

Rights of Accompanied Children in an Irregular Situation

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EXECUTIVE SUMMARY

Member states across the European Union have been progressively criminalising migration and implementing restrictions on access to basic social rights for irregular migrants. Due to the increasing numbers of children arriving unaccompanied to Europe and their particular vulnerabilities, policies and systems to take charge of separated children are being put in place. They remain in their infancy, or indeed entirely unimplemented in many EU countries. At the same time, the focus on separated children in the policy and public debates around migrating children has also been accompanied by almost a complete lack of consideration of children who are with their parents or other caregivers. Families with children in an irregular migration situation are subjected to the same restrictive policies on irregular migration without due consideration of the best interests of the child. The impact of such measures on children is entirely neglected.

The analysis in this paper demonstrates that the best interests of the child are regularly superseded by migration control interests that result in the restriction of basic social rights for children in an irregular migration situation. Undocumented children are often excluded from the general systems for protecting child rights and subjected to the same immigration control measures as their parents. Where children are protected by the state, it is sometimes done at the expense of their right to family life, by separating children from their families. This creates a tension between the right to family life and access to other basic rights, and contradicts the best interests of the child.

This policy approach contradicts EU member states' obligations to protect the best interests of the child and their basic civil and social rights, as enshrined, for example in the UN Convention on the Rights of the Child. There is a concerning lack of visibility of these children and how they are affected by policies on irregular migration - they frequently live in extremely precarious situations with very limited access to basic social rights.

The core issue is the lack of separation between service provision and immigration control, whether in law, or in practice, due to contradictory provisions and heavy-handed immigration enforcement or lack of awareness on the part of civil servants what their duties are towards both undocumented migrants and immigration authorities. Tackling this issue is of paramount importance in order to improve access to basic social rights for children in an irregular migration situation. A firewall between public service provision and immigration control must be erected, in law, and in practice, through the issuing of clear guidance for service providers, immigration control personnel, and families in an irregular migration situation.

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PART 1 - INTRODUCTION

1. INTRODUCTION

The Lisbon Treaty committed the European Union to protecting the rights of the child in both its internal and its external policy. The Stockholm Programme and the Charter of Fundamental Rights of the European Union both clarify that the principle of the best interests of the child – a fundamental principle of the UN Convention on the Rights of the Child – is a core principle of the European Union. This paper addresses how that principle is being applied in the context of irregular migrant children – with a focus on those living with their families.

The European Union has reiterated its intention to “fight” irregular migration through various directives, readmission agreements, and the Stockholm Programme, which outlines its agenda on citizenship, justice, security, asylum and immigration from 2010-2014.¹ The Stockholm Programme clearly signals the approach by juxtaposing fundamental rights and justice on the one hand, and migration and asylum on another. While violence against women, the protection of children and justice enforcement are all considered in the context of “citizens’ rights” within the document, seasonal workers, unaccompanied children and asylum seekers come under the chapter on “internal security.” Notably, the segment on “proactive policies for migrants and their rights” essentially limits “fair treatment of third country nationals” to those who “reside *legally* on the territory” (our emphasis) while continuing to “combat illegal immigration”.² There is growing concern among civil society and front-line service providers that this framework, which intends to consolidate EU Member State policy, is too disconnected from the realities regarding integration and migration, and risks becoming increasingly incongruent with the EU’s founding principles of justice and human rights. Alongside increased border surveillance, policies to return migrants to their countries of origin and sanctions for employers who hire undocumented workers, Member States across the European Union have been implementing progressive restrictions on access to basic social rights for irregular migrants.

Due to the increasing numbers of children arriving unaccompanied to Europe and their particular vulnerabilities, and revelations about the prevalence of cases of human trafficking, these issues have begun to receive much needed attention over the last few years.³ Policies and systems to take charge of separated children and to identify and care for victims of trafficking are being put in place, yet they remain in their infancy, or indeed entirely unimplemented in many EU countries. At the same time, the focus on separated children and victims of trafficking in the policy and public

¹ European Council “The Stockholm Programme – An open and secure Europe serving and protecting citizens”, (2010/C 115/01, 4.5.2010) available online at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF>

² Article 6.1.6. of the Stockholm Programme, Ibid

³ EU Action Plan on Unaccompanied Children 2010-2014 (COM(2010)213 final, Brussels, 6.5.2010); European Parliament Resolution on the Stockholm Programme of 25th November 2009 (available online at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0090+0+DOC+XML+V0//EN>); the specific provisions for unaccompanied children included in EU asylum legislation (e.g. appointment of guardians, minimum standards for access to education, health care and accommodation).

debates around migrating children has also been characterised by almost a complete lack of consideration of children who are with their parents or other caregivers. There is a concerning lack of visibility of these children and how they are affected by policies on irregular migration - they frequently live in extremely precarious situations with very limited access to basic social rights.

