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Assessing EU Policy on Irregular Immigration under the Stockholm Programme

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Abstract

The relationship between EU policy and the rights of undocumented migrants remains in tension. The status and treatment granted to undocumented migrants continues to be 'invisible' in EU policy strategies and responses. This is so despite the wide recognition and evidence of the vulnerability and insecurities these persons face in their access to fundamental rights. The 'policy gap' between current European policy-making under the third multiannual programme on the Union's Area of Freedom, Security and Justice – the Stockholm Programme – and the results emerging from social science research funded by EU institutions has been assessed and evidenced elsewhere. This collection of papers aims at moving the debate forward by substantiating these findings with the experiences and knowledge of a selected group of EU umbrella (civil society) organisations and practitioners representing key institutions in Europe on fundamental human rights. The papers include three contributions arising from the conference "Undocumented Migrants and the Stockholm Programme: Assuring Access to Rights?" held in Brussels on 9 March 2010. The conference was organised by CEPS, the European Trade Union Confederation, the Platform for International Cooperation on Undocumented Migrants and EURO CITIES. The discussion is expanded by two further contributions, by representatives of the European Union Agency for Fundamental Rights and Council of Europe's Department of the European Social Charter. This collection concludes with a concrete set of policy recommendations and a four-point plan to reduce 'irregularity' in Europe.

This publication falls within the scope of the project "Undocumented Migration and the Stockholm Programme: Towards an Area of Freedom, Security and Justice for All" and presents its final results and policy recommendations.

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The CEPS Papers in *Liberty and Security in Europe* offer the views and critical reflections of CEPS researchers and external collaborators on key policy discussions surrounding the construction of the EU's Area of Freedom, Security and Justice. The series encompasses policy-oriented and interdisciplinary academic studies and commentary about the internal and external implications of Justice and Home Affairs policies inside Europe and elsewhere throughout the world.

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1. Undocumented migrants and the Stockholm Programme

Ensuring access to rights?

Sergio Carrera and Elspeth Guild

Introduction

The phenomenon of irregular immigration in the EU constitutes a domain where the results emerging from social science research and the priorities driving current policy-making processes rarely coincide. The vulnerability of third-country nationals (TCNs) lacking a regular status of entry or stay (or both) (i.e. undocumented migrants) and the negative impact of certain irregular immigration policies on the access of undocumented TCNs to basic socio-economic (fundamental) rights have been repeatedly pointed out by academics and civil society organisations across Europe during the last few years. The Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS) published a report entitled *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme* in December 2009, underlining ‘the policy gap’ between EU policies on irregular immigration and social science research funded by different directorates-general of the European Commission.¹ The report identified a number of synergies in the findings among a selection of EU projects dealing with irregular immigration and undocumented immigrants in Europe. It showed how incoherent the relationship is between some of the common results and the EU policies that preceded and followed endorsement by the European Council of the third multiannual programme on the EU’s Area of Freedom, Security and Justice (AFSJ) in December 2009 – the Stockholm Programme – which delineates the main political priorities that will guide the EU’s immigration policy and legislative agenda for the period 2010–14.

The results and policy recommendations put forward by the CEPS report were publicly presented at a conference co-organised by CEPS and the European Trade Union Confederation (ETUC), the Platform for International Cooperation on Undocumented Migrants (PICUM) and EURO CITIES. The event, which took place in March 2010, was entitled “Undocumented Migrants and the Stockholm Programme: Assuring Access to Rights”. (See the conference programme in the appendix to this publication.) The goal of the conference was to use the findings of the report as the basis for a wider debate on the status and rights of undocumented migrants in Europe not only with EU policy-makers, but also together with practitioners (from civil society, social partners and cities) working on the issues at stake. The event served as a unique opportunity for bridging some of the experiences and lessons from their daily work with the Union’s policy agenda foreseen by the Stockholm Programme. The event was structured around three main, different roundtables dealing with the following aspects: first, access to labour rights for undocumented workers; second, irregular immigration and the role of local and regional authorities; and third, access to health care for undocumented migrants.

This publication continues the debate on the present and future relationship between EU policies on irregular immigration and the status and rights of undocumented migrants in Europe. It does so by building upon the inputs and deliberations that came out of the CEPS conference of March 2010. The co-organisers, the ETUC, PICUM and EURO CITIES, acted as rapporteurs in each of

¹ See S. Carrera and M. Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*, CEPS Papers in Liberty and Security in Europe, Centre for European Policy Studies, Brussels, 2009.

the three panels dealing with their respective fields of work and interest. Based on the outcomes of the presentations and discussions taking place in each panel, they prepared written contributions synthesising the main points that were raised during the discussions as well as the policy recommendations put forward. This collection features these three contributions, covering the results of the discussions on labour rights, on the role of cities and on access to health care. They are complemented by two further contributions: one by a representative of the European Union Agency for Fundamental Rights (FRA), which outlines the current work of the FRA on the fundamental rights of undocumented migrants; and another by a representative of the Council of Europe's Department of the European Social Charter, which analyses a seminal decision by the European Committee of Social Rights on access to housing by undocumented migrants. The final section concludes with a set of policy recommendations for EU policy-makers on implementation of the Stockholm Programme and the EU's longer-term AFSJ policy agenda on irregular immigration.

Undocumented migration and EU policy

Since the transfer of the domain of immigration to shared EU competence in 1999, the development of a common European immigration policy has primarily focused on common public policies covering the status and rights of TCNs who are 'legally resident' in the Union and the enactment of coercive policies for what has been labelled as 'the fight against illegal immigration'. Irregular immigration has too often been artificially put by some high-level EU official discourses into the same basket as a whole series of diverse insecurities, threats and criminalities – something that has frequently justified the adoption of policies calling for repressive responses centred on expulsion, detention and criminalisation measures.² As underlined in the contribution by Adriano Silvestri, the prominence given at the EU level to the prevention of unlawful entries and the effectiveness of removals has not gone hand in hand with addressing the exploitation and discrimination that irregular immigrants face in key areas of social life. Indeed, proper attention has not been given so far to the effectiveness and necessity of security measures and practices seeking to curb irregular immigration, nor to their multifaceted repercussions on the foundations the EU is said to uphold, which include a legally binding EU Charter of Fundamental Rights as well as a set of legal commitments by its member states in international and regional human rights instruments.³ The access to fundamental and basic (socio-economic) rights and freedoms (such as health, education, fair working conditions, legal aid and effective remedies, and housing) by undocumented migrants has simply been a 'non-policy issue' across the various agendas and multiannual (five-year) programmes covering the EU's AFSJ. The inexistence of rights, status and interests of undocumented persons in European policy responses has resulted in a vacuum, which (as time passes) increasingly undermines the legitimacy of the entire AFSJ project as well as Europe's commitments to fundamental rights protection for all its residents, independent of their immigration and citizenship status.

The processes that preceded adoption of the Stockholm Programme at the end of 2009 are an excellent illustration of these concerns. The French presidency of the EU, which took place in

² Refer to E. Guild, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper, Council of Europe, Commissioner for Human Rights, Strasbourg, 2010; refer also to D. Bigo, S. Carrera, E. Guild and R.B.J. Walker, "The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE Project", *International Social Science Journal*, Vol. 59, No. 192, 2008, pp. 283–308; and also to R. Cholewinski, "The Criminalisation of Migration in EU Law and Policy", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, 2007, pp. 301–36.

³ See B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 3–28.

the second half of 2008, aimed at having ‘early input’ into the Stockholm Programme on immigration and asylum. The European Pact on Immigration and Asylum, adopted by the Council in October 2008, outlined various political priorities intended to guide the future shape of the EU’s immigration policy. The Pact was subject to concerns owing to its narrow coverage of migrants’ rights as well as its predominantly nationalistic and intergovernmental approach, which sought to legitimise certain French immigration policies at (and transfer them to) the EU level and emphasised member states’ competences over those of the Union.⁴ The spirit of the Pact mainly revolved around migration controls and common actions “against illegal immigration”. It identified the need “to control illegal immigration by ensuring that all illegal immigrants return to their country of origin or transit” as one of the five political commitments underpinning the future EU immigration policy and the Stockholm Programme.⁵ After underlining its reaffirmation ‘to control illegal immigration’ and stating that “illegal immigrants on Member States’ territory must leave that territory”, the Council set out the following specific proposals: to use “only” case-by-case regularisation (“rather than generalized regularisation”);⁶ to conclude readmission agreements at the EU or bilateral level; to develop cooperation among member states on common arrangements for expulsion (biometrics, the identification of irregular entrants and joint flights); to provide incentives for ‘voluntary’ return; to take employers’ sanctions; and to put into effect mutual recognition of expulsion decisions.

The European Commission’s contribution to the Stockholm Programme arrived in June 2009 with the publication of a Communication entitled “An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment”.⁷ The Commission highlighted as one of the “challenges ahead” for the EU’s AFSJ that “there are 8 million illegal immigrants in the Union. Tackling the factors that attract clandestine immigration and ensuring that policies for combating illegal immigration are effective are major tasks for the years to come.”⁸ Apart from the fact that these statistics proved later on to be completely wrong,⁹ the personal scope of the Communication was said to be too concerned with (and limited to) ‘the citizens’, and to a more limited extent, ‘legally residing TCNs’. Undocumented immigrants remained (yet again) excluded from its scope. The messages sent by the Commission in its contribution included “building a citizens’ Europe” and “put[ting] the citizen at the heart of its project”.¹⁰ A specific section of the document, entitled “Better controls on illegal immigration”, covered the domain of irregular immigration. Among the measures put forward to feed the Stockholm Programme, priority was given to evaluating the transposition by EU member states of the Directives on

⁴ See Council of the European Union, European Pact on Immigration and Asylum, 13440/08, Brussels, 24 September 2008; see also S. Carrera and E. Guild, *The French Presidency’s European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?*, CEPS Policy Brief No. 170, Centre for European Policy Studies, Brussels, September 2008.

⁵ See p. 7 of the Pact, *op. cit.*

⁶ *Ibid.*, p. 8.

⁷ Refer to European Commission, 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. For an assessment refer to E. Guild and S. Carrera, *Towards the Next Phase of the EU’s Area of Freedom, Security and Justice: The European Commission Proposals for the Stockholm Programme*, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels, August 2009.

⁸ See p. 4 of the Communication.

⁹ Refer to the results of the Clandestino Project, which estimated the number of irregular foreign residents to be between 1.8 and 3 million (Clandestino, *Comparative Policy Brief, Size of Irregular Immigration*, Clandestino Project, October 2009 (<http://clandestino.eliamep.gr>) and its database on irregular immigration (<http://irregular-migration.hwwi.net>)). Refer also to A. Triandafyllidou (ed.), *Irregular Migration in Europe: Myths and Realities*, Abingdon: Ashgate Publishing, 2010.

¹⁰ *Ibid.*, p. 5.

Employers' Sanctions (2009/52/EC) and Returns (2008/115/EC);¹¹ developing European guidelines for the implementation of regularisations; setting up common standards for taking care of 'non-removable' persons (irregular immigrants who cannot be deported); and adopting an action plan on unaccompanied minors.

