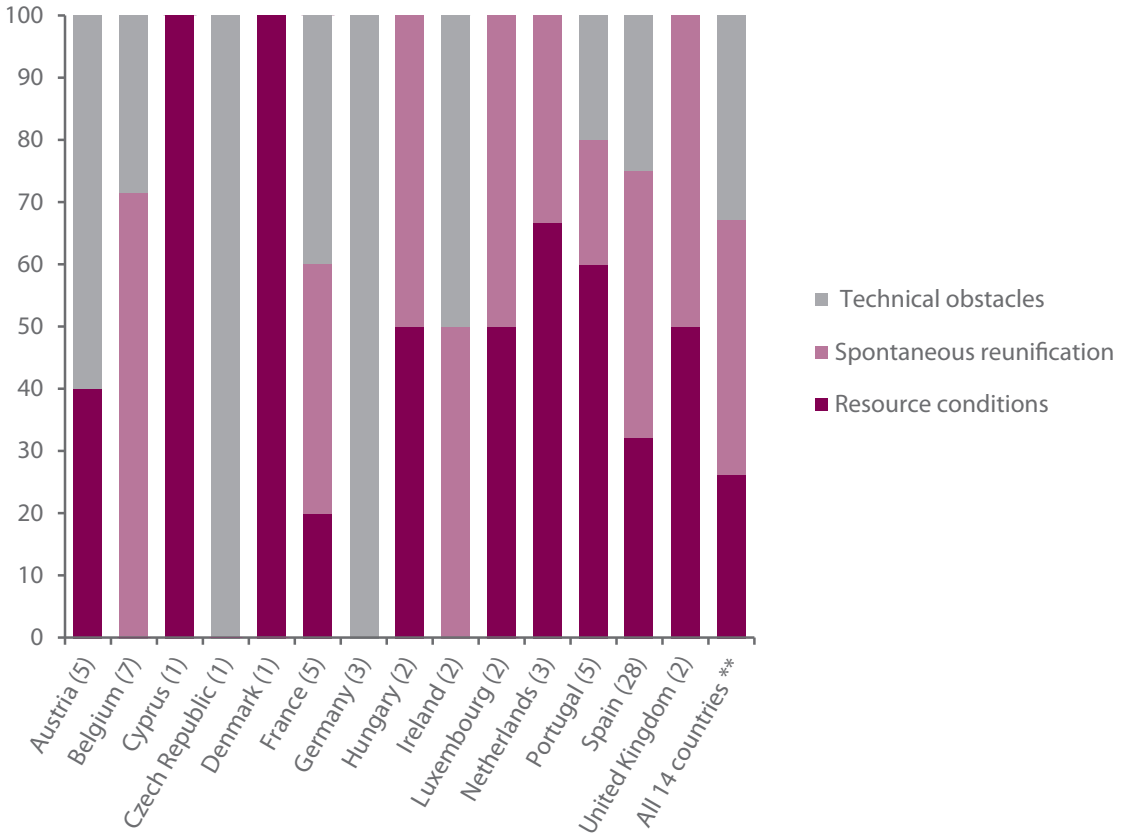
497 Article 4(2) of the Directive 2003/86/EC states that Member States may allow the entry and residence of parents, parents in law and dependent adult children, which does not, however, include other dependent persons as foreseen, for example, in Article 3(2) of Directive 2004/58/EC.

498 Civil society representatives questionnaire. Altogether, civil society organisations from 14 countries responded to this and other questions regarding family members and irregularity.

499 The countries from which responses were received are shown in Figure 7.

500 For the UK, 'spontaneous reunification' was not selected but deduced from the narrative.

Figure 7: Reasons considered most important by civil society responses for irregularity of family members, selected EU Member States (%)*



Notes: * *Percentages are calculated by country.*
***Average giving equal weight to all countries. The numbers in brackets indicate the total number of responses received from civil society actors. For the Czech Republic, one collective response from four organisations was received.*
Source: FRA civil society questionnaire, 2011

are seen as an equally important reason for irregularity as spontaneous family reunification.[501]

Whereas it appears that certain obstacles are not relevant in some Member States, this conclusion would require a more extensive survey.