Families with children in an irregular migration situation are subjected to the same restrictive policies on irregular migration without due consideration of the best interests of the child. On the contrary, migration control tends to take priority over child protection, so much so that the impact of such measures on children is entirely neglected.

Children are rarely treated as individuals in immigration and asylum applications, and often their best interests are not appropriately considered even in questions of family unity, when they should be the paramount consideration. Undocumented children are often excluded from the general systems for protecting child rights and subjected to the same immigration control measures as their parents. Where children are protected by the state, it is sometimes done at the expense of their right to family life, by separating children from their families. This creates a tension between the right to family life and access to other basic rights, and contradicts the best interests of the child.

This policy approach contradicts EU member states' obligations to protect the best interests of the child and their basic civil and social rights, as enshrined, for example in the UN Convention on the Rights of the Child. There is a concerning lack of visibility of these children and how they are affected by policies on irregular migration - they frequently live in extremely precarious situations with very limited access to basic social rights.

Despite the numerous explicit and legally binding international and regional instruments that guarantee children access to their basic civil and social rights, they still face numerous barriers to exercising these rights in Europe. National legislation often falls short of these standards, and even when legal entitlements exist, practical barriers often make the laws ineffective.

This paper provides a brief analysis of the key issues facing children in an irregular migration situation. Firstly, the scope of and lack of data for "children in an irregular migration situation" will be looked at in more detail (Section 1.1 and 1.2). Part 2 presents the relevant legal frameworks - the relevant international and regional human rights legal framework will be outlined (Section 2), followed by the consideration of the best interests of the child in migration decisions (Section 3) and the situation regarding access to general systems for protecting child rights (Section 4). In Part 3, access to basic civil and social civil rights in both law and practice will be examined, specifically, access to birth registration (Section 5), education (Section 6), health care (Section 7) and housing (Section 8), with the key issues highlighted in each case.

Part 4 of the paper concludes that the best interests of the child are regularly superseded by migration control interests that result in the restriction of basic social rights for children in an irregular migration situation. Children with an irregular migration status are not adequately protected as children, first and foremost. It also highlights the pressing need for permanent and long-term mechanisms for children to regularise their status (Section 9.1). Finally, some key recommendations are proposed (Section 9.2).

1.1. Who are children in an irregular migration situation?

“Children in an irregular migration situation” refers to children whose lives are affected by an irregular migration status.

This is a diverse group. It includes children whose immigration status is irregular - “undocumented children”.⁴ The parent(s) or other caregiver(s) of these children may also be undocumented, for example, those who have entered irregularly or overstayed residence permits or visas as a family. The parent(s) or other caregiver(s) may also have regular migration status, for example, when children come to Europe to be reunited with their family but do not fall under the official family reunification schemes.⁵ Children who are born in Europe may also be undocumented, because their parents are undocumented.

Children in an irregular migration status may also be children whose own migration status is regular, but whose parent(s) or caregiver(s) are undocumented migrants. For example, some children gain citizenship through one parent or birthright citizenship laws. In some countries, such as France and Ireland, children are not required to have any documentation until the ages of 18 and 16 respectively. Therefore, in these countries there is no such thing as an “undocumented child”. However, they are still affected by the irregular migration status of their parents.

Children in an irregular migration situation also include those whose families are ‘not removable’, in that their deportation has been suspended, due, for example, to international law or humanitarian considerations, or to technical obstacles. In some countries, this status is formalised with documentation in certain circumstances (e.g. Germany)⁶. In other countries, no documentation is provided in recognition of the situation, and families remain completely undocumented (e.g. the UK).⁷ In either case, access to basic social rights is still often restricted, and the suspension of deportation is only temporary, but can nonetheless, cause situations of protracted irregularity.⁸

Undocumented children may also be sent by their families to Europe in search of better conditions, or have run away, but stay outside of the reception systems for unaccompanied children, and are

⁴ In this paper “irregular” and “undocumented” are used synonymously.

⁵ For example, because the family does not meet the criteria for family reunification, such as the minimum income or the nuclear family definition, or has other difficulties with the application process that mean they avoid the formal procedure or else reside irregularly in the meantime, such as the need to submit applications from abroad and long delays for applications to be processed.

