

# The fundamental rights of migrants in an irregular situation in the European Union

*Articles 1, 14, 31, 35 and 47, falling under the Chapters 'Dignity', 'Freedoms', 'Solidarity' and 'Justice' of the Charter of Fundamental Rights of the European Union, guarantee the right to human dignity, education, fair and just working conditions, healthcare and the right to an effective remedy and to a fair trial.*

## Policy context

International and European human rights law impose an obligation on EU Member States to guarantee human rights to all individuals within their jurisdiction. This includes irregular migrants.

The term 'migrants in an irregular situation' or 'irregular migrants' refers to individuals who are not nationals of an EU Member State and are present in an EU Member State without a valid visa or residence permit.

Although the Member States are not under an obligation to offer the same benefits to irregular migrants as to nationals, they must follow a core set of human rights standards. These include access to:

- necessary healthcare for all, including emergency as well as essential healthcare, such as the possibility to see a doctor or to receive necessary medicines;
- healthcare for pregnant women, and healthcare and education for children on the same basis as nationals;
- justice – a mechanism allowing an individual to make a complaint and get a remedy such as compensation, for example, for a work accident.

## Key issues

An estimated 1.9 to 3.8 million irregular migrants were staying in the EU in 2008, according to the European

Commission-funded Clandestino project. Because of their irregular migration status they are vulnerable to exploitation and abuse in the workplace. They also often face legal and practical barriers in getting access to basic services, such as healthcare, education and access to justice. Certain categories of irregular migrants find themselves in particularly vulnerable situations, such as those, predominantly women, employed as domestic workers. They may face discrimination on the basis of their race or ethnicity and gender-based violence. Some groups of irregular migrants face particularly serious consequences if they cannot access their basic rights: lack of access to healthcare and education can undermine children's health and future development.

## Main findings and evidence-based advice

### Detection and reporting practices

While Member States have the right to control who enters and remains in their territory, they must comply with human rights standards when enforcing immigration law. In some Member States, such measures include apprehending irregular migrants at or near hospitals and schools. Similarly, in some Member States certain public bodies, such as the courts, and healthcare and education providers, are either under an obligation to or have a practice of reporting irregular migrants to immigration authorities when they try to access services. These real or perceived detection and reporting practices may prevent irregular migrants from accessing basic rights for fear of deportation.

EU Member States should not use detection methods that effectively block access to healthcare, education or access to justice. Service providers should not be under a duty to report irregular migrants to immigration authorities. Reporting and information sharing with immigration authorities should be discontinued, and

the absence of reporting obligations should be communicated to service providers and migrants.

## Access to healthcare

Irregular migrants, who are not usually permitted to work, often have to pay for medical care that is available cost-free to nationals, including emergency care. Even particularly vulnerable groups, such as pregnant women and children, may not be entitled to cost-free treatment on the same basis as nationals. Where irregular migrants are entitled to cost-free treatment under national law, they may still have to satisfy administrative requirements that make it difficult for them to access healthcare in practice, such as the need to prove a fixed residence.

Access to necessary healthcare should be made available to irregular migrants on the same basis as for nationals, applying the same fee payment and exemption rules. In accordance with Article 24 of the United Nations Convention on the Rights of the Child (CRC) and Article 12 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), pregnant women should be entitled to cost-free antenatal, delivery and post-natal care, and children should be entitled to healthcare on the same basis as nationals, including immunisations.

## Access to education

Children of irregular migrants may be prevented from enrolling for free primary education because they are unable to produce the official documents required, such as a valid residence permit, birth certificate or medical records.

Free primary education should be made available to all children, in accordance with Article 28 of the CRC.

## Access to justice

Irregular migrants, who experience physical abuse or injury at work or who have been unpaid, encounter several barriers to enforcing their rights through the courts. This reduces the law's deterrent effect for employers, making irregular migrants more vulnerable to exploitation.

Those undertaking domestic work are particularly vulnerable to abuse and exploitation since this employment sector is typically less regulated by the law than others. Employers often do not provide for rest periods, paid holidays and paid sick leave, even if available under national law.

Irregular migrants may fear being reported to immigration authorities by the courts if they make a complaint and, if they do so, often face difficulty proving their cases. Witnesses, who may also be irregular may be unwilling to testify, and there may be no proof of an employment relationship. In addition, not all EU Member States recognise the right to claim back pay or compensation for workplace accidents.

Member States should recognise and support the key role of NGOs and trade unions in facilitating access to justice for irregular migrants.

They should also ensure that effective mechanisms are in place allowing irregular migrants to lodge complaints against their employers, building on the provisions of the Employers Sanctions Directive (Directive 2009/52).

## Non-removable irregular migrants

In some cases irregular migrants cannot be removed by Member States for legal or practical reasons. However, they are often not provided with any formal legal status; this can leave them in a situation where they are unable to get access to employment or basic services for several years.

Future evaluation and revision of the Return Directive in 2014 provides the opportunity for amendments to ensure that the basic rights of those who are not removed are respected. Mechanisms should be set up either at EU or Member State level to provide persons facing protracted situations of 'legal limbo' with legal status and, consequently, access to their rights.

### Further information:

This factsheet is based on three FRA reports published in 2011 on the rights of irregular migrants:

*Fundamental rights of migrants in an irregular situation in the European Union* (November 2011)

*Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States* (July 2011)

*Migrants in an irregular situation: access to healthcare in 10 European Union Member States* (October 2011)