8.2 Patterns of irregularity involving families

In the civil society survey, the FRA asked respondents to evaluate, according to their experience, which family members are most often in an irregular situation.

Overall, spouses are seen as those family members most often in an irregular situation, followed by grown-up children. Underage children and cousins are seen as the groups least likely to be in an irregular situation, although there are some exceptions. Children generally seem to enjoy more security in terms of legal status and are thus less at risk of being in an irregular situation as they often enjoy greater protection than adults. Protection appears, however, to be perceived as more effective in one group of countries (Belgium, Denmark, Luxembourg and Portugal) as compared with another group where children are considered to be among the persons most at risk of irregularity (Cyprus, the Czech Republic, Germany and Hungary). Similar divergence is seen concerning siblings and parents.

Analysing responses at a country level, in 10 countries (Austria, Cyprus, Czech Republic, Denmark, France, Germany, Hungary, Ireland, Netherlands and Spain) spouses are most frequently mentioned, while in Luxembourg this is considered to be the least likely group to be in an irregular situation.[502] Siblings

501 Factual inability to return is a key reason for non-compliance with these requirements.

502 See on spouses: Kraler, A. (2010) *Civic Stratification, Gender and Family Reunification. Policies in Europe,* Vienna, BMWF/ICMPD, p. 64f, available at: www.icmpd.org/fileadmin/ICMPD-Website/ICMPD-Website_2011/Research_and_Documentation/publications/AK_Family_Migration_WP_01.pdf. For one of the first European research projects addressing issues around binational marriages see: Verband binationaler Familien und Partnerschaften (2001) *Fabienne: Familles et couples binationaux en Europe*, Frankfurt, Verband binationaler Familien und Partnerschaften.

Table 11: Family members most often in an irregular situation according to civil society responses, selected EU Member States

	Spouse	Child > 18	Parents	Siblings	Children	Cousins
Austria (5)	***	***	*	**	**	*
Belgium (5)	**	**	**	***	*	**
Cyprus (1)	***	**	***	**	***	*
Czech Republic (1)	***	**	*	**	***	*
Denmark (1)	***	***	**	*	*	*
France (5)	***	***	***	**	**	*
Germany (3)	***	***	***	*	***	*
Hungary (2)	***	**	**	**	***	**
Ireland (2)	***	***	***	**	**	**
Luxembourg (2)	*	**	**	***	*	***
Netherlands (3)	***	***	*	**	**	*
Portugal (4)	**	***	**	***	*	***
Spain (26)	***	***	***	***	**	***
United Kingdom (2)	**	***	**	**	**	**
Average (all)	2.0	2.5	3.1	3.3	3.9	4.1

Notes: *Maximum number of respondents per question in brackets; for the Czech Republic, one collective response of four NGOs was given. Respondents were asked to rate the extent to which particular family members were most likely to be in an irregular situation, with 1 being most likely and 6 least likely. This table shows average rating as follows:*

*** *1.00 – 2.6*
** *2.7 – 4.4*
* *4.5 – 6.0*

Source: *FRA civil society questionnaire, 2011*

are mentioned in four countries (Belgium, Spain, Luxembourg and Portugal) as the most important category, while in two countries (Portugal and the United Kingdom) siblings and cousins are both mentioned as the most important categories.

8.3 Family reunification

As part of this research, civil society respondents were asked to share their perception as to whether and to what extent irregular family members have access to a legal status on the basis of their family bond with a legally resident family member (citizens, EU citizens or legally staying third-country nationals). The rationale of the question was to assess, in light of the experiences of civil society representatives working with migrants, to what extent family members are actually able to reunite with their family. Table 12 shows civil society actors' responses to this question.