⁶ For example, in Germany, there is a formal ‘tolerated’ status, with people granted a ‘*Duldung*’ or temporary toleration permit. This only grants restricted access to basic rights, such as health care. For more information, see e.g. European Stability Initiative, “Cutting the lifeline: Migration, Families and the Future of Kosovo”, 18 September 2006, Berlin – Istanbul, available online at: http://www.esiweb.org/pdf/esi_document_id_80.pdf; Verena Knaus and Peter Widmann et al., “Integration Subject to Conditions: A report on the situation of Kosovan Roma, Ashkali and Egyptian children in Germany and after their repatriation to Kosovo”, UNICEF Kosovo, 2010, available online at: http://www.unicef.org/kosovo/RAEstudy_eng_web.pdf

⁷ For more information, see e.g. Keßler, S. & Schöpf, M. (2010) “Living in Limbo: forced migration destitution in Europe”, Advocacy Network on Destitution, Brussels: Jesuit Refugee Service

⁸ The issue of protracted irregularity will be considered in the report by the European Union Fundamental Rights Agency, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report*, to be launched at the Fundamental Rights Conference November 2011 in Warsaw.

therefore alone. Some children are trafficked to Europe, either alone or with their families, and may also be undocumented.

1.2. Lack of data on the scale of the issue

The presence of children in an irregular migration situation in Europe is a varied and complex reality which is difficult to define conclusively.⁹ As with all undocumented migrants, undocumented children may find their migration status transient, changing due to a visa expiring, a claim for international protection being rejected, or on the other hand, a status being granted (for example, a child may qualify for regularisation based on residence after a number of years). Virtually no statistics or official data exist for these children in Europe.

Despite the political attention on irregular migration, estimates of numbers of undocumented migrants in Europe are often vague and of unclear origin. Data is often available on migrants apprehended and subject to enforcement – e.g. arrests at border control points, numbers in immigration detention, and return figures (through voluntary programmes or enforced) - but is of differing reliability and not comparable between European Union Member States. Furthermore, it is not a reliable indication of the number of irregular migrants. This is even more the case for undocumented children. On the national level, even if attention is given to the registration of separated children (and then often only those who seek asylum), little or no attention is given to undocumented children with their families, and practice varies regarding whether they are recorded as individuals, as dependents, or at all.

It is possible to look at the percentage of children in apprehension figures to give some indication of the percentage of children in the total irregular migrant population, but, this does not provide a true indication due to concerns about reliability, comparability and accuracy. In 2008, children averaged 8.5 percent of irregular migrants apprehended in 25 EU countries.¹⁰

The European Commission DG Research CLANDESTINO project began in 2009 to address the lack of reliable data on irregular migration in Europe in general. Using scientifically elaborated methodology,¹¹ it provides an inventory and a critical appraisal of existing data and estimates on undocumented migration stocks and flows in selected Member States. It estimated that there are between 1.6 and 3.8 million undocumented migrants in the European Union.¹² Regarding children,

⁹ A October 2011 report of the Council of Europe Parliamentary Assembly stated that “The rapporteur is at a loss to estimate the number of undocumented migrant children in Europe.” See Council of Europe, “Undocumented migrant children in an irregular situation: a real cause for concern”, Council of Europe Committee on Migration, Refugees and Population, Doc. 12718, Strasbourg, 16 September 2011, para 9, available online at:

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc11/EDOC12718.htm>

¹⁰ Eurostat, Enforcement of Immigration Legislation Statistics (extracted 21/10/10) and calculations by ICMPD, personal correspondence (10/10/2011)

¹¹ Analysis of methodological issues involved in the collection of data, the making of estimates of undocumented migration and their use by CLANDESTINO can be found in Michael Jandl et al, “Report on methodological issues”, November 2008, available online at: http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report-on-methodological-issues_final12.pdf

¹² Anna Triandafyllidou, “CLANDESTINO Project Final Report”, November 2009, p.11, available online at: http://clandestino.eliamep.gr/wp-content/uploads/2010/03/clandestino-final-report_-november-2009.pdf

estimates considered to have medium quality¹³ reliability were only found for the United Kingdom (UK) and for Greece.

A 2009 estimate for the UK found between 44,000 – 144,000 (central estimate: 85,000) UK-born undocumented children¹⁴ out of a total of 417,000 – 863,000 (central estimate: 618,000) undocumented migrants. It also estimated that 20-25% of undocumented migrants were under the age of 18.¹⁵ Based on these figures, a 2011 estimate from Sigona and Hughes at the University of Oxford gives a total of 155,000 undocumented children in the UK (of which over 85,000 are UK-born).¹⁶

To compare this to numbers of separated children is not directly possible, as figures are not available for the total number of separated children in the UK – only for those who seek asylum. In 2008, 4,285 unaccompanied children arrived in the UK and claimed asylum. A further 1,400 young people applied for asylum and had their age disputed.¹⁷ Although this is not an indication of the number of separated children in total, as some do not claim asylum, it gives some idea of scale.