The Swedish presidency of the EU was the one in charge of handling the negotiations within the Council on the third (five-year) programme on the EU's AFSJ during the second half of 2009. The Stockholm Programme, "An Open and Secure Europe Serving and Protecting the Citizens", was endorsed by the European Council in December 2009, which coincided with the entry into force of the Treaty of Lisbon.¹² Similar to the Commission's Communication of June 2009, the Programme placed "the citizens" at the heart of priorities and advocated a narrow personal scope when dealing with the protection of what it qualified as vulnerable groups. While the Programme included some references that could be interpreted as going beyond the scope of 'the citizenry',¹³ it is not clear that the actual intentions of member states' representatives was to include other categories of persons such as undocumented migrants. The Stockholm Programme did not provide any express mention of undocumented persons under section 2.3, entitled "Living together in an area that respects diversity and protects the most vulnerable". The insecurity language of 'illegality', which ascribes non-documented mobility to a criminal act, was nonetheless widespread throughout the body of the Programme. Moreover, priority was given to control-oriented measures on irregular immigration, such as those focused on return, readmission and criminalisation of solidarity. It is notable that the final version of the Stockholm Programme omitted two important initiatives that had previously been recommended by the Commission's June 2009 Communication: i) the common EU standards on non-removable irregular immigrants and ii) the common guidelines for implementing regularisations. Instead, the European Council gave preference to seven policy actions:

- first, monitoring the transposition of the Directives on Returns and on Employers' Sanctions. The Action Plan implementing the Stockholm Programme, which was subsequently published by the Commission in April 2010, foresaw the publication of reports on the implementation of these two Directives by 2014.¹⁴ The evaluation of their effective national implementation and the implications of their practical application over the fundamental rights of undocumented migrants does indeed remain an issue of concern, calling for close monitoring. As the contribution by Irina de Sancho Alonso highlights, for example, the implementation of the Directive on Employers' Sanctions raises a whole series of open questions that necessitate scrutiny. Among them are the actual level of protection being granted to the victims of labour exploitation and the ways in which the criteria mandated by the Directive for employers is prevented from ultimately increasing the vulnerability of the migrant workers;

¹¹ See 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 L 348, 24.12.2008; see also 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 L 168/24, 30.06.2009.

¹² See Council of the European Union, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, 5731/10, Brussels, 3 March 2010.

¹³ Refer for instance to section 1.1 under "Political Priorities", which states that "[a]ll actions taken in the future should be centred on the citizen of the Union *and other persons for whom the Union has a responsibility*" (emphasis added).

¹⁴ European Commission, Communication on Delivering an Area of Freedom, Security and Justice for Europe's Citizens: Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, Brussels, 20 April 2010, p. 54.

- second, putting into effect mutual recognition of return decisions by EU member states. A Communication on the evaluation on the common policy on return and on its future development is expected to be presented by the Commission in 2011;¹⁵
- third, increasing practical cooperation among member states on the return of irregular immigrants by chartering joint flights (to be assisted and financed by FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders),¹⁶ on the verification of the nationality of TCNs and the procurement of travel documents from non-EU countries;
- fourth, fostering the external dimension of Europe's irregular immigration policy by developing information on migration routes, promoting cooperation on border surveillance and border controls, and facilitating readmission and capacity building in non-EU countries;
- fifth, concluding "effective and operational" readmission agreements, developing monitoring mechanisms for implementation and a common EU approach against non-cooperative countries. The European Commission will publish an evaluation of the readmission agreements before the end of 2010;¹⁷
- sixth, developing an action plan on unaccompanied minors, focused on prevention, protection and assisted return;¹⁸ and
- finally, the Action Plan implementing the Stockholm Programme presented an initiative that was not originally part of the Stockholm Programme as endorsed by the European Council. More specifically, it presented a legislative proposal amending Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence ("and possibly merg[ing] with Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence; and extending existing provisions").

Delivering fundamental human rights to undocumented immigrants

Where are the rights and status of undocumented migrants in the Stockholm Programme? With the sole exception of 'unaccompanied minors', the Stockholm Programme and the European Commission's Action Plan implementing it of April 2010 have continued to be silent about the social insecurities and vulnerabilities of undocumented persons in Europe. There is, at present, a 'no-policy' strategy at the EU level to address the insecurities faced by TCNs lacking a legal status, something that remains at odds with a 'Europe of Rights'. Silvestri's contribution points out that many of the rights stipulated in the EU Charter of Fundamental Rights are recognised as

¹⁵ See p. 53 of the Action Plan (ibid.).

¹⁶ The Commission presented in February this year a new proposal that would expand the competences of FRONTEX in the return of irregular immigrants. Refer to European Commission, *Proposal for a Regulation amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, COM(2010) 61 final, Brussels, 24 February 2010.

¹⁷ See J.P. Cassarino, *Readmission Policy in the EU: Drivers and Implications for Human Rights Observance*, Study commissioned by the Policy Unit C of the European Parliament, Brussels, September 2010.

¹⁸ This constituted one of the key priorities of the Spanish presidency during the first half of 2010. The European Commission presented the action plan in May 2010. See European Commission, *Communication on an Action Plan on Unaccompanied Minors (2010–2014)*, COM(2010) 213 final, Brussels, 6 May 2010. In June 2010 the Justice and Home Affairs Council adopted the Council Conclusions on Unaccompanied Minors – Council of the European Union, Council Conclusions on Unaccompanied Minors, 3018th Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010.

pertaining to ‘everyone’ (independent of the citizenship and legal status of stay of the person involved). The same holds true for several regional and international human rights instruments. Indeed, it could even be argued that the general rule is that fundamental rights also apply to undocumented migrants *unless* the relevant legal instruments expressly exclude them from the personal scope of application. The exception is therefore that they are not beneficiaries of these very rights. Undocumented migrants do have rights and as such should be entitled to express protection (through comprehensive policy responses) at the EU level.¹⁹ There is thus a clash between international and regional human rights instruments on the one hand, and current EU policy discourses and initiatives under the Stockholm Programme on the other, which fosters a perception of TCNs’ non-entitlement to or the non-existence of their rights in the EU. Among the first initiatives at the European level aimed at addressing some of these gaps was the proposal by the Reflection Group on the Future of the EU 2030 in “Project Europe 2030: Challenges and Opportunities”, to harmonise the rights of irregular immigrants across the EU.²⁰

One of the main dilemmas on the ground is actually that of the *practical delivery and access* by undocumented migrants to these very fundamental socio-economic rights in light of the restrictive and coercive nature of irregular immigration policies across the Union. Exclusion, discrimination and marginalisation are unfortunately the rule for these persons in terms of having access to basic social and economic rights.²¹ Moreover, as has been demonstrated by research projects funded by the European Commission,²² even in those cases where those rights are formally enshrined by the law of the member state at stake, several obstacles exist in practice that make it difficult (and at times impossible) for these persons to fully enjoy a minimum level of protection, dignity and inclusion. This issue was underlined by the Global Migration Group – which groups together 14 agencies (12 United Nations agencies, the World Bank and the International Organisation for Migration) – in their “Statement on the Human Rights of Migrants in Irregular Situation” [*sic*] of September 2010. The statement called upon states “to review the situation of migrants in an irregular situation within their territories and to work towards ensuring that their laws and regulations conform with and promote the realisation

¹⁹ See the Platform for International Cooperation on Undocumented Migrants (PICUM), *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, PICUM, Brussels, 2007(a) (<http://www.picum.org/?pid=210>); see also T.A. Aleinikoff and V. Chetail (eds), *Migration and International Legal Norms*, The Hague: TMC Asser Press, 2003.

²⁰ See Reflection Group, *Project Europe 2030: Challenges and Opportunities – A Report to the European Council by the Reflection Group on the Future of the EU 2030*, Brussels, May 2010, p. 25 (http://www.reflectiongroup.eu/wp-content/uploads/2010/05/reflection_en_web.pdf).

²¹ Refer to R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg: Council of Europe Publishing, 2005; refer also to S. Tonelli, “Irregular Migration and Human Rights: A Council of Europe Perspective”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyrsczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 301–10.

²² See for instance Platform for International Cooperation on Undocumented Migrants (PICUM), *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels, 2007(b) (<http://www.picum.org/data/Access%20to%20Health%20Care%20for%20Undocumented%20Migrants.pdf>); see also Médecins du Monde, *Access to healthcare for undocumented migrants in 11 European countries, 2008 Survey Report*, European Observatory on Access to Healthcare, London, September 2009 (http://www.mdm-international.org/index.php?id_rubrique=1); and also S. McKay, E. Markova, A. Paraskevopoulou and T. Wright, *The relationship between migration status and employment outcomes*, Final Report, Working Lives Research Institute, London, March 2009, p. 5 (http://www.undocumentedmigrants.eu/londonmet/library/v65239_3.pdf).

of the applicable international human rights standards and guarantees at all stages of the migration process”²³

The narrowness (and incapacity) of certain national immigration legislation in terms of meeting local social realities and ensuring that those who reside in their territories (irrespective of whether they have ‘the right papers’) have access to basic socio-economic rights has led to situations whereby local actors (mainly cities) have been encouraged to develop ‘creative’ (informal) practices for social inclusion, community well-being and the provision of services to all their residents. As the contribution by Dirk Gebhardt points out, cities are the first place where the phenomenon of irregular immigration engages with existing public policies, and where the actual challenges surrounding the effectiveness of these very policies are first encountered. Independent of restrictive national and EU policies on irregular immigration, many cities have been ‘pragmatic’ when it comes to dealing with irregular immigration. They have (within the remits of their conferred competences) developed practices sometimes not formally foreseen (or expected) by the national immigration legislation, which cover the status of undocumented migrants and which help the latter to have access to basic socio-economic rights and security of residence. Some cities often make use of their competences (in the provision of services) to improve access to socio-economic rights by undocumented migrants, concerning for instance legal support and information, access to health care, education, reception services and housing.

Which ‘rights’ are more at stake for undocumented migrants in Europe in light of the international, regional and EU legal obligations of EU member states and the Union itself? The following four general streams can be highlighted:

- First, two fundamental human rights are crucial in relation to the expulsion and detention laws and practices concerning irregular immigrants. Both are foreseen in the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights (hereinafter the ‘EU Charter’): i) the right to family life as enshrined in Arts. 8 ECHR and 7 EU Charter, which are of special relevance in the scope of return and expulsion measures taken against undocumented migrants; and ii) the right not to be subject to torture or inhuman and degrading treatment in view of Arts. 3 ECHR and 4 EU Charter, which become central at times of assessing the detention conditions of undocumented migrants.
- Second, access to health care (and medical assistance/treatment) is another dimension of particular importance for undocumented persons in Europe. Here the relevant legal provisions include Arts. 3 ECHR and 4 EU Charter, Art. 12.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and Arts. 13 and 17 of the European Social Charter (ESC). In this regard we also highlight a decision by the European Committee on Social Rights, which is in charge of interpreting the ESC, i.e. the collective complaint, *International Federation for Human Rights (FIDH) v. France*, No. 14/2003 of September 2004. The Committee ruled 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”. Access to health care is at present one of the most sensitive issues related to undocumented immigrants’ fundamental human rights. Health care systems across the Union face many challenges in responding adequately to

²³ See Global Migration Group, “Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation”, Geneva, 30 September 2010, on the website of the UN Office for the High Commissioner for Human Rights (www.ohchr.org).

the phenomenon of immigration. As discussed in the contribution by Michele LeVoy and Kadri Soova, many EU member states reject the right of undocumented migrants to medical care and in others the practical obstacles for such migrants in accessing it are simply too high. By way of illustration, practical barriers include the requirement to provide documentation proving their ability to cover hospital expenses, a lack of information about their right to health care, ‘the duty to denounce’ of hospital administrations in some member states, and a lack of translators and cultural mediators in hospitals.²⁴ Many undocumented migrants do not have information about their right of access to medical services. It is also a rather widespread occurrence that they do not seek medical help because of their fears of being discovered, reported to the immigration authorities and consequently being deported.