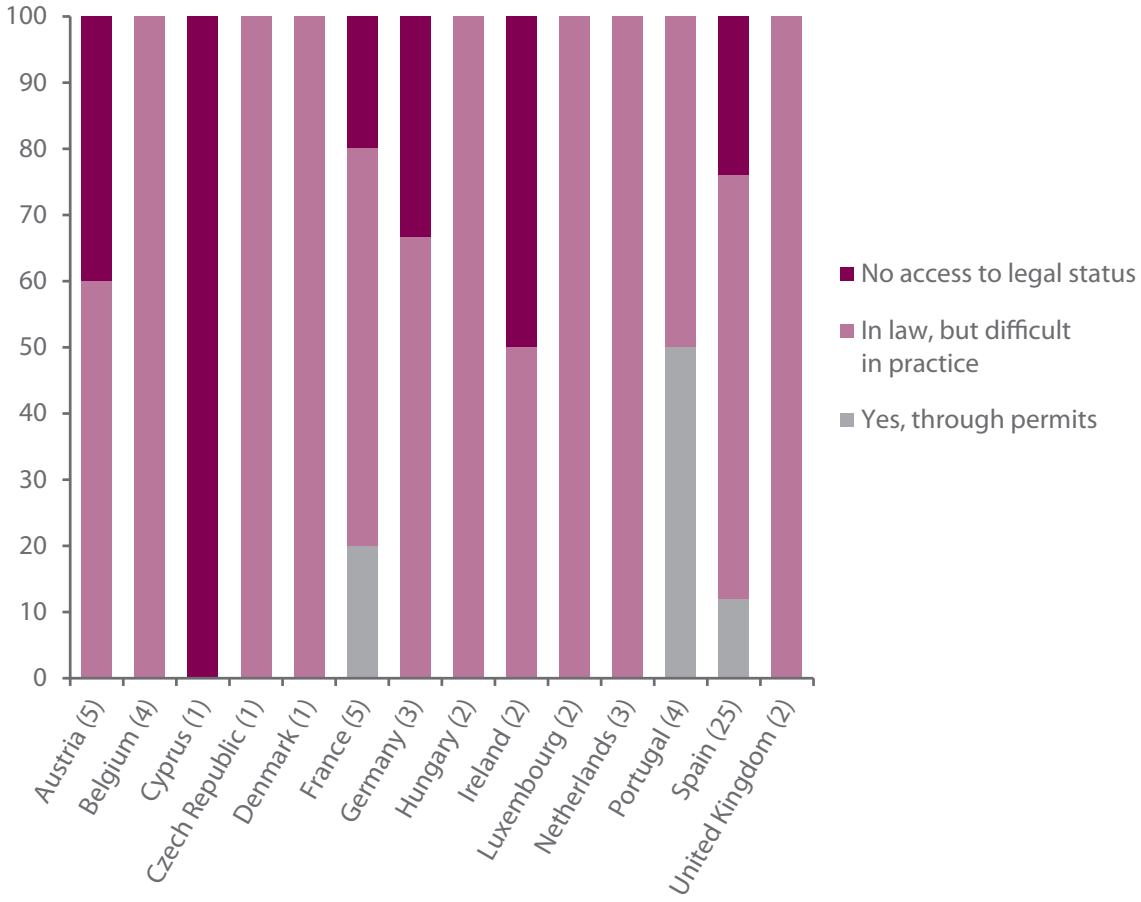
The majority of responses see access to a legal status possible in principle, but not in practice, as practices to grant a permit vary or permits are rarely granted. This suggests that access to legal status is subject to considerable administrative discretion. This can also in part explain the disagreement between respondents in a few countries as to whether access to a legal status was possible at all.[503]

If the options above are seen as a continuum between two poles, ranging from generous and liberal practices through to more restrictive practices, three groups of EU Member States can be formed from responses to this question:[504] countries where family members of legal residents usually have access to legal status (Portugal); countries where access is possible but practice differs and restrictions apply (Belgium, the Czech Republic, Denmark, France, Hungary, Luxembourg, Netherlands, Spain and the United Kingdom); and a last group (Austria, Cyprus, Germany and Ireland) that applies, according to NGO assessments, a restrictive policy that allows only suspension of removal or, at best, a temporary status that is difficult to obtain in practice for irregularly staying family members of legal residents. Further research could be conducted in this area by collecting the views of other stakeholders.