In Greece there were an estimated 26,314 undocumented children in 2007.¹⁸ In 2009, there was debate around granting citizenship to children who were who were born in Greece to migrant parents or who had arrived very young and had received basic education in Greek schools. Children would be eligible even if their parents were undocumented. The proposals were expected to affect about 250,000 children (including regular and irregular migrant children).¹⁹

¹³ Due to lack of empirical foundation for crucial assumptions (Gordon et al., “Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK”, GLAEconomics, 2009, pp. 46-48, available online at: http://www.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-report.pdf) (Hamburg Institute of International Economics (HWWI), “Stocks of Irregular migrants: Estimates for United Kingdom”, HWWI Database on Irregular Migration, 2009, available online at: www.irregular-migration.hwwi.de/typo3_upload/groups/31/3.Database_on_IrregMig/3.2.Stock_Tables/UnitedKingdom_Estimates_IrregularMigration_Nov09.pdf

¹⁴ Number of children born to irregular migrant couples between 2001 and 2007, based on women-child ratio for main sending countries for irregular migration derived from the Labour Force Survey 2007 (HWWI, Ibid.)

¹⁵ Gordon et al., “Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK”, GLAEconomics, 2009, p.40, available online at: http://www.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-report.pdf

¹⁶ Sigona & Hughes, “Policy Primer: Irregular Migrant Children and Public Policy”, *The Migration Observatory and the University of Oxford*, 2010, p.4, available online at: <http://migobs.nsms.ox.ac.uk/sites/files/migobs/Irregular%20Migrant%20Children%20Policy%20Primer.pdf>

¹⁷ Brownlees & Finch, “Levelling the playing field: A UNICEF UK report into provision of services to unaccompanied or separated migrant children in three local authority areas in England”, *UNICEF*, 2010, p.8, available online at: <http://www.unicef.org.uk/Documents/Publications/levelling-playing-field.pdf>

¹⁸ CLANDESTINO country expert estimate based on residual method: Third country national school and birth register data 2006 minus estimate for regularly resident children under 18 years (Hamburg Institute of International Economics (HWWI), “Stocks of Irregular migrants: Estimates for United Kingdom”, HWWI Database on Irregular Migration, 2009, available online at: www.irregular-migration.hwwi.de/typo3_upload/groups/31/3.Database_on_IrregMig/3.2.Stock_Tables/UnitedKingdom_Estimates_IrregularMigration_Nov09.pdf

¹⁹ Renee Maltezou, “250,000 migrant children to become Greek citizens”, *Times of Malta* (Reuters), 4 November 2009 (available online at: <http://www.timesofmalta.com/articles/view/20091104/world-news/greece-to-make-250-000-migrant-children-citizens.280268>).

The other countries analysed in the CLANDESTINO project had data with low quality of reliability, mostly being based on apprehension figures or using the percentage of children in the total foreign born or regularly residing migrant populations, or had no data at all.

Another source of data which can be interesting to consider are figures for permanent regularisation programmes where family reasons are central considerations, as is often the case in Austria, Belgium, France, Spain, Sweden and the UK. For example, between 2002 and 2006, more than 85,000 people were regularised in France due to personal and family reasons.²⁰ In Spain, the three criteria to qualify for regularisation under the 'arraigo social' mechanism are a minimum length of residence, employment and family reasons. 20,000 people were regularised under this mechanism in 2006.²¹ It is not possible to know how many undocumented children are living with their families in Europe from these figures, but they can give some idea of the number of families in an irregular migration situation, who apply for regularisation through these programmes. Nonetheless, to develop adequate policy responses for undocumented children, alternative sources of data need to be explored, and data collected more consistently in order to allow for EU level estimates.

PART 2 – LEGAL FRAMEWORKS

2. INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORKS PROTECTING THE RIGHTS OF CHILDREN

The rights of children, regardless of immigration status, are protected in several legally binding international and European regional laws. Their rights are protected along with all other human beings in the body of human rights legislation, and particularly, as children, in the UN Convention on the Rights of the Child (CRC).

2.1. International Human Rights Laws

The UN Convention on the Rights of the Child (CRC) is the most important international legal text on children's rights and has been ratified by all EU Member States.