- Third, undocumented migrants are especially vulnerable to exploitative working conditions. As workers, and therefore beneficiaries of several regional and international human rights instruments dealing with labour-related rights, they are entitled to fair and equal working conditions. Of special relevance in this context are the International Labour Organisation (ILO) standards,²⁵ notably the ILO Declaration on Fundamental Principles and Rights at Work of June 1998 and Convention 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of June 1975. Art. 7 ICESCR and the ICRMW are also highly pertinent in this context.²⁶ Concerning access to labour rights, the contribution by de Sancho Alonso in this publication discusses the interests of trade unions in working more for the protection (and equal treatment) of undocumented workers and their seminal work in overcoming the vulnerability and exploitation that TCN undocumented workers might face. Several actions have been taken and projects developed by workers’ organisations at the national level to provide support, information and assistance to migrant workers who are ‘newcomers’ (independent of their legal status). Such actions have sought to encourage migrants’ organisation and empowerment at the union level – so that they can represent themselves in and through unions, and facilitate their socio-economic inclusion in the labour market, the workplaces and society in general. Similar to local authorities and cities, the involvement, voice and experiences of social partners when devising new European strategies and common policy approaches on labour immigration (in the pre-proposal as well as evaluation phases) are indeed of fundamental importance to guaranteeing coverage of the social dimension that is inherent to any labour immigration policy.²⁷
- Finally, on the right to housing and adequate standards of living, we underline for example Art. 31.2 of the ESC, which deals with the effective exercise of the right to housing and the prevention and reduction of homelessness. The contribution by Gioia Scappucci offers a synthesised analysis of the decision by the European Committee on

²⁴ See PICUM (2007b), op. cit.

²⁵ Refer to R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford: Clarendon Press Oxford, 1997; refer also to R. Cholewinski, “International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization”, in J. Graig and S. Lynk (eds), *Globalization and the Future of Labour Law*, Cambridge: Cambridge University Press, 2006, pp. 409–44.

²⁶ See the International Steering Committee for the Campaign for Ratification of the Migrants’ Rights Convention, *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Geneva, 2009 (www.migrantsrights.org).

²⁷ Refer to the European Economic and Social Committee, *Fundamental Rights in European Immigration Legislation: Respect for Fundamental Rights in European Immigration Policies and Legislation*, CESE 1710/2009, Brussels, 4-5 November 2009.

Social Rights in the complaint *Defence for Children International (DCI) v. the Netherlands*, No. 47/2008 of October 2009. The Committee declared that the exclusion of undocumented children (as a specific category of vulnerable persons) from the provision of adequate shelter goes against the ESC, even if they are unlawfully on the territory. In the Committee's Opinion, as Scappucci summarises, "[s]tates' immigration policy objectives and their human rights obligations would not be reconciled if children, whatever their residence status, were denied basic care and their intolerable living conditions were ignored".

2. Access to labour rights for undocumented workers

Irina de Sancho Alonso

Introduction

Irregular migration is a complex phenomenon and employment one of its many pull factors. An adequate public policy response requires a wide range of measures and policies, addressing undeclared work and the precariousness of work, along with the need to open up more channels for legal migration. Undocumented workers are among the most vulnerable and exploited workers in Europe. They are often victims of labour exploitation. For instance, they may experience unpaid wages, no holidays, dangerous conditions and uncompensated workplace injuries. They may be obliged to work for long hours or suffer unlawful deductions from pay in an environment in which health and safety conditions are ignored. They may be forced to stay with their employer, especially in cases of trafficked workers, and face a virtual absence of social protection, denial of freedom of association and workers' rights, discrimination, xenophobia and social exclusion. They also work and live in the constant fear of expulsion. In some countries, irregular migrant workers may face situations such as sexual and physical harassment, debt bondage, retention of identity documents and threats of denunciation to the authorities, without effective access to legal protection. Undocumented workers who try to stand up for their rights frequently encounter physical, racist and immigration-related threats and retaliation.

EU migration policies are putting an emphasis on highly skilled migrants. The reality, however, is that migrant workers – millions of them irregular migrants – are mainly concentrated in low-skilled occupations such as agriculture, construction, hotels and restaurants, and domestic work (cleaning and caring services). The jobs they carry out are often 'dirty, demeaning and dangerous' ('3D-jobs'). This makes the protection of their rights even more difficult. The absence of legal channels for migration for low-skilled/low-paid work creates a vicious circle of a lack of rights and fear of expulsion, leading to an easily exploitable workforce and possibly enormous profits, and increasing practices by subcontracting chains through which large enterprises avail themselves to cheap products and services. One clear example of this is the price of tomatoes and other agricultural products, which can be sold by vast retail chains for (too) low prices because they tend to be produced and picked by workers who are paid salaries far below the level of a fair (living) wage.

In many EU member states, negative sentiments against immigrants – both regular and irregular – are increasing among workers and citizens. Fears about the prospects of undercut wages and working conditions and of competition for scarce resources (public housing, social benefits, etc.) are being exacerbated by the economic crisis. The existence of irregular migration and the lack of adequate policies to deal with this phenomenon, in addition to a situation in which member states are mostly focusing on the criminalisation of irregular migration and repressive measures, are leading to a potentially dangerous rise of racism and xenophobia.

EU migration policy

There is a need for policies with regard to migration and integration at the EU level that are based on the recognition of the fundamental social rights of current citizens as well as newcomers, and which are linked to strong employment and development policies, in both the countries of origin and destination. A common framework of EU rules on admission for employment is urgently needed. The EU must develop a more proactive migration policy, geared towards 'managing' and not preventing mobility and migration for employment, which

combines vigorous integration efforts with making employers and public authorities respect and enforce labour standards. This should offer old and new groups of migrants and ethnic minorities equal rights and opportunities in our societies, while promoting social cohesion.

This policy should be based on a clear framework of rights as established by the international conventions of the United Nations (UN) and International Labour Organisation (ILO) and instruments of the Council of Europe, and be formulated in close consultation with social partners at all relevant levels. In addition, possibilities should be created for the admission of economic migrants, by providing for a common EU framework for the conditions of entry and residence. Such a framework should be founded on a consensus between public authorities and social partners about real labour market needs, thus preventing a two-tier migration policy that favours and facilitates the migration of the highly skilled while denying access and rights to semi- and lower-skilled workers. More proactive policies should also be developed to combat labour exploitation, especially of irregular migrants, which call for recognition and respect of their trade union and other human rights and provide migrants with bridges out of irregularity. While there is a need to be tough on employers using exploitative employment conditions, more effective policies should be implemented to prevent and remedy such exploitative situations. These should be linked to external policies (trade and development) that promote improved living standards and opportunities in the countries of origin, thereby offering (potential) migrant workers and their families proper job opportunities at home. Cooperation and partnership with non-EU countries, in particular developing countries and those in the European neighbourhood, should be strengthened.

Regarding the Directive on Employers' Sanctions (2009/52/EC), it would also be necessary to address and influence the implementation of this instrument at the national level. The Directive presents some problems, such as

- first, the lack of a concrete definition of seriously or severely exploitative conditions. This constitutes a key issue because victims facing 'seriously exploitative conditions' can be granted permits of a limited duration to stay during court proceedings, and in some member states, if the legal sentence recognises them as being in the category of victims, they can also be entitled to temporary residence and working permits;
- second, the actual level of protection given to victims of labour exploitation and the ways of ensuring access to legal channels and assistance for claiming compensation. Unfortunately, undocumented migrants who have been victims of labour exploitation are very often sent to detention centres without the right to report the exploitation they suffered and with no assistance; and
- third, the obligation of employers to notify public authorities when they hire a third-country national. There have been cases of employers' requirements to introduce, through a collective agreement, an obligation for third-country nationals to provide the employer exhaustive information about their situations when it comes to working permits, renewal, etc. This could put the migrant worker in an even weaker and more vulnerable position in front of the employer, who would be collecting private information about the workers.

There are some useful mechanisms that could be promoted by the EU to better protect undocumented migrants and respect their rights. Among them, for instance, are providing for a legal space in which irregular workers can complain about exploitative working conditions without immediately being threatened with expulsion, and separating labour inspections from inspections on immigration status. In addition could be the recognition that labour rights and human rights can and do exist and should be dealt with independent of having the right documents in place. Finally, a chain responsibility could be introduced for the main contractors using agencies and subcontractors that do not respect minimum labour and human rights.

On the topic of the recently adopted proposals for EU directives on seasonal workers and intra-corporate transferees,²⁸ the European Trade Union Confederation (ETUC) has always been in favour of taking a horizontal approach rather than coming up with a series of sectoral proposals, as the latter would increase the divergence of rights for several groups of workers. EU migration legislation should cover all third-country nationals, without general preferences or privileges. In fact, neither the proposal for a directive on seasonal workers nor the proposal for the so-called single permit directive,²⁹ which is being currently discussed in the European Parliament, guarantee equal treatment and rights for third-country nationals legally working in EU territory. There are some points in both measures that will not be in line with what UN and ILO conventions establish in terms of rights for migrant workers.

First of all, while the rights-based approach chosen by the European Commission is to be appreciated, a reference to the ILO and UN conventions on workers' rights as well as to the articles of the EU Charter of Fundamental Rights concerning the rights of workers is missing in the proposal for the single permit directive. The ETUC has also expressed its criticism concerning the scope of this proposal: if its objective is to create a level playing field for all third-country nationals legally working in the EU, it is hard to explain the exclusion of seasonal workers, au pairs, asylum seekers and persons under subsidiary protection from the application of the directive. Although some of these groups may be covered now or in the future by separate directives when it comes to their right of access to employment in member states, the ETUC does not accept any exclusions, especially on work-related issues such as pay and working conditions, for which equal treatment has to be guaranteed regardless of specific immigration status. Furthermore, the text opens the possibility for member states to introduce restrictions on the rights to equal treatment. We are concerned that it is largely left to the member states' discretion to grant equal treatment – notably with regard to working conditions and freedom of association – solely to those who are employed. A right to similar protection should also be granted to jobseekers in the recruitment phase. The exceptions to equal treatment contained in the proposal would also greatly limit the scope and effectiveness of this directive, which is intended to be a nucleus of 'basic rights'.

The role of trade unions

Trade unions have a dual interest in working for migrant workers' rights. First, the trade union movement is based on solidarity and defends equal rights and treatment for all workers. We defend human and fundamental rights. Second, protecting migrant workers' rights protects the rights of all workers and prevents a worsening of labour conditions for all workers. The ETUC is committed to the defence of migrant workers, adopting an action plan at its last congress in 2007. The latter clearly states that EU migration policy must be based on a transparent framework of rights as established by UN and ILO conventions and Council of Europe instruments. We think a two-tier migration policy has to be avoided, as a source of discrimination that favours and facilitates the migration of highly skilled migrant workers while denying access and rights to semi- and lower-skilled workers. The ETUC adopted the following three action points:

²⁸ See European Commission, *Proposal for a Directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer*, COM(2010) 378, Brussels, 13 July 2010; see also the *Proposal for Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment*, COM(2010) 379, Brussels, 13 July 2010.