503 Contradictory responses were, for example, received from France and Austria.

504 Responses to this question were received from the 14 countries listed in Figure 8.

Figure 8: Access to legal status for irregular family members of legal residents according to civil society responses, selected EU Member States (%)*



Notes: *Percentages are calculated by country.
The numbers in brackets indicate the total number of responses received from civil society actors.
Source: FRA civil society questionnaire, 2011

The overall legal framework for family reunification is an important factor that may either contribute to or reduce the risk of family members being in an irregular situation. Those involved need to be informed about the existing framework. Whether legal options for reunification in principle exist or not appears to be unclear even among the civil society actors surveyed for this report. If legal reunification is not possible or procedures are not understood, individuals may decide to join their family members in other ways.

Three elements of family reunification policies in particular impact on the ability of individuals to access legal means of family reunification. In addition, a fourth obstacle may derive from the duty of Member States to impose entry bans on persons found residing irregularly in the country.

Beneficiaries entitled to family reunifications

First, only core family members, meaning spouse and minor children, are entitled to family reunification with third-country nationals.[505] While Article 4(2) and (3) of the Family Reunification Directive allows the admission of other family members – such as adult unmarried children or first-degree relatives in direct ascending line and unmarried partners– these provisions are optional. Persons with whom there is a strong family bond may thus be excluded from legal family reunification.

In the case of the Citizens Directive, which applies to EU nationals living in an EU Member State (other than their own), facilitated entry and residence should be granted to any other dependent family member,[506] although the Commission found that 13 EU Member States had failed to correctly transpose this provision.[507]

505 Family Reunification Directive, Article 4(1).
506 See Article 3(2).
507 European Commission (2008) *Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*. COM(2008) 840 final, p. 4.

Resource requirements

For family reunifications with third-country nationals, another obstacle is the need to fulfil certain resource conditions, such as income thresholds.[508] Requirements for the sponsor to show "stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family" normally require a stable long-term work contract or a full-time job, which adversely affect part-time employees and the self-employed.[509] Accommodation requirements, applicable to family reunification with third-country nationals[510] for the whole family may often need to be fulfilled prior to family reunification, which puts a strain on sponsors' resources.

Submitting applications from abroad

A third obstacle is the requirement to submit the application for a residence permit from abroad, which applies to family reunification with a third-country national and, in some countries, also to family reunification with EU citizens not enjoying freedom of movement rights.[511] By contrast, the Court of Justice has clarified that based on the Directive 2004/38/EC, family members of EU citizens who have moved to another EU Member State, can submit applications for residence permits from within the host Member State, irrespective of how the national of a non-member country entered that state.[512]

As shown in Figure 7, the need to submit an application from outside the country is seen as an obstacle by civil society organisations. Return may in some cases be difficult due to technical obstacles, such as in the absence of travel documents or difficulty in establishing nationality.[513] In other cases, return may present a practical obstacle in terms of expense, the length of separation that might result from complying with the principle to apply from abroad and the uncertainty regarding whether the application would be approved and (re-)entry granted.[514]

While Article 5(3) of the Family Reunification Directive (2003/86/EC) stipulates application from abroad as the general principle in family reunification cases, it also permits EU Member States to deviate from this clause in 'appropriate circumstances'. The majority of EU Member States make use of this exception. Cyprus is the only Member State for which an application from abroad is not possible. In Austria, applications from abroad are only allowed on humanitarian grounds, and in Germany, only if the applicant's return to his/her country of origin is not reasonable.[515]

Complying with a return decision and/or the requirement to apply for family reunification from abroad, however, may put the entitlement to family reunification at risk if the resulting periods of separation cause the relevant authorities to question whether the dispersed family members still have active family ties.[516]

The possible impact of entry bans

An additional obstacle may derive from the effects of entry bans issued under the Return Directive. According to Article 11 of the Directive, return decisions should usually be accompanied by an entry ban. Such a ban has an EU-wide effect and would be featured in the Schengen Information System database, which stores information for national security, border control and law enforcement purposes.