As well as specific provisions for access to a broad range of social, economic and cultural rights, the CRC includes four basic principles. One of the most important is the primacy of the best interests of the child. The CRC sets out that:

²⁰ Albert Kraler (2009), "Regularisations: A misguided option or part and parcel of a comprehensive policy response to irregular migration?", *IMISCOE Working Paper*, p.28, available online at: <http://dare.uva.nl/document/138178>

²¹ OECD, "International Migration Outlook. Annual Report 2008", Paris: OECD c.f. ICMPD, personal correspondence (10/10/2011).

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” (Article 3.1)

In certain considerations, the best interests of the child should be the paramount consideration, for example, in any situation involving the separation of a child from his or her parents.²² The Committee on the Rights of the Child has made clear that interests in migration control cannot override considerations of the best interests of the child.²³

The principle of ‘non-discrimination’ is a basic principle of international law and is reiterated clearly in the CRC. The Committee on the Rights of the Child has explicitly stated that this means that the CRC applies regardless of immigration status.²⁴ Therefore, if the CRC is properly implemented, undocumented children are guaranteed equitable treatment, access and protection as all children.

The CRC also sets out the right to birth registration (Article 7 (1)).²⁵ The right to birth registration is intrinsically linked to the right to a legal identity and the right to nationality. It is a right conferred to individual children – it is not dependent in any way upon the status of their parents, and must be ensured for all children without discrimination.

Specific provisions of the CRC stipulating access to basic social rights include (text in Annex A):

- The right to education (Article 28, see also Article 29)
- The right to health care (Article 24 (1), see also Articles 25 and 39)
- The right to housing (Article 27 (1), (3))

²² Article 9 of the UN Convention on the Rights of the Child states that separation, against the child’s wishes, must only occur when ‘necessary for the best interests of the child’, and indeed such necessity is to be determined by competent authorities in accordance with applicable law and procedures and subject to judicial review.

²³ “Exceptionally, a return to the home country may be arranged, after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.”

(Paragraph 86, General Comment No. 6, Committee on the Rights of the Child, available online at:

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/\\$FILE/G0543805.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.pdf)). Although this paragraph refers specifically to return, the general principle may apply to every right.

²⁴ “State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). [...] Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.” (Paragraph 12, General Comment No. 6 (2005), Committee on the Rights of the Child, available online at:

[http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/\\$FILE/G0543805.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.pdf))

²⁵ Text in Annex A. States Parties to the CRC also have obligations to ensure implementation of these rights (Article 7), as well as respect the right of the child to preserve his or her identity, and assist the child to re-establish it in circumstances where it is deprived (Article 8). The right to birth registration is also set out in Article 24 of the International Covenant on Civil and Political Rights (1966). Other relevant legal texts include the 1997 European Convention on Nationality, the 1954 UN Convention relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness.

The other key international human rights instruments are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the UNESCO Convention against Discrimination in Education. Two other important legal instruments are also relevant: the Universal Declaration of Human Rights (UDHR), which, although not technically legally binding, is considered customary international law, and so is intended to be binding, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). Although no EU Member State has ratified the ICRMW, it reiterates international standards relevant to migrant workers and their families, including children.

2.2. Regional Laws

2.2.1 Council of Europe

There are also two important regional Council of Europe texts protecting the rights of undocumented children: the European Convention on Human Rights (ECHR) and the European Social Charter (ESC).

The ECHR and its additional protocols guarantee civil and political human rights. The rights in the ECHR are applicable to all human beings, regardless of immigration status.

The ESC guarantees social and economic human rights. The ESC is usually limited in scope to nationals or regular workers of Contracting State Parties, but the jurisprudence of the Committee has established that some of the rights apply to irregular migrants, particularly in the case of children. In particular, the Committee has extended the application of Article 13 - the right to social and medical assistance - to irregular migrants, and further, found that limiting care of children to emergency situations was a violation of Article 17- the right of children and young persons to social, legal and economic protection.²⁶ The Committee has also found that the eviction of families with children from reception centres upon the refusal of their claim for asylum is a breach of their right to housing (Article 31).²⁷

The Council of Europe Convention on Action against Trafficking is also relevant, and includes several provisions to ensure that the best interests of the child are respected.

²⁶ International Federation of Human Rights Leagues (FIDH) v. France, complaint n° 14/2003, decision on the merits of 8 September 2004, §§ 26-32; Council of Europe, "Digest of the Case Law of the European Committee of Social Rights", 2008, pp. 183-184, available online at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf

²⁷ [Defence for Children International \(DCI\) v the Netherlands](#), complaint No. 47/2008, decision on the merits of 20 October 2009, available online at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47SummaryMerits_en.pdf

2.2.2 European Union

The key EU human rights instrument, legally binding since the entry into force of the Treaty of Lisbon in December 2009, is the Charter of Fundamental Rights of the European Union (the Charter of Fundamental Rights).²⁸ The Charter includes the rights and principles set out in the ECHR and ESC. The Treaty of Lisbon has also made it possible for the European Union itself to accede to the ECHR. Discussions are still underway, but if accession occurs, it will be possible for the European Court of Human Rights to take cases against the EU for breaches of the human rights enshrined in the ECHR.