²⁹ Refer to European Commission, *Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*, COM(2007) 638 final, Brussels, 23 October 2007.

- 1) Work towards a more proactive European migration policy that is geared to managing and not preventing migration, combined with strong integration efforts and the enforcement of human rights and labour standards to combat exploitation, especially of irregular migrants.
- 2) Intensify actions and campaigns at both the European and national levels in favour of ratification and application of all the conventions and important instruments of the ILO, UN and Council of Europe on the protection of rights of all migrant workers and their families.
- 3) Support policies that recognise the fundamental social rights of all workers and which favour social cohesion by preventing the creation of two-speed migration channels and the exploitation of workers in irregular administrative situations, as well as the recruitment of migrants in precarious working and social protection conditions.

The ETUC's views can be found in several of the positions it has adopted in recent years:³⁰

- It is important when tackling labour market shortages to prioritise investing in the training and retraining of the unemployed and underemployed who are already on our territory, including local workers as well as second- and third-generation immigrants.
- It is necessary to strengthen social policies, the enforcement of labour standards and working conditions, and the 'integration' of immigrants and ethnic minorities, with integration clearly seen as a two-way process demanding that not only immigrants but also that the receiving society and dominant culture adapt.
- It is inevitable that more legal channels for migration will be needed at all skill levels, i.e. not just focusing on highly skilled workers or temporary/seasonal migrants, or giving the message that 'circular' migration is the solution to all problems related to migration. A comprehensive policy must be developed that includes a vision of how to deal with the persistent need for and presence of low-skilled migrant labour in Europe.
- A high priority must be given to preventing and combating the labour exploitation of irregular migrants and to offering them bridges out of irregularity.
- Every policy on migration should be rights-based and recognise that all migrants, regardless of their legal status, have basic human rights and especially labour and social rights – the recognition and enforcement of which is the best instrument to counter exploitation.
- All forms of human trafficking must be combated.

It is fundamental that the European Commission and Council recognise the social policy dimension of economic migration and set up adequate procedures and practices for consultation of the European social partners in the legislative process. The lack of an adequate framework in the decision-making process on migration at the EU level and of consultation with the social partners is preventing the rights of migrant workers from being properly defended by their trade union organisations.

Despite the lack of consultation, most of the European trade unions have devised actions at the national level aimed at helping and supporting migrant workers in three main areas. First are actions that try to support and assist migrant workers as an initial step, regardless of their administrative situations. Second, many trade unions across the EU are also carrying out actions to organise and unionise migrant workers and to empower them so they can represent

³⁰ For a full overview, see the website of the ETUC (<http://www.etuc.org/r/49>).

themselves in and through the unions. Third, trade unions are also working towards the better integration of migrants in the labour market, the workplaces and in society in general. Workers' organisations are implementing actions and projects of raising awareness on the part of workers and society, and fighting the negative discourse about migrant workers at all levels.

Trade union organisations should play a more central role in fighting for the protection and equal treatment of all migrant workers (regardless of their legal status), and in facilitating access to social protection, combating labour exploitation and precariousness, promoting fundamental labour and social rights for all migrants, and providing for bridges out of irregularity and access to justice. Workers' organisations can play a key part in providing information and support, developing appropriate ways and instruments to reach out to these workers in solidarity, and in being visible, available and accessible to them. This is only possible if the current membership of trade unions understands the importance of countering the language and practices of exclusion and xenophobia, and of bridging the gap with the 'outsiders'. History has shown that solidarity between organised and unorganised workers, along with inclusive trade union policies and strategies, can provide all workers with better protection.

3. Irregular migration and the role of local and regional authorities

Dirk Gebhardt

The Stockholm Programme has answered the question of fundamental rights for undocumented migrants and the role of cities with silence on two accounts: not only did the Stockholm Programme fail to address the fundamental rights issue of irregular migration, it also said little about the role of cities in migration policy in a more general sense. Nevertheless, irregular migrants in cities are a reality. Judging from estimates provided by cities,³¹ undocumented migrants represent for example between 3% and 6% of the population in Ghent, Genoa and Rotterdam. According to the estimates of a study by the London School of Economics commissioned by the mayor of London, the numbers are as high as 440,000 in London – a population group as large as that of a medium-sized city, living in a highly precarious legal situation.³²

While the legal framework that decides who is or is not an irregular migrant is set at the European and national levels, the challenges of dealing with those who have become illegalised and marginalised by this framework are felt locally, and jeopardise the well-being of the city population as a whole. The potential effect of denying access to health care to some population groups is blatant if one thinks about how public health is threatened when persons with infectious diseases do not receive treatment. Denying access to housing and employment heightens the risk of exploitation and the take-up of criminal activity by migrants who have no other options. Denying access to education has serious effects on the social mobility of children, the most vulnerable population group and the most important for the city's future. Altogether, denying access to fundamental rights and basic services in cities threatens community cohesion as a whole.

The examples presented at the conference of March 2010, “Undocumented Migrants and the Stockholm Programme: Assuring Access to Rights”, showed that cities, in facing these challenges, make use of their remit to improve access to fundamental rights in several ways:

- 1) *Legal support.* Legal advice that is open to all migrants, as is the case in Ghent for instance, is one important step towards access to fundamental rights. Many migrants did not arrive as irregulars, and many may have options to become legalised without knowing it. Furthermore, undocumented migrants are in particular need of support as they face more threats to their safety and security than ordinary inhabitants, because of their vulnerable status.
- 2) *Access to health care.* Cities have found numerous ways to develop local support systems, such as the policy of the Ghent local welfare office. Even in Germany, where until recently federal legislation called for medical staff to denounce undocumented migrants, cities insisted that professional secrecy and the respect of fundamental rights superseded denunciation, and put in place structures for medical treatment. For instance, Frankfurt's international, humanitarian consultation service offers free and anonymous treatment that corresponds to the services a general practitioner has to offer. Munich has

³¹ For more information on the EURO CITIES Migration and Integration Working Group, see the EURO CITIES website (<http://www.eurocities.eu/main.php>).

³² See p. 9 of GLA Economics, *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, Greater London Authority, London, 2009 (http://www.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-summary.pdf).

set up a fund for financing emergency treatment for undocumented migrants through medical non-governmental organisations.

- 3) *Access to education.* Genoa has opened up educational services for children over the age of three for the entire population, including undocumented migrants. Again, cities like Genoa and some German cities have found ways to discharge staff from their duty to denounce children without legal status, arguing that denunciation is counterproductive for social cohesion. Genoa has also put in place awareness-raising measures for teaching staff and measures to reach out to parents, explaining to them that sending their children to school will not lead to denunciation.
- 4) *Wider reception services.* Many reception services, such as language and citizenship education, and services that explain the main steps towards integrating into the new society, target legally residing third-country nationals. Opening up these services to undocumented migrants (as well as to other migrants from within the EU who might be in need of support) is another important measure that cities like Barcelona and Ghent have taken for the sake of social cohesion.
- 5) *Access to housing.* Housing, one of the rarest goods in most cities, probably remains the greatest challenge. Genoa and Ghent have emergency re-housing facilities for the most urgent cases, victims of ‘slumlords’ and exploitative renters. In general, however, the capacity of local welfare systems does not seem to allow for more comprehensive policies in this sector.

Similar measures to those described above exist in many (although not all) cities, and together they provide something like a substitute for (urban) citizenship. This local form of belonging is based on residency rather than on legal distinctions, is more pragmatic than exclusive and attempts to solve the practical challenges for social cohesion and well-being. The idea of a complimentary urban form of citizenship becomes particularly tangible in Ghent, where the mayor or deputy mayor hands over a diploma to an undocumented migrant for successful participation in an integration course. The example of the US, where all major cities have adopted the status of ‘sanctuary cities’, demonstrates how far this urban form of citizenship can go if the contradictions between national and European governance are not resolved. Sanctuary cities hinder the enforcement of federal and state legislation against undocumented migrants, by preventing staff working for city services from asking individuals about their immigration status.

Summing up the present state of affairs from a European perspective, undocumented migrants are excluded by the policies of the European Commission, the Parliament and the Council, while the challenges that such policies create for social cohesion and well-being at the local level are widely ignored. In other words, cities currently have to deal with the problems created at higher levels. This is a clear case for subsidiarity: to act efficiently on the challenges related to irregular migration, cities need to have more options and means to solve local problems locally.

Treating irregular migration, as the Stockholm Programme does, solely as a security issue and a case for more efficient removal policies will not make the problem disappear in cities. Therefore, European funds that are dedicated to the social inclusion of the general population, and migrants in particular, also need to be applicable to irregular migrants. In addition, EURO CITIES members believe that the best remedy for irregular migration consists of better policies for economic migration. EU policies such as the Blue Card³³ (which is too miserly in

³³ Refer to Council of the European Union, Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.06.2009.

granting rights to migrants to become a success) and circular migration (which basically seems to repeat the mistakes of old 'guest worker' schemes) do not hold promise for meeting the labour market needs of cities.

An interesting observation with regard to the link that is often made between irregular migration and criminal activities in EU migration policies can be made in the case of Genoa, where, as a result of the more restrictive policy towards irregular migration, it is said that the criminal and exploitative character of migration has become stronger. In contexts that offer few legal options for migration, and in which efforts to persecute irregular migration have been strengthened, the best-organised 'traffickers' with the largest economic stake in irregular migration seem to be the most likely to continue their activities. This raises serious questions about the unintended effects of today's EU policy priorities, which go in the same direction.

Many, although not all, undocumented migrants are de facto economic migrants, and are precariously integrated in local labour markets. The economic benefits that can arise from a regularisation of migrants who have demonstrated their willingness to integrate is a forceful argument against the anti-regularisation discourse, launched by the European Pact on Immigration and Asylum. The economic argument is not a substitute for the need to respond to fundamental rights questions, but rather a strong additional point. The current anti-regularisation discourse in Europe has already been contradicted by the regularisations in Italy and Belgium last year.

Many cities are pragmatic when it comes to dealing with irregular migration and solving the problems that it poses for fundamental rights. Their approach could serve as a model for adapting the Stockholm Programme to the real needs Europe has and to the challenges it faces with regard to regular and irregular migration.

4. Access to health care for undocumented migrants

Michele LeVoy and Kadri Soova

Introduction

While numerous international instruments in human rights law have been ratified by EU member states and refer to the right of everyone to health care as a basic human right (regardless of one's administrative status), the laws and practices in many European states deviate from these obligations.³⁴ It is a fact that a high percentage of undocumented migrants do not access any kind of health care even if they are entitled to do so. For them, a worsening of their physical and mental health is more likely to occur because of poor access to health care services or the continual fear of being discovered and deported.

Undocumented migrants mainly seek health care when they are severely ill. Health is commonly not their central concern because their energies are often exhausted in acquiring the minimum subsistence necessary for survival. Furthermore, many undocumented migrants lack information about their rights of access to medical services in the country where they live. They frequently do not seek medical help because of their enormous fear that their irregular status will be discovered and they will consequently be deported. They also find it very difficult to navigate within the health care system and are often unable to respond to all the necessary administrative requests in order to receive assistance.

Human right to health care

The right to the highest attainable standard of health is a fundamental right embedded in instruments on international human rights law to which all EU member states are party. Therefore, the situation in each EU member state regarding the accessibility of health care services for undocumented migrants should be weighed against these international standards.