If an EU Member State wants to issue a visa or residence permit to an individual who has been issued an entry ban by another Member State, a particular

508 Family Reunification Directive, Article 7(1). See also *Ibid.*, p. 5.
509 Family Reunification Directive, Article 7(1)c.
510 *Ibid.*, Article 7(1)b.
511 See, for example, Austria, Residence Act *(Niederlassungs - und Aufenthaltsgesetz)*, BGBl. I N. 100/2005 last amended by BGBl. I N. 38/2011, Section 21.
512 See CJEU, Case C-127/08, *Metock and others v. Minister for Justice, Equality and Law Reform*, 25 July 2008 and Case C-551/07, *Deniz Sahin v. Bundesminister für Inneres*, 19 December 2008.
513 See for a case description, Wittmann, S. C. (2010) *Binationale Ehen von ÖsterreicherInnen mit Drittstaatsangehörigen im Lichte der Judikatur des EGMR, VfGH und VwGH zu Artikel 8 EMRK*, Master Thesis, University of Graz, p. 20, available at: http://ehe-ohne-grenzen.at/uploads/publikationen/diplomarbeit_wittmann_binationale%20ehen.pdf.
514 See Sohler, K. and Lévy, F. (2009) *Civic stratification, gender and family migration in France: Analysis of interviews with migrants and their family members*, Vienna, BMWF/ICMPD, p. 18f, available at: http://research.icmpd.org/fileadmin/Research-Website/Project_material/NODE/FR_Interview_Analysis.pdf, for the example of a difficult reunification process involving a Chinese family (husband, wife and child). The husband was expelled after being apprehended by the police, but his wife and child continued to stay in France. After his wife and child were regularised in the 1997/1998 regularisation campaign, he applied for family reunification. The *préfecture* finally approved the application after one year, but then the French consulate in Shanghai denied him an entry visa for nearly three more years, demanding proof of continuing family ties. Only after complaints were lodged with the ombudsman (*médiateur de la république)* was an entry visa granted – four years after the initial application and eight years after the husband's expulsion.
515 See European Commission (2008) *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification*, COM(2008) 610 final, 8 October 2008, p. 9.
516 See for an example: Sohler, K. and Lévy, F. (2009) *Civic stratification, gender and family migration in France: Analysis of interviews with migrants and their family members*, Vienna, BMWF/ICMPD, p. 18f, available at: http://research.icmpd.org/fileadmin/Research-Website/Project_material/NODE/FR_Interview_Analysis.pdf.

procedure has to be followed. Before issuing a permit to enter or reside to an individual with an entry ban from another Member State, the Return Directive introduces a duty to consult and to take into account the interests of the Member State that issued the entry ban.[517] Although experience will show how these provisions are implemented, such a consultation process has the potential in theory to lead to further delay in reunifications or even prevent them in certain situations. Some NGOs have also noted that previous non-compliance with an obligation to leave expressed in the form of an entry ban may also constitute a significant barrier to access family reunification from within the country.[518]

8.4 Access to marriage

The ability to establish a family is an important element of the protection of the family. The right to marry and establish a family is enshrined, for example, in Article 23(3) of the ICCPR. States can impose restrictions on the right to marry migrants in an irregular situation to prevent marriages of convenience which are entered into solely for the purpose of securing an immigration advantage. The ECtHR did not, however, accept restrictions that were not aimed at assessing the genuineness of the relationship, nor blanket prohibitions on marriage for migrants in an irregular situation.[519]

As a legal institution marriage provides certain rights and protection to spouses and has important implications for the exercise of a variety of other rights, including custody, inheritance and access to a residence permit on family grounds. It is the latter which makes marriage involving migrants in an irregular situation problematic from a migration-control perspective. In the context of increasing concerns about marriages of convenience, since the 1990s, most EU Member States have thus tightened their policing of marriages involving third-country nationals.