European Union legislation governing claims for asylum and international protection²⁹ and family reunification³⁰ are also relevant, in that children who do not qualify under these structures often become undocumented. The “Return Directive” is also worth noting as it sets out minimum standards in deportation proceedings, with particular safeguards regarding children.³¹ Other relevant EU policies include the EU Agenda on the Rights of the Child and the policies on social inclusion.³²

3. THE BEST INTERESTS OF THE CHILD IN MIGRATION DECISIONS

Although children have the right to state protection as individuals, as seen in the section on data (Section 1.2), children are often subsumed by authorities within their family units. This is also evident in claims for international protection, where children’s circumstances are usually not considered individually. Therefore, if a parent’s claim for asylum is rejected, the child’s claim also

²⁸ Poland and the UK have opted out of the Charter.

²⁹ ‘Qualifications Directive’ (Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30/09/2004); ‘Procedures Directive’ (Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005); ‘Receptions Conditions Directive’ (Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6.2.2003); ‘Temporary Protection Directive’ (Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7.8.2001).

³⁰ For family members of third country nationals: ‘Family Reunification Directive’ (Directive 2003/86 on the right to family reunification, OJ L 251 3.10.2003); for family members of EU citizens: ‘Citizens Directive’ (Directive 2004/58/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 229/35, 29.6.2004).

³¹ Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348/98 24.12.2008) see Article 14.1(d), 16.3

³² E.g. EU 2020 Strategy; regarding education, the 2000 Lisbon Agenda and Proposed Directive on equal treatment (COM (2008) 426) extending protection against discrimination to education; regarding adequate standard of living/ child poverty, Articles 13, 136 and 137 EC, the Lisbon Strategy and Social Inclusion Process, the On-going Work of the Social Protection Committee EU Indicators Sub-group.

fails without individual scrutiny, and they also become undocumented.³³ It is important to explore how children can access legal aid and legal procedures regarding immigration and asylum claims independently from their parents.

At the same time, the preservation of family unity when it is in the best interests of the child is paramount. If a child is granted status on the basis of his or her application or claim, the parent's situation must be reassessed accordingly.

Although the best interests of the child are evident in legislation and practice where rights are guaranteed, systematic best interests determination procedures are absent in many decisions affecting children, particularly in the context of immigration control. The staff making such decisions are often untrained in the specifics of child rights and best-interests determination procedures, and the implementation of such assessments, including in questions of family unity when they should be the paramount consideration, is evidently uneven and unsystematic.

As case law regarding the right to family life is developing, the weight to be given to the best interests of the child in decisions regarding immigration is being clarified by the courts.

This paper aims to contribute to this unfolding debate. Both the European courts (the European Court of Human Rights and the European Court of Justice) and various national courts have been setting precedents in the last few years. For example, there has been a case in the Netherlands regarding access to family social support payments, in which the courts ruled that under certain circumstances, it is necessary to provide undocumented families child benefits to protect the right to private and family life and duty to protect children.³⁴ There have also been a number of cases considering the best interests of the child and his or her attachment to the EU country in decisions regarding deportation.³⁵ An important such case from the European Court of Justice has established that the sole carer of a European Union citizen child, who would have no other right to reside, has the right to reside and work in the country of their child's citizenship. This has been taken up by several governments and courts including in Ireland,³⁶ Denmark,³⁷ Austria³⁸ and the

³³ Jyothi Kanics, "Realizing the rights of undocumented children in Europe" in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 139

³⁴ BR1905, Central Board of Appeal, 08/6595 AKW etc. (judgment available online at: http://zoeken.rechtspraak.nl/detailpage.aspx?ljin=BR1905&u_ljin=BR1905 c.f. PICUM Bulletin, 12 September 2011, available online at: <http://picum.org/en/news/bulletins/29345/>). There was also a case in France, where the Court of Appeal or Riom found that the parent (regularly residing) of an undocumented child was wrongly refused child benefits because the child's right to social benefits must be protected without discrimination. However, this was annulled by the Supreme Court (Cour de Cassation decision of 15.04.2010, Avis de M. Azibert, Premier avocat general, Pourvoi n° 09-69.052, available online at: http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/azibert_premier_20256.html).