Adopted by the United Nations in 1948, the Universal Declaration of Human Rights proclaimed that "everyone has the right to a standard of living adequate for the health and well-being of oneself and one's family, including food, clothing, housing, and medical care".³⁵ The right to the highest attainable standard of physical and mental health may be described as a fundamental human right as it is indispensable for the realisation of all other rights. It is a right that includes both the right to health care and the right to other essential conditions for health.³⁶ The UN International Covenant on Economic, Social and Cultural Rights provides the most comprehensive clause on the right to health in international human rights law. In Art. 12(1), states' parties recognise "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". The content of this provision has been further clarified by the Committee on Economic, Social and Cultural Rights, established to monitor the implementation of the convention, in its General Comment 14. Accordingly, "[s]tates are under

³⁴ See Platform for International Cooperation on Undocumented Migrants (PICUM), *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, PICUM, Brussels, 2007(a) (<http://www.picum.org/sites/default/files/data/UndocumentedMigrantsHaveRights!.pdf>).

³⁵ See Art. 25, Universal Declaration of Human Rights, G.A. res. 217A (III), UN Doc. A/810 at 71 (1948).

³⁶ The report by the International Federation of Health and Human Rights Organisations (IFHHRO) and University of Essex Human Rights Centre (*Our Right to the Highest Attainable Standard of Health*, IFHHRO and University of Essex Human Rights Centre, Utrecht and Colchester, 2006), gives an explanation of the key elements of the right to health (http://www.essex.ac.uk/human_rights_centre/research/rth/docs/REVISED_MAY07_RtH_8pager_v2.pdf).

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 migrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a [s]tate policy”.³⁷

In addition to specific international obligations concerning access to health care services, EU member states are bound by the general principle of non-discrimination. Non-discrimination is a core guiding principle of human rights protection. Everyone is entitled to human rights without discrimination of any kind. This means that human rights are for all human beings, regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³⁸ Non-discrimination protects vulnerable individuals and groups against the denial and violation of their human rights. In its General Comment No. 30, which addresses discrimination against non-citizens including undocumented ones, the UN Committee on the Elimination of Racial Discrimination states in the preamble that groups such as undocumented non-citizens have become important groups of concern. The Committee urged states to ensure that states’ parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.³⁹

Despite their responsibility to guarantee the right to health in accordance with human rights principles, EU member states are increasingly limiting or denying health care services to undocumented migrants on the basis of their administrative status. As a result, undocumented migrants are arguably among the most marginalised and unprotected groups in Europe today. The former UN rapporteur on the right to the highest attainable standard of health, Paul Hunt, stated after his country visit to Sweden in 2006 that “nobody would suggest that an asylum seeker or undocumented person, who is charged with a criminal offence, should be denied their human right to a fair trial. Equally, a sick asylum seeker or undocumented person should not be denied their human right to medical care without discrimination.”⁴⁰

Health care entitlements in the EU

While in no EU member states does the legislation specifically forbid access to health care for undocumented migrants, access to publicly subsidised health care, either partially or fully, is not entirely guaranteed in Europe. In some countries, all health care (even emergency care) is provided solely on a payment basis and treatments are generally unaffordable for undocumented migrants. The most restrictive member states shield themselves from criticism by asserting that emergency care is never denied to undocumented migrants. It is nonetheless impossible to seriously speak about the ‘accessibility’ of health care when undocumented migrants continue to be asked to pay high and unaffordable sums in return, even in situations where their life is at severe risk or when they seek to give birth, as occurs in some EU member states.

³⁷ See UN Economic, Social and Cultural Rights Committee, General Comment No. 14, the right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, 22nd Session, August 2000, para. 34 (<http://www1.umn.edu/humanrts/gencomm/escgencom14.htm>).

³⁸ See the Universal Declaration of Human Rights, Art. 2.

³⁹ Refer to the UN Committee on the Elimination of Racial Discrimination, G.C. No. 30, para. 36, on the UNHCHR website (<http://www.unhcr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d?Opendocument>).

⁴⁰ See UN Special Rapporteur Paul Hunt, Press Statement on country visit to Sweden, 17 January 2006, on the website of the University of Essex Human Rights Centre (http://www.essex.ac.uk/human_rights_centre/research/rth/pressreleases.aspx).

In addition, access to health care is being used as an instrument of immigration control policies and has become progressively more restricted in recent years. For example, entitlements have been significantly reduced in the UK,⁴¹ while France⁴² has introduced more conditions on access to publicly subsidised health care. There are also positive developments, however, such as the setting-up of a specific government fund in the Netherlands in 2009,⁴³ to enable all undocumented migrants to access health care services for free or for a small fee. There is a growing tendency in Europe to restrict access to health care for undocumented migrants and to reinforce the link between access to health services and immigration control policies. Such policies not only undermine fundamental human rights but also overburden migrant communities, which may already be marginalised and living in precarious situations. Disputes over immigration status frequently cut across the provision of care and treatment, leaving sick persons untreated, supported only by others in the migrant communities who themselves subsist at a minimum wage and with minimum social-amenity standards.⁴⁴

The applicable laws and procedures are usually complicated and need more publicity. Many relevant actors are unfamiliar with the legislation in force and have difficulties in accurately describing undocumented migrants' entitlements to health care. When regulating on this issue, EU member states use different concepts and generally do not provide clear-cut definitions. There are many terms in use: emergency care, urgent medical care, essential medical care, immediate care, immediate necessary treatment, medically necessary care, etc. The absence of clear definitions has not only brought confusion and failures at the level of implementation, but has also allowed wide interpretations of the law and often arbitrary and inconsistent decisions regarding access to certain health care services. In some countries, there is no specific legislation on access to health care for undocumented migrants but entitlements can be interpreted through other laws, such as through an obligation to provide emergency care to everyone, embedded in penal law.

Vulnerable groups

While undocumented migrants are a vulnerable group in terms of access to health care, there are many undocumented migrants who are especially vulnerable owing to their specific and sometimes-increased health needs. PICUM's research on health care⁴⁵ demonstrates that children, pregnant women and the mentally ill face additional vulnerabilities but their health needs are not met by health care systems in Europe.

Undocumented children frequently do not get the necessary vaccinations and their development is not regularly examined. Even in countries where free vaccinations are available,

⁴¹ Refer to Platform for International Cooperation on Undocumented Migrants (PICUM), *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels, 2007(b), p. 100 (<http://www.picum.org/sites/default/files/data/Access%20to%20Health%20Care%20for%20Undocumented%20Migrants.pdf>).

⁴² Ibid., p. 28.

⁴³ See M. Martens, *Accessibility of Health Care for Undocumented Migrants in the Netherlands*, Maastricht University, July 2009, p. 2 (http://www.pharos.nl/uploads/site_1/Pdf/Documenten/Master_thesis_Merel_Martens_i215562.pdf).

⁴⁴ See D. Flynn, "The ideal of migrant-friendly health care", in AIDS and Mobility Europe, *You can speak! How HIV-positive people with an uncertain residence status survive in Europe*, AIDS and Mobility Europe, Amsterdam, September 2006, p. 2 (<http://ws5.e-vision.nl/systeem3/images/WG%20IV%20-%20You%20can%20speak.pdf>).

⁴⁵ Refer to PICUM (2007b) and PICUM, *Undocumented Migrants' Health Needs and Strategies to Access Health Care in 17 EU Countries*, PICUM, Brussels, forthcoming in October 2010.

undocumented children very often do not receive them as their parents may be unaware of the availability or the necessity of childhood vaccinations.

In many countries pre-natal care is not available for undocumented women and they only seek medical attention in the last phase of their pregnancy or for childbirth. The lack of pre-natal screening jeopardises the health of both the mother and the child. Yet barriers such as fear of discovery prevent pregnant women from using their health care entitlements in countries where free maternity care is available.

Mental health problems are a very prevalent concern for undocumented migrants as access to adequate treatment and counselling services is very limited. Irregular migration is a traumatic process with numerous mental health implications for those involved. Many undocumented migrants have experienced multiple and chronic stress, which may have caused them to migrate or may have occurred during their often dangerous voyage, or developed while living a marginalised and impoverished existence in their country of destination. Undocumented migrants are highly exposed to exploitative conditions that exacerbate their susceptibility to systematic ill treatment, sexual abuse and psychological trauma.

Through PICUM's research it has become evident that mental health problems, such as severe depression, anxiety and psychosis, manifest themselves mainly in undocumented migrants who have been in an irregular status for longer periods of time. Stress and loss of hope, social isolation, fear of being discovered and deported, and a lack of knowledge regarding their rights are among the most frequent factors that trigger mental health problems. Many medical professionals stress the urgency of mental health care for undocumented migrants, while most EU member states do not grant access to adequate mental health services for undocumented migrants, including counselling.

Conclusions

International human rights instruments underline the right of every person to receive health care as a basic human right, despite their gender or administrative status. Contrary to the obligations under international human rights law, the national laws and practices in many EU member states do not abide by these obligations. As a result a high percentage of undocumented migrants do not access health care services. It is vital that, in accordance with international human rights law and legislation at the national level, fundamental human rights are not limited or denied to the most vulnerable on the basis of administrative status.

In addition to the lack of legal entitlements, undocumented migrants face many other obstacles that hinder their access to health care services. Many practical barriers continue to prevent undocumented migrants from gaining access to health care services, including barriers linked to procedures and administrative conditions, discrimination, language and cultural obstacles, medical fees and fear of discovery. In addition, practice shows that many undocumented migrants are usually unable to pay the high medical fees in those countries where they are requested to do so.

Improving access to health care for undocumented migrants is an urgent priority since the lack of access is proven to have serious consequences not only for undocumented migrants themselves, but also for public health in general. Indeed, the effectiveness of public health policies requires the participation of all residents in health care programmes to protect the well-being of all.

Policy recommendations

- 1) *Respect international human rights obligations.* The right to health care is recognised as a fundamental right of every human being in many international and European conventions, for example the UN Covenant on Economic, Social and Cultural Rights,⁴⁶ the European Social Charter (Art. 13) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 3), to name a few. Countries that are signatories to these conventions are obliged under international law to progressively guarantee that the right to the highest attainable standard of physical and mental health is enjoyed by all regardless of administrative status.
- 2) *Ensure implementation of entitlements and assume responsibility for health care provision for undocumented migrants.* States should guarantee that national health care entitlements for undocumented migrants are fully implemented and uniformly applied nationwide. National governments have the ultimate responsibility of providing health care to all. This obligation should not be fully delegated to civil society, which should only play a complementary and supportive role in facilitating undocumented migrants' access to public health care services. National governments should pay special attention to culturally competent service provision to vulnerable groups such as pregnant women, the mentally ill and undocumented migrants who are homeless.
- 3) *Ensure access to adequate information about health care services.* States should ensure that adequate information regarding entitlements and the health care system in general is available and accessible to all actors in the health care system (undocumented migrants, doctors, nurses, administrative personnel, etc.). Health care providers should also receive information and training on culturally competent ways to address the health needs of undocumented migrants.
- 4) *Detach health care from immigration control.* States should under no circumstances task health care professionals with the duty to report patients to the immigration authorities. Medical confidentiality should not be obliterated by direct or indirect reporting obligations.
- 5) *Take EU action for wider health care entitlements.* The European Commission has recognised migrants as one of the social groups most affected by health inequalities in its 2009 Communication on reducing health inequalities in the EU.⁴⁷ Yet undocumented migrants are not explicitly included in the actions targeted at reducing health inequalities within the member states of the EU. The EU should address the extreme vulnerability and health inequalities of undocumented migrants by explicitly including this group in its health policies.