Article 34 of Directive 2004/58/EC contains a provision to counter marriages of convenience, stressing that any measure taken must be proportionate and respect procedural safeguards. The Family Reunification Directive also allows for the rejection of applications for family reunifications, when marriage "was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State" (Article 16(2)b).

While measures against marriages of convenience are not *per se* problematic from a fundamental rights perspective and reflect legitimate concerns of states and their sovereign right to control immigration, states nevertheless must respect individuals' fundamental rights when adopting preventive measures or sanctions. In particular, states must ensure that any measures adopted against the abuse of marriage do not endanger the fundamental right of each person to form a family and enter into a marriage of his or her own free will.

As a result of the increased policing of marriages, individuals involved in a genuine relationship may face legal or practical barriers that prevent them from accessing marriage altogether. From a fundamental rights perspective, the main issue is one of proportionality. It is in principle compatible with human rights to declare as void marriages which are solely or mainly entered into to gain residence status, but it is incompatible with proportionality to deny marriage just because it would help one partner gain residence status.

Against this background, practices in certain EU Member States regarding conditions for marriage may be problematic from a fundamental rights perspective: in order to conclude a marriage or a civil partnership (where available) proof of legal residence is required in at least six EU Member States (Germany,[520] Denmark,[521] Estonia,[522] Greece,[523] Lithuania[524] and Latvia[525]). In these countries, legal residence is a pre-condition for marrying. This was also the case in the United Kingdom in the past. Proof of leave to remain was originally required to obtain a 'certificate of approval' introduced in the 2004 Asylum and Immigration Act.

517 Return Directive, Article 11(4).

518 Responses to the FRA civil society questionnaire from Austria, Germany and Spain. See for an example from the Netherlands: Kraler, A. (2010) *Civic Stratification, Gender and Family Migration Policies in Europe,* Vienna, BMWF/ ICMPD, p. 56, available at: www.icmpd.org/fileadmin/ICMPD-Website/ICMPD-Website_2011/Research_and_Documentation/publications/AK_Family_Migration_WP_01.pdf.

519 ECtHR, *O'Donoghue and Others v. the United Kingdom*, No. 34848/07, 14 December 2010, paragraph 87ff. The court also disapproved of the high level of fees charged by the UK.

520 Germany, Section 30, paragraph 1, sentence 1 No. 3 of the Residence Law.

521 According to the Marriage Act provision 11 a, a marriage can only be entered into when both parties have Danish citizenship or legal residence in Denmark under the Aliens Act § 1 to 3 a, § 4 b or § 5, paragraph 2, or under a residence permit under § § 6 to 9f. Under exceptional circumstances, and in particular in cases of long de facto residence in Denmark, this requirement can be waived (Information provided by EMN National Contact Point for Denmark, November 2010).

522 Estonia, Act on Marital Status, Section 58.

523 The documentary requirements (including proof of legal residence) are stipulated in Law 1250/82 concerning issuing civil wedding license for foreigners. Article 31(2) of Law 1975/91 stipulates that only foreigners who are legal residents in Greece have the right to have a civil wedding license issued.

524 The marriage officers check passports, visa and residence permit. If a foreigner is in an irregular situation, his or her marriage will not be registered. Information provided by the EMN National Contact Point for Lithuania.