³⁵ See e.g. ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent), [2011] UKSC 4, United Kingdom: Supreme Court, 1 February 2011 (available online at: http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0002_Judgment.pdf); The Queen on the application of Zaira Maibel Salvador Tinizaray v Secretary of State for the Home Department [2011] EWHC 1850 (Admin), 25 October 2011 (available online at: <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1850.html>).

³⁶ Irish Examiner, "European ruling prompts Shatter to examine 120 immigration cases", 21 March 2011 (available online at: <http://www.examiner.ie/breakingnews/ireland/european-ruling-prompts-shatter-to-examine-120-immigration-cases-498103.html>)

UK,³⁹ asking for further clarifications or announcing guidance and plans to change regulations. In the particular case (the so-called “Zambrano case”), the child is a citizen, so to deport the carer would result in the deprivation of their right to reside in their own country.⁴⁰ However, it establishes a precedent in terms of possible regularisation of parents based on the best interests of the child.

As this case law regarding the right to family life develops, an interesting area for further research would be to investigate in what circumstances the best interests of the child are invoked by governments and when they are ignored. Detention, for instance, is an interesting example, as child detention is often justified in the best interests of the child - as preserving family unity – for example in Italy. However, best-interests assessments are rare in such decisions⁴¹ and alternatives to detention for the whole family oft unconsidered.

4. ACCESS TO NATIONAL SYSTEMS FOR THE PROTECTION OF CHILD RIGHTS

In most EU Member States, there are also constitutional provisions and national legislation protecting the rights of the child, as well as policies and action plans to promote and improve child protection. Children’s rights institutions such as Ombudsmen are also common.

However, the tension between migration control and protecting children’s rights results in children with an irregular migration status being treated separately and differently from “all” children. This is evident for both separated children and those who are accompanied by their parents or other caregivers. The systems of protection for separated children frequently provide care at lower standards than that for domestic children in care.⁴²

At the same time, children with their families are often entirely excluded from national mechanisms for protecting child rights, or otherwise rarely afforded any protection from the State unless they separated from their families.

³⁷ Dann Vinther, “With Zambrano Ruling and new immigration minister, what will change?”, The Copenhagen Post, 24 March 2011 (available online at: <http://www.cphpost.dk/news/making-the-cut/200-making-the-cut/51284-with-zambrano-ruling-and-new-immigration-minister-what-will-change.html>).

³⁸ Migration News Sheet, “Austria’s Supreme Court asks for clarity on family reunion of third country nationals” August 2011 (available online at: http://www.migrationnewssheet.eu/?page_id=2950)

³⁹ UKBA, “Judgement on carers of British Citizens”, 21 September 2011 (available online at: <http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/september/48-british-carers> c.f. NRPf Network, NRPf Bulletin Issue 32, October 2011).

⁴⁰ Judgment of the Court (Grand Chamber), 8 March 2011, Case C-34/09, Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm) (Belgium) (available online at : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML>).

⁴¹ Elena Rozzi, “Undocumented migrant and Roma children in Italy: between rights protection and control” in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p.186

⁴² Jyothi Kanics, “Realizing the rights of undocumented children in Europe” in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 139

For example, in Italy, all children are eligible for a residence permit, valid until the age of 18. However, in practice, undocumented children with their families are precluded from benefiting from this protection, and regularisation on the basis of childhood, as only their parents are able to apply for the permit, and they risk expulsion if they come into contact with the police authorities who deal with these applications.⁴³

Belgium has an “interpretive declaration” regarding Article 2 of the Convention on the Rights of the Child (CRC), the principle of non-discrimination (see Section 2.1), stating that the Belgian State has the possibility to limit the enjoyment of the rights set out in the CRC for children not having Belgian nationality. The Committee on the Rights of the Child has recommended that Belgium speed up the process of withdrawing this declaration. It has also expressed serious concern about “the continuous discrimination suffered by children of foreign origin.”⁴⁴

Similarly, in the UK, the key legislation protecting child rights is the Children Act (2004), which places a duty on almost all state agencies to have regard for the welfare of children. However, there is a reservation on immigration matters – the UK Border Agency⁴⁵ is exempt. The 2009 Borders, Citizenship and Immigration Act imposes a statutory duty to ‘safeguard the welfare of children in immigration matters’, and a code of practice has been developed.⁴⁶ However, this has been criticised for not formally amending the Children Act. Similarly, the code of practice did not actually change any immigration procedures affecting children. It provides lower standards than the Children Act, is more difficult to monitor, and essentially focuses on helping children cope with immigration control processes, rather than adapting those processes to respect and protect children’s rights.⁴⁷