⁴⁶ Refer to Art 12(1) and the Covenant's General Comment 14, para. 34, op. cit.

⁴⁷ See European Commission, Communication on Solidarity in Health: Reducing Health Inequalities in the EU, COM(2009) 567 final, Brussels, 20 October 2009 (<http://eur-lex.europa.eu/Notice.do?checktexts=checkbox&checktexte=checkbox&val=502712%3Acs&pos=1&page=1&lang=en&pgs=10&nl=1&list=502712%3Acs&hwords=&action=GO&visu=%23texte>).

5. Research projects by the European Union Agency for Fundamental Rights on undocumented migration

Adriano Silvestri

Introduction

The European Union Agency for Fundamental Rights (FRA) is an advisory agency of the EU. It was set up in March 2007 and is based in Vienna. The FRA helps to ensure that the EU and national governments respect people's fundamental rights. It does this by collecting evidence about the situation of fundamental rights across the EU. Based on such evidence it provides advice about how to improve the situation. Two of the FRA's projects focus on the fundamental rights situation of irregular migrants in the EU. The first project aims at providing a legal analysis of a number of issues covered in the Directive on Returns (2008/115/EC). The second project collects information on the situation of irregular migrants in the EU from national authorities, municipalities, various actors working with irregular migrants, and most importantly from migrants themselves. This paper draws on preliminary findings of these two projects.

The United Nations has estimated the number of international migrants in 2010 at over 200 million persons – thus comprising some 3.1% of the world's population.⁴⁸ Only 10-15% of them are estimated to be in an irregular situation.⁴⁹ In Europe, research undertaken by the Clandestino project indicates that between 1.9 and 3.8 million third-country nationals reside in the EU in an irregular manner.⁵⁰ Although the quality of available figures on irregular migration is still relatively poor, irregular migrants seem to be only a small proportion of the world's migrant population. As they lack legal status, however, they are most vulnerable to exploitation and discrimination in key areas of social life. While major efforts are underway to curb irregular migration, it would be desirable if more attention could be given to addressing the abusive situations that many irregular migrants face.

Irregular migrants also have human rights

Many of the rights enshrined in international human rights law are applicable to everybody, regardless of nationality or legal status. This is the case for numerous provisions in major, universal human rights instruments, including the 1989 Convention on the Rights of the Child, the 1966 International Covenant on Civil and Political Rights, the 1966 International Covenant on Economic, Social and Cultural Rights, and the 1965 International Convention on the Elimination of all Forms of Racial Discrimination. Some instruments of the International Labour Organisation are also applicable to all workers regardless of their nationality or legal status.⁵¹

⁴⁸ Refer to United Nations, Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2008 Revision*, United Nations, New York, NY, 2009 (<http://esa.un.org/migratiON/index.asp?panel=1>).

⁴⁹ See International Labour Organisation (ILO), *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report VI, International Labour Conference, 92nd Session, Geneva, 2004, p. 11, para. 37.

⁵⁰ See Clandestino, *Undocumented Migration: Counting the Uncountable, Data and Trends across Europe*, Clandestino Project, 23 November 2009 (<http://clandestino.eliamep.gr>).

⁵¹ This is in particular the case for ILO Convention No. 143 (1975) on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, which contains a number of provisions intended to ensure that immigrant workers enjoy a basic level of protection even when they have immigrated or are employed illegally and their situation cannot be regularised. Art. 9(1) of the Convention

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is the most important universal instrument relating to immigrant workers. Although at present none of the EU member states are party to the Convention, the provisions contained therein are to a large extent a compilation of rights already contained in the above-listed universal human rights instruments to which all EU member states are party.

In its part III, the 1990 Convention lists those human rights that are applicable to all immigrant workers and members of their families, irrespective of legal status. It includes, for example, the right to life, freedom from slavery, freedom of expression, protection from arbitrary or unlawful interference with privacy, family, home and correspondence, access to courts, non-discrimination as regards conditions of employment, the right to receive a certain degree of medical care and registration at birth.

At the EU level, many of the rights laid down in the Charter of Fundamental Rights relating to dignity, freedoms, equality, solidarity and justice are recognised as pertaining to everyone.⁵² The European Commission defined humane and dignified treatment of irregular immigrants and compliance with fundamental rights as one of the elements of the EU approach in the fight against irregular immigration of third-country nationals.⁵³ In 2008, it also stressed that measures to fight irregular immigration “shall fully respect the dignity, fundamental rights and freedoms of the persons concerned” and highlighted the need for “illegally residing third-country nationals [to] have access to services that are essential to guarantee fundamental human rights (e.g. education of children, basic health care)”.⁵⁴ The need to fully respect human rights was also expressed in early 2010 by the Justice and Home Affairs Council, when it adopted the Council Conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal immigration.⁵⁵

At the same time, legislative texts relating to irregular immigration adopted at the EU level have focused essentially on the prevention of unlawful entry and the effectiveness of removals. The protection of fundamental rights of irregular migrants has so far received only limited attention. The possibility to grant a temporary right to stay during court proceedings to victims of trafficking or to irregular migrants subject to particularly exploitative working conditions is limited to individuals who agree to collaborate with the authorities.⁵⁶ Art. 14 of the Returns Directive provides some minimum standards for the treatment of irregular migrants, including

ensures that immigrant workers who are illegally employed are not deprived of their rights with respect to the work actually performed and it guarantees equality of treatment for the worker and his/her family concerning rights arising out of past employment relating to remuneration, social security and other benefits.

⁵² Some rights, however (e.g. Art. 15 on the right to work or Art. 34 on social security and social assistance), are limited to legally residing third-country nationals, whereas the conditions of enjoyment of other rights, particularly those listed under ‘solidarity’, are subject to rules laid down by Union law and national law.

⁵³ See European Commission, Communication on Policy Priorities in the Fight against Illegal Immigration of Third-Country Nationals, COM(2006) 402 final, Brussels, 19 July 2006, at 2.8.

⁵⁴ Refer to European Commission, Communication on a Common Immigration Policy for Europe: Principles, Actions and Tools, COM(2008) 0359, Brussels, 17 June 2008, pp. 11 and 13.

⁵⁵ See Council of the European Union, Council conclusions on 29 measures for reinforcing the protection of the external borders and combating illegal, 2998th Justice and Home Affairs Council meeting, Brussels, 25 and 26 February 2010.

⁵⁶ See Council of the European Union, 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 L 261/19, 06.08.2004; see also Art. 13 of 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 L 168/24, 30.06.2009.

standards on access to education and health care, albeit limited to individuals in return proceedings.

Enjoyment of rights can be difficult

The human rights situation of irregular migrants in Europe, as well as their exposure to exploitation and abuse, has been documented in various reports and studies.⁵⁷ Yet so far there has been no comprehensive, EU-wide comparative study on the social situations of irregular immigrants.

Building on existing materials, the FRA plans to examine more comprehensively key aspects of the social situations of irregular immigrants in the EU in order to assess the extent to which their fundamental rights are respected and protected. Areas covered by the research include health, housing, education, social care, employment status and fair working conditions, and access to remedies against violations and abuse. Initial findings confirm that there are two kinds of obstacles that negatively impact on the enjoyment of fundamental rights by irregular immigrants. First, formal barriers exist whereby certain rights, such as those in relation to social assistance or access to health services beyond emergency treatment, can only be enjoyed by persons lawfully staying or residing in the country. Second, practical obstacles can discourage irregular migrants from approaching public service providers, including schools, medical facilities, courts or offices responsible for the registration of births, for fear of being identified as irregular and in consequence removed from the territory. Existing barriers result, for example, in persons in need of medical treatment not approaching health care providers.⁵⁸ By examining current problematic situations and documenting good practices, the FRA intends to give policy-makers and practitioners (ranging from European institutions and service providers to advocacy groups) evidence-based advice and practical suggestions to promote the rights of irregular migrants. In this context, preliminary findings indicate that the results of the research project will likely touch upon the following issues.

1) Persons in limbo

In addition to undetected irregular immigrants, there is a considerable number of persons whose presence is acknowledged by the authorities, but who cannot be deported, often as a result of technical obstacles. Their removal may have been suspended because of identification and documentation difficulties, an absence of viable return routes or humanitarian considerations. While their presence in the territory is officially acknowledged by the authorities, they are often not provided with lawful stay. Such individuals may be tolerated *de facto*, but find themselves in a legal limbo, sometimes for years. Without legal access to the labour market and with limited or no public assistance they are dependent on employment in an informal economy or on the support of charitable organisations or community members.

The transposition of Art. 14 of the Returns Directive, which provides for a set of minimum rights to be accorded to persons in removal proceedings, may address some of the most extreme

⁵⁷ See for example, Office of the High Commissioner for Human Rights, *Compilation of findings and observations by the United Nations human rights system relating to the human rights of migrants*, United Nations, New York, NY, 2006; Jesuit Refugee Service Europe, *Living in Limbo: Forced Migrant Destitution in Europe*, Jesuit Refugee Service Europe, Brussels, 2010; European Migration Network, *Illegally resident third-country nationals in EUMS: State approaches towards them, their profile and social situation*, European Migration Network, 2005; Médecins du Monde European Observatory on Access to Healthcare, *Access to health care of undocumented migrants in 11 European countries*, Médecins du Monde, Paris, 2009; and PICUM, *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe in 2006*, PICUM, Brussels, 2007, as well as several other thematic compilations by PICUM.

⁵⁸ See Médecins du Monde European Observatory on Access to Healthcare (2009, p. 10), *supra*.

shortcomings. Still, it remains to be seen whether the safeguards to be accorded on the basis of Art. 14 of the Returns Directive will take due account of applicable international obligations deriving in particular from the 1989 Convention on the Rights of the Child and the 1966 International Covenant on Economic, Social and Cultural Rights. Moreover, no guidance is available in EU law for ending situations of protracted non-removability. Too often, irregular migrants remain in a situation of legal limbo for years on end. The FRA finds that the treatment of irregular migrants who for technical or similar reasons cannot be removed from EU territory should be further examined. The research undertaken by the FRA should provide a solid scientific basis for the identification of policy responses for irregular immigrants, for whom return has not, after a reasonable period of time, been practically possible. Suggestions for practical policy responses should assist in ending protracted situations of legal limbo and contribute to legal certainty in Europe.

2) *Inappropriate detection practices*

Measures to detect irregular migrants may have the indirect effect of discouraging them from seeking access to basic rights, such as education or health care. These measures may include duties for service providers to record the personal details of irregular migrants and make these available to police authorities, or the patrolling or raiding of areas in or near service providers, such as schools, health care facilities and counselling centres that are regularly used by irregular migrants. As a result of the fear of being identified and reported to the police, irregular migrants avoid approaching public service providers. In response to this phenomenon existing practices will be reviewed by the FRA with a view to formulating pragmatic suggestions for police authorities on how to carry out their tasks in a manner that does not discourage irregular migrants from accessing basic services.