525 Information provided by the State Border Guard, Latvia, November 2010.

The requirement of a 'certificate of approval' did not apply to persons with an indefinite leave to remain or who intended to marry in an Anglican church in England or Wales.[526] While the policy was changed so as to allow applications for a 'certificate of approval' from persons without a valid immigration leave,[527] the need to apply for the certificate had a strong deterrent effect as it led to the detection of irregular stay. The certificate requirement was abolished in May 2011.[528]

In addition, the requirement to provide a 'certificate of no impediment' is a common requirement in many EU Member States. It aims at preventing prohibited forms of marriages such as polygamy, marriage of persons under marriageable age or marriages between close relatives. In practice, such certificates may become an impediment to marriage. As an illustration, in Cyprus the Civil Registry and Marriage Department tends to deny 'confirmation of marriage certificate'[529] for third-country nationals without a residence card or with an expired residence card, thus effectively making legal residence a requirement for marriage.[530]

Conclusions

The presence of migrants in an irregular situation in the EU has an important family dimension. As illustrated by the research undertaken by the FRA, the reasons why individuals join their family members outside established procedures are manifold. While more data and information are needed to determine the key factors, these include the need to comply with procedural and resource requirements and the fact that family reunification under the Family Reunification Directive does not include all family members with whom there is a dependency relationship or a strong bond.

Although experience will tell how entry bans under the Return Directive are applied, there is a risk that they may act as obstacles or delay family reunifications in certain situations.

Efforts to forestall marriages of convenience should be designed in such a way as to avoid compromising the right to marry and form a family.

FRA opinion

More research should be done to determine the key factors (e.g. procedural, technical or resource-related obstacles) contributing to the phenomenon of spontaneous family reunifications outside established procedures, as irregular status is one of the factors that heightens the risk of fundamental rights violations. Such research should build on the findings of this report.

The FRA considers it important to monitor the effects of an EU-wide entry ban system on the exercise of the right to family reunification and to include a first evaluation in the report on the implementation of the Return Directive planned for 2014. Such a report should also evaluate if the consultation process between the Member State issuing a residence permit and the one banning entry leads to unnecessary delays.

Immigration control measures should not result in the application by Member States of disproportionate restrictions on the right to marry and establish a family, such as blanket prohibitions on marrying or the imposition of restrictions which go beyond an assessment of the genuineness of a relationship.

526 Introduced by the Section 19 to 24 of the Asylum and Immigration Act 2004, see previous guidelines by UK Border Agency (2010) *COA [Certificate of Approval] Guidance Notes. Version 4/2009*, available at: www.giolegal.co.uk/Docs/Immigration_Forms/Forms/April09/coa_guide.pdf.

527 See standard note: "Immigration: abolition of the certificate of approval to marry requirement" SN/HA/3780 by Melanie Grower, Home Affairs Section of the House of Commons, 13 April 2011.