In Ireland, the Ombudsman for Children is prohibited from ‘investigating any action by or on behalf of a public body, school or voluntary hospital “taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship”’.⁴⁸

Such exceptions seem to indicate recognition and acceptance of the fact that children in an irregular migration situation experience rights violations due to their status. They are affected by

⁴³ Elena Rozzi, “Undocumented migrant and Roma children in Italy: between rights protection and control” in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 182

⁴⁴ OHCHR Committee on the Rights of the Child, “Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Fifty-fourth session, Concluding observations: Belgium” (Combined Third and Fourth Periodic Reports), 2010, available online at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.OPSC.BEL.CO.1.doc>

⁴⁵ Called the Border and Immigration Agency at the time.

⁴⁶ UK Border Agency Code of Practice for Keeping Children Safe from Harm is available online at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/closedconsultations/keepingchildrensafefromharmcodeofpracticechildren?view=Binary>

⁴⁷ Sigona & Hughes (2010), “Being children and undocumented in the UK: A background paper”, Working paper n°78, *ESRC Centre on Migration, Policy and Society*, 2010, p. 18, available online at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1078%20Nando%20Sigona%20A.pdf; Frances Webber, “New immigration code does not fully protect children”, 8 January 2009, *IRR News*, available online at: <http://www.irr.org.uk/2009/january/bw000006.html>.

⁴⁸ Ombudsman for Children Act 2002, cited by Jyothi Kanics, “Realizing the rights of undocumented children in Europe” in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 42

migration control policies and not adequately protected as children, first and foremost, under the systems for protecting child rights.

Further, undocumented families can be subject to discrimination and at greater risk of being separated within the rubric of child protection, when the child protection concerns are only rooted in economic hardship and poverty or cultural prejudices.⁴⁹ Procedural safeguards are not always respected, for example, there have been cases in Italy, where parents have not been provided with interpretation in court proceedings regarding separation from their child.⁵⁰ As will be discussed in Section 8.2.2., families are rarely provided housing solutions as a family, and there have been cases, for example in the UK and in Italy,⁵¹ where families have been separated or threatened with separation, to fulfil duties to the child while avoiding providing housing to the whole family.

In the majority of cases, the decision in the child's best interests would be to provide material support to the child to live with his or her family. To do so, is also a legal obligation, foreseen in the right to an adequate standard of living as enshrined in the CRC (see Section 2.1).

PART 3 - ACCESS TO BASIC CIVIL AND SOCIAL RIGHTS

Despite the numerous explicit and legally binding international and regional instruments that guarantee children access to their basic civil and social rights, they still face numerous barriers to exercising these rights in Europe. National legislation often falls short of these standards, and even when legal entitlements exist, practical barriers often make the laws ineffective.

Indeed, countries across Europe have been progressively restricting access to basic social rights for irregular migrants, and families with children in an irregular migration situation are subjected to these same policies without due consideration of the best interests of the child. This linkage between migration control and access to basic social rights uses poverty as a tool of immigration control, under the premise that making life as intolerable as possible will motivate "voluntary" return and discourage further irregular migration.

Certain barriers that prevent access to basic rights for children in an irregular migration situation arise across the registry, health, education and housing sectors. National legislation is often below the standards set out in human rights law, inexplicit or contradicted by other rules and practices, such as the duty to denounce or administrative requirements. There are frequent changes in policy, service providers are being given increasing responsibility for determining immigration status, and yet there is a lack of training. At the same time, there is a lack of clarity in the rules, leaving wide room for discretion in decision-making. Fear of detection and lack of awareness on the part undocumented families of their rights are also common barriers.

⁴⁹ Jyothi Kanics, *Ibid*, p. 138; Elena Rozzi, "Undocumented migrant and Roma children in Italy: between rights protection and control" in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p.192.

⁵⁰ Elena Rozzi, *Ibid*, p. 192

⁵¹ Elena Rozzi, *Ibid*, p. 194

The core issue is the lack of separation between service provision and immigration control, whether in law, or in practice, due to contradictory provisions and heavy-handed immigration enforcement or lack of awareness on the part of civil servants what their duties are towards both undocumented migrants and immigration authorities.

The situation in Italy is illustrative. In Italy, the criminalisation of unauthorised entry or stay has introduced a duty on all public officers to report undocumented migrants to the police, as they have a duty to report any crime. Thanks to advocacy efforts,⁵² health professionals have been exempted from this duty, but there is no such provision for other civil servants providing basic rights to children, including school professionals. Lack of awareness in this case has been beneficial, as there are