3) *Criminalisation of support activities*

Another occurrence is the criminalisation of an increasing range of support activities by private individuals. This includes, most typically, the provision of shelter to irregular migrants, but may also cover other offers of support. Existing practices do not exclude the possibility to punish individuals for actions taken purely on a humanitarian basis. The Facilitation Directive (2002/90/EC)⁵⁹ imposes on states the duty to provide for sanctions for persons who, for financial gain, intentionally assist an irregular migrant to reside in the EU. While it gives states the option of not punishing such action when it is carried out for a humanitarian purpose, the Directive does not exclude that humanitarian actions can also be subject to sanctions. An evaluation of the impact of the Facilitation Directive could be a first important step to determining whether the humanitarian clause contained in Art. 1.2 of this Directive should be made compulsory.

4) *Use of checks to uphold migrants' rights*

Indications from the research undertaken so far seem to suggest that controls carried out by the authorities at the place of work are not used to the full potential when it comes to protecting irregular migrants from abusive or exploitative working conditions. In its report on the implementation of the European Pact on Immigration and Asylum, the Commission recommends that member states should increase the number and effectiveness of inspections at workplaces in sectors where there is a particular risk of exploitation of illegally staying

⁵⁹ Refer to Council of the European Union, Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17, 05.12.2002.

workers.⁶⁰ The review of domestic law required to implement the Employers' Sanctions Directive (2009/52/EC)⁶¹ would be an opportunity for states to promote the use of inspections at the workplace as a tool to address situations amounting to exploitative working conditions, and not merely to identify employers disrespecting immigration regulations.

Conclusions

The legal study based on the Returns Directive as well as the social study on the situations of irregular migrants in the EU currently being undertaken by the FRA will hopefully stimulate debate on the need to address gaps in the enjoyment of fundamental rights by irregular migrants. Together with the efforts underway by other international and regional organisations, the forthcoming FRA publications (which are expected in late 2010 and early 2011) will aim at providing viable policy suggestions to address at least some of the fundamental rights challenges identified in the course of the research.

⁶⁰ See European Commission, *First Annual Report on Immigration and Asylum (2009)*, COM(2010) 214, Brussels, 6 May 2010, p. 4.

⁶¹ Refer to Directive 2009/52/EC of the European Parliament and of the Council, *op. cit.*

6. Access to housing for undocumented migrants

Decision of the European Committee of Social Rights in *Defence for Children International v. the Netherlands*

Gioia Scappucci

Introduction

On 4 February 2008, Defence for Children International (DCI) lodged a complaint (No. 47/2008) against the Netherlands before the European Committee of Social Rights (hereinafter ‘the Committee’), claiming that housing is a prerequisite for the preservation of human dignity.

DCI asked the Committee to consider legislation or practice that denies entitlement to housing to foreign nationals, even if they are on the territory unlawfully, contrary to the European Social Charter (Art. 31 – right to housing).⁶² It further alleged that a finding of violation of the right to housing gave rise to violations of other fundamental rights guaranteed by the European Social Charter (hereinafter ‘the Charter’).⁶³

The key challenge of the complaint was to ascertain whether the Committee would exclude from the scope *ratione personae* of the Charter those children unlawfully present on the territory of a state party, given that, as argued by the government of the Netherlands, the terms of para. 1 of the Appendix of the Charter limit such scope of 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 its decision on the merits of 27 October 2009, the Committee recalled that the restriction of para. 1 of the Appendix attaches to a wide variety of social rights and impacts on them differently (Complaint No. 14/2003, *FIDH v. France*, decision on the merits of 8 September 2004, § 30). The Committee further held that it should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake. Consequently, with regard to each alleged violation, it preliminarily had to determine whether the right invoked was applicable to the specific vulnerable category of persons concerned, i.e. children unlawfully present in the Netherlands. It also clarified that when ruling on situations in which the interpretation of the Charter concerns the rights of a child, it considers itself bound by the internationally recognised requirement to apply the principle of the best interests of the child.

As to the scope *ratione materiae* of the complaint, in light of the submissions made by the parties, the Committee observed that allegations concerning violation of rights other than that to housing were presented as subsidiary and were not sufficiently developed. It therefore considered that in substance the complaint concerned the following issues:

⁶² The European Social Charter guarantees fundamental rights and freedoms in the field of economic and social rights. Through a supervisory mechanism based on a system of collective complaints and national reports, it ensures that they are implemented and observed by states’ parties. The European Committee of Social Rights ascertains whether countries have honoured the undertakings set out in the Charter. This has been signed by all 47 member states of the Council of Europe and ratified by 43 of them. For more details, see the Council of Europe website (www.coe.int/socialcharter).

⁶³ All complaint case documents are public. For those concerning *DCI v. the Netherlands*, see Complaint No. 47/2008 (http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp).

- denial of access to housing of an adequate standard to children unlawfully present in the Netherlands (Art. 31§1);
- failure to prevent or reduce homelessness by not providing shelter to children unlawfully present in the Netherlands as long as they are in the Netherlands' jurisdiction (Art. 31§2);
- failure to take all appropriate and necessary measures designed to provide protection and special aid from the state to children unlawfully present in the Netherlands by denying them entitlement to shelter (Art. 17§1.c); and
- discrimination in access to housing against children unlawfully present in the Netherlands (Art. E read in conjunction with Arts. 31 and 17).

On denial of access to housing

States have the right under international law to control the entry, residence and expulsion of aliens from their territories (*mutatis mutandis* European Court of Human Rights, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A, No. 193, § 43 and European Court of Human Rights, *Beldjoudi v. France*, judgment of 26 March 1992, Series A, No. 234-A, § 74). The Netherlands is thus justified in treating children lawfully residing and children unlawfully present in its territory differently.

Nevertheless, states' interest in foiling attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a state's immigration policy must therefore be reconciled (*mutatis mutandis* European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, § 81).

Under Art. 31§1, temporary supply of shelter cannot be considered adequate and individuals should be provided with adequate housing within a reasonable period (*ERRC v. Italy*, Complaint No. 27/2004, decision on the merits of 7 December 2005, § 35 and *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 6 December 2006, § 34). Adequate housing under Art. 31§1 means a dwelling that is safe from a sanitary and health point of view, i.e. it must possess all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity and must also be structurally secure, not overcrowded and with secure tenure supported by the law (Conclusions 2003, Art. 31§1, France and *FEANTSA v. France*, Complaint No. 39/2006, decision on the merits, 5 December 2007, § 76).

The immigration policy objectives of states and their human rights obligations would not be reconciled if children, whatever their residence status, were denied basic care and their intolerable living conditions were ignored. As far as Art. 31§1 is concerned, the denial of adequate housing, which includes a legal guarantee of security of tenancy, to children unlawfully present on the state's territory, does not automatically entail a denial of the basic care needed to avoid people living in intolerable conditions. Moreover, to require that a party provide such lasting housing would run counter the state's aliens policy objective of encouraging persons unlawfully on its territory to return to their country of origin. Accordingly, children unlawfully present on the territory of a state party do not come within the personal scope of Art. 31§1.

On failure to prevent or reduce homelessness

Art. 31§2 is specifically aimed at categories of vulnerable persons. It obliges parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of emergency and longer-term measures, such as the provision of immediate shelter and care for the homeless as well as measures to help such individuals overcome their difficulties and to prevent them from returning to a situation of homelessness (Conclusions 2003, Italy, Art. 31 and *FEANTSA v. France*, Complaint No. 39/2006, decision on the merits, § 103).

The right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity. If all children are vulnerable, growing up in the streets leaves a child in a situation of outright helplessness. Therefore children would adversely be affected by a denial of the right to shelter. Children, whatever their residence status, come within the personal scope of Art. 31§2.

There is no legal requirement to provide shelter to children unlawfully present in the Netherlands for as long as they are in its jurisdiction. Moreover, according to section 43 of the Aliens Act 2000, after the expiry of the time limit fixed in the Act on the Central Reception Organisation for the Asylum-Seekers or another statutory provision that regulates benefits in kind, the aliens supervision officers are authorised to compel the vacation of property in order to terminate the accommodation or the stay in the residential premises provided as a benefit in kind.

Art. 31§2 is directed at the prevention of homelessness with its adverse consequences on individuals' personal security and well-being (Conclusions 2005, Norway and *ERRC v. Italy*, Complaint No. 27/2004, decision on the merits, § 18). Where the vulnerable category of persons concerned are children unlawfully present on the territory of a state as in the instant case, preventing homelessness requires states to provide shelter as long as the children are in its jurisdiction. Furthermore, alternatives to detention should be sought in order to respect the best interests of the child.

As to living conditions in a shelter, under Art. 31§2 they should be such as to enable living in keeping with human dignity (*FEANTSA v. France*, Complaint No. 39/2006, decision on the merits, §§ 108-109).

Under Art. 31§2 states' parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and must make alternative accommodation available (Conclusions 2003, France, Italy, Slovenia and Sweden, Art. 31§2, as well as *ERRC v. Italy*, Complaint No. 27/2004, decision on the merits, § 41, *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the merits, § 52, *ATD v. France*, Complaint No. 33/2006, decision on the merits of 5 December 2007, § 77 and *FEANTSA v. France*, Complaint No. 39/2006, decision on the merits, § 81). Accordingly, since in the case of unlawfully present persons no alternative accommodation may be required by states, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness – which is contrary to the respect for their human dignity.

States' parties are required, under Art. 31§2, to provide adequate shelter to children unlawfully present on their territory for as long as they are in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children. As this is not the case, the situation in the Netherlands constitutes a violation of Art. 31§2.

On failure to take measures to provide protection and special aid

Art. 17§1.c requires that states take the appropriate and necessary measures to provide the requisite protection and special aid to children temporarily or definitively deprived of their family's support. As long as their unlawful presence in the Netherlands persists, the children at stake in the instant case are deprived of their family's support in that by law (section 10 of the Aliens Act) they may not claim entitlement to the benefits or facilities that would *inter alia* secure them shelter.

In this respect, the obligations related to the provision of shelter under Art. 17§1.c are identical in substance to those related to the provision of shelter under Art. 31§2. Insofar as the Committee has found a violation under Art. 31§2 on the ground that shelter is not provided to children unlawfully present in the Netherlands for as long as they are in its jurisdiction, the Committee also finds a violation of Art. 17§1.c on the same ground.

On discrimination

The principle of equality, which is reflected in the prohibition of discrimination (Art. E), means treating equals equally and unequals unequally (*Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 52). Thus states' parties may treat persons lawfully or unlawfully present on their territories differently. Yet in so doing, human dignity, which is a recognised fundamental value at the core of positive European human-rights law, must be respected.

The question, as submitted by the complainant organisation, did not concern equality of treatment of children unlawfully present in the Netherlands compared with children lawfully resident. The question was instead whether such a category of persons could claim entitlement to rights under the Charter and under what conditions. Art. E does not serve this purpose and is thus not applicable in the instant case.

Conclusions

In accordance with the case law of the European Committee of Social Rights on access to housing with regard to children, irrespective of their residence status, the following conclusions are drawn:

- First, the immigration policy objectives of states are in line with their human rights obligations under the European Social Charter only if children are guaranteed dignified living conditions.
- Second, Art. 31§2 of the European Social Charter is directed at the prevention of homelessness with its adverse consequences on individuals' personal security and well-being. Where the vulnerable category of persons concerned are children unlawfully present on the territory of a state, preventing homelessness requires states to provide shelter as long as the children are in its jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children.
- Third, living conditions in a shelter should be such as to enable living in keeping with human dignity. Eviction from shelter should be banned, as it would place the persons concerned, particularly children, in a situation of extreme helplessness – which is contrary to the respect for their human dignity. Alternatives to detention should be sought in order to respect the best interests of the child.