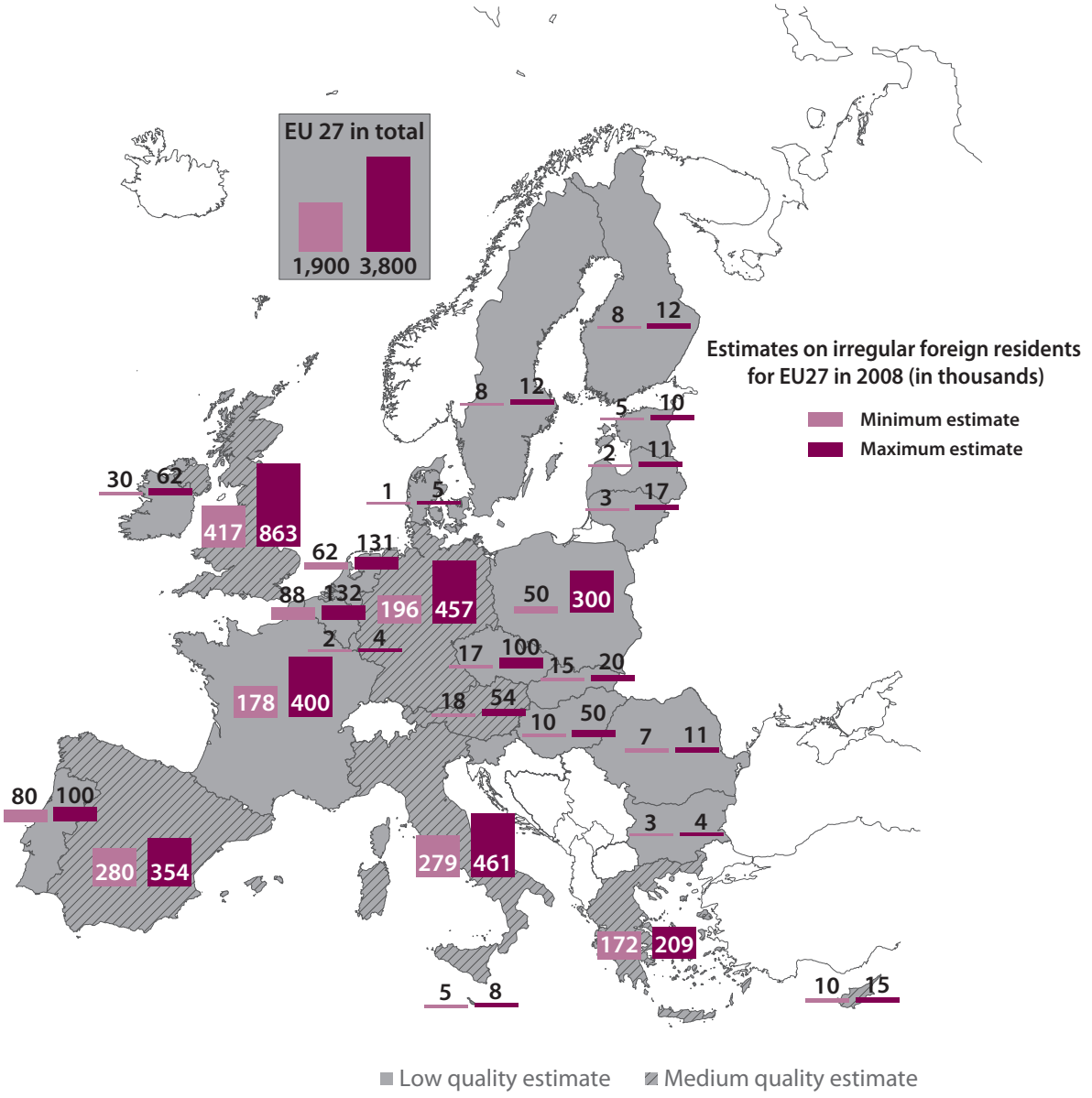
528 Following the declaration by the High Court, made in April 2006, the UK Government sought to appeal the judgment with relation to the Article 12 finding. The policy was amended and on appeal to the House of Lords, the court found the policy to be Article 12 compliant and confined the declaration solely to Article 14 and the Anglican exemption (discrimination on the grounds of religion and nationality).The UK Government entered into negotiations with the Church of England to seek to bring the Church within the COA scheme. However, agreement could not be reached and the Government accepted that it would be necessary to remove the entire COA scheme in order to remedy the incompatibility.

529 Laid down in Article 31(1) of the Laws of Marriage 104(I)/2003.

530 Information provided by the Office of the Commissioner for Administration (Ombudsman) in Cyprus.

Annex

Figure A1: Estimates of migrants in an irregular situation, EU27



Source: Clandestino project; compilation of estimates from different data sources by the Hamburg Institute of International Economics

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FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Securing the fundamental rights of migrants in an irregular situation – those who do not fulfil conditions for entry, stay or residence in a European Union (EU) Member State – remains a challenge. Such migrants are at high risk of exploitation in the labour market, often filling market gaps by working at dangerous, dirty or degrading jobs. Their housing situation can be precarious. Their right to healthcare is unevenly protected; their children's right to education remains unclear. While EU Member States have a right to control immigration, non-compliance with migration regulations cannot deprive migrants in an irregular situation of certain basic rights to which they are entitled as human beings. This European Union Agency for Fundamental Rights (FRA) report examines the legal and practical challenges facing EU Member States as they strive to guarantee such migrants' fundamental rights and proposes ways to incorporate those rights into the policies, laws and administrative practices that affect migrants in irregular situations.

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