7. Policy recommendations

Sergio Carrera, Elspeth Guild and Massimo Merlino

On the basis of some of the results put forward by the CEPS report, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*, and the policy recommendations outlined by each of the contributions making up this publication, the following final recommendations are put forward.

EU policy should recognise that undocumented migrants are among the most vulnerable groups in the EU and that they are holders of rights. People, irrespective of their immigration categorisation, must be treated first and most importantly as the holders of human rights in accordance with the obligation to do so inherent in the EU Charter of Fundamental Rights and EU member states' obligations under the UN Bill of Rights. The EU should adopt a common framework of protection for the rights of all third-country national (TCN) workers. A common EU status of undocumented migrants should be developed, which should be firmly rooted in a rights-based approach to migration and focus on overcoming the practical obstacles undocumented migrants face in access to the rights of health care, education, housing and fair working conditions across the EU. The European Commission should propose a directive establishing a common set of rights for all migrant workers in the EU, ensuring, inter alia, equal pay for equal work, decent working conditions and collective organisation. The European Parliament should put pressure on the Council to prioritise this policy measure in the EU's decision-making processes.

Furthermore, EU measures and policy discourses are silent on the rights of TCNs who work in the EU without authorisation. The EU should shed light on this social phenomenon, and foster an ethical discourse (by politicians and the media) highlighting their vulnerability and need for protection. The EU should also promote the adoption and correct implementation by member states of existing international and regional legal frameworks on human rights that protect the social, economic, civic and political rights of undocumented migrants. Socio-economic entitlements for undocumented migrants should be fully and uniformly applied across the EU. In particular, the EU should put forward strategies for promoting ratification by all EU member states of the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families.

In addition, the EU should develop institutionalised structures to foster a regular dialogue with civil society, social partners, and local and regional authorities (in particular practitioners taking part in informal EU networks and the platforms of local and regional authorities). The aim of such dialogue should be to discuss matters related to labour immigration policy at the European level, including those covering (or relevant to) undocumented workers, and to evaluate (impartially and objectively) their added value, effectiveness and impact on local and social cohesion. The negative implications of the increasing criminalisation of migration and solidarity on undocumented migrants' access to fundamental and basic (socio-economic) rights should also be a special issue for attention. As proposed by the European Commission's June 2009 Communication, "An Area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment", a permanent (consultative) European platform for dialogue on migration should be established for these purposes. Such a platform could play an important role in channelling the experiences of and lessons learned by practitioners in current and future EU policy-making processes on immigration policy. The Committee of the Regions (in close

partnership with the European Economic and Social Committee) could be a venue for the establishment of the platform in cooperation with the European Commission.⁶⁴

Finally, the EU should adopt a **four-point plan to reduce irregularity in Europe**:

- 1) Member states should regularise those immigrants who cannot be returned within three months. The most vulnerable group of undocumented persons in the EU is made up of those who cannot be returned to their country of origin on account of the violence and unrest there. The main countries of origin of asylum seekers in the EU are among the same states of origin of these persons, such as Somalia, Afghanistan and Iran. At the same time, the reluctance of some member states to grant protection status to individuals in these situations results in their applications for asylum being rejected while they cannot be expelled because of the conditions in the country of origin. Some member states argue that it is counterproductive to give documentation to these persons as the situation in their country of origin may change from day to day (for instance, in the event of a surge of foreign military support for the government) and thus they may be able to expel them quickly if they remain undocumented. Sadly, this argument does not stand the test of history. These countries have been among the top ten countries of origin of asylum seekers in the EU for more than ten years. There is no sign that things are changing for the better in most of them (or indeed in any of them). It is inhuman to leave individuals in a state of limbo in which they have no status and yet even the state authorities accept that they cannot expel them. Where more than three months passes after the final rejection of a protection claim (including any appeal rights exercised) and the state has not made realistic and achievable arrangements for the expulsion of the individual, the individual should be entitled to a work and residence permit so that he or she comes out of the undocumented category. In addition, there is no point giving persons in such situations work and residence permits valid for only a month or two. A period of 12 months is the minimum the individual needs to be able to carry on a normal life and find employment. If the state cannot expel then it must treat the individual with dignity and not subject him or her to humiliating conditions such as weekly reporting to the police. If after 12 months the state authorities still cannot show a realistic plan for expulsion within three months then the individual should be entitled to a three-year work and residence permit.

The best strategy for the EU and member states in respect of undocumented migration is to assist all individuals to avoid falling into the category. As state administrations hold the power to issue documents and regularise the status of individuals, they need to be encouraged to do so as quickly and effectively as possible. Our research has revealed that many individuals live in an undocumented state because state officials fail to deal in a timely way with their applications and dossiers. Applications for the documentation of residence rights, for instance on the basis of family relationships that are well documented and beyond question, are not dealt with by officials who excessively delay the issue of documents. In the meantime the individuals live in an undocumented state in a world where having documents has become an increasing necessity even to carry out daily life. One interesting practice, which used to occur in the Netherlands and which concentrated the minds of officials on the need to deal with applications in a timely manner, is the imposition of a short time limit of three months, after which there is an automatic presumption that the application has been granted and the individual is entitled

⁶⁴ This recommendation was put forward by S. Carrera and G. Pinyol in *Local and Regional Authorities in the Future Area of Freedom, Security and Justice: Towards a Multigovernance Strategy for the Stockholm Programme?*, Study commissioned by the Commission for Constitutional Affairs, European Governance and the Area of Freedom, Security and Justice of the Committee of the Regions, Brussels, 2009.

immediately to documents. Without such tight time limits, lives are blighted by long delays and living in irregularity with uncertain access to work and social rights.

- 2) Member states should have an obligation to deal with applications for the renewal of work permits in a timely manner and to enact legislation guaranteeing that between the application and the administrative decision, the individual has access to lawful employment and appeal rights.

All too often, laws at the member state level have been passed that make residence and work after the expiry of work and residence permits irregular. Thus employers become liable for fines if they continue the employment of workers who are awaiting the extension or renewal of the work and residence documents. The problem is that it is administrative delay and incompetence that have resulted in the individual or the business not receiving the extension or renewal of the work and residence documents in a timely manner before the expiry of the existing one. This situation is untenable as it catapults individuals into an undocumented state through no fault of their own or that of their employer. Moreover, this problem is becoming ever more important as access to permanent residence is progressively restricted, such that TCNs are for longer and longer periods living on the basis of temporary work and residence permits that need to be renewed regularly. The consequence is the fabrication of undocumented status. An interesting example in the UK was that where an application for an extension or renewal of a work and residence permit was submitted before the existing one expired, by operation of law the individual's right to work and reside was extended until such time as there was a final decision on the extension application. Thus the individual received acknowledgement that the application had been made in a timely manner and that acknowledgement constituted a work and residence permit limited to the period of the consideration of the application by the state authorities. Such practices clearly have the beneficial effect of diminishing the number of persons in undocumented statuses and provided certainty to employers regarding the continuity of workers' status.

- 3) Facilitated mechanisms for the issue of labour permits, particularly for those sectors most affected, should be adopted. It is apparent that there are many sectors of the EU economy where the demand for work exceeds supply at the levels of pay available. One of the most pressing is care of the elderly. Across Europe, the elderly are desperate to remain living in their own homes rather than having to live in very expensive, sheltered accommodation. Multigenerational dwellings that include the elderly are becoming ever more rare, as families no longer have sufficient space even for themselves and their children let alone for their parents to live with them. Increasingly, however, the elderly can only remain living in their own homes if there is sufficient support available in the form of home care staff who visit regularly and carry out a series of tasks like shopping and washing for the elderly person. Staff in this sector is in short supply in many member states yet work permits for TCNs to carry such work out are, by and large, not provided for by law. One argument used is that the wages and working conditions should be improved, after which there would be workers for these jobs. National minimum wage levels and the EU Working Time Directive (2003/88/EC)⁶⁵ provide the basis for job regulation in the EU. In the sector of care for elderly, as the cost most frequently falls on the individual and his or her family, the capacity to pay more can be quite limited. The consequence of the reality squeeze is that many persons working in this sector are undocumented although critical to the well-being of many EU citizens in their later years.

⁶⁵ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003.

- 4) Access to public health facilities is of vital importance for the well-being of the EU's people. Everyone present in the EU irrespective of their immigration status must have access to primary health care free of charge if necessary in order to protect the good health of everyone and reduce risks such as epidemics. The right to the highest attainable standard of physical and mental health to be enjoyed by all regardless of administrative status should be properly ensured and properly implemented across the EU. The EU should address the vulnerability and inequalities faced by undocumented migrants in their access to the right to health care by explicitly including this group in its various policy strategies.

Contributors

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Appendix. Conference programme

Undocumented Migrants and the Stockholm Programme: Assuring Access to Rights?

9 March 2010, CEPS, Place du Congrès 1, Brussels

9.30 – 11.15: UNDOCUMENTED MIGRANTS AND RIGHTS IN THE STOCKHOLM PROGRAMME

- **Chair:** Elspeth Guild (CEPS)
 - Sergio Carrera & Massimo Merlino (CEPS)
 - Jesús Marinas (Spanish presidency)
 - Giulia Amaducci (European Commission, DG Research)
 - Michele LeVoy (PICUM)
- Open Discussion

11.30 – 13.00: ACCESS TO LABOUR RIGHTS FOR UNDOCUMENTED WORKERS

- **Chair:** Nele Verbruggen (King Baudouin Foundation)
 - **Rapporteur:** Irina de Sancho Alonso (ETUC)
 - David Joyce (Irish Congress of Trade Unions)
 - Samuel Engblom (the Swedish Confederation for Professional Employees)
 - **Discussant:** Tomasz Ostropolski (European Commission, DG JLS)
- Open Discussion

13.00 – 14.00: Lunch

14.00 – 15.30: IRREGULAR MIGRATION AND THE ROLE OF LOCAL AND REGIONAL AUTHORITIES

- **Chair:** Sergio Carrera (CEPS)
 - **Rapporteur:** Dirk Gebhardt (EUROCITIES)
 - Henk Vis (GGD Rotterdam-Rijnmond)
 - Tom Balthazar (City of Ghent)
 - Gloria Piaggio (City of Genoa)
 - **Discussant:** Karolina Dybowska (EESC)
- Open Discussion

15.45 – 17.15: ACCESS TO HEALTH CARE FOR UNDOCUMENTED MIGRANTS

- **Chair:** Michele LeVoy (PICUM)
 - **Rapporteur:** Kadri Soova (PICUM)
 - Benoît Blondel (Médecins du Monde)
 - Anne Sjogren (Rosengrenska Foundation)
 - Paul Pace (Jesuit Refugee Service, Malta)
 - **Discussant:** Antonio Chiarenza (Local Health Authority of Reggio Emilia)
- Open Discussion

17.15 – 18.00: ROUND UP CONCLUSIONS FROM THE RAPPORTEURS

- **Chair:** Michele LeVoy (PICUM)
- Kadri Soova (PICUM)
- Dirk Gebhardt (EUROCITIES)
- Irina de Sancho Alonso (ETUC)

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- European Climate Platform (ECP)
- European Credit Research Institute (ECRI)
- European Network for Better Regulation (ENBR)
- European Network of Economic Policy Research Institutes (ENEPRI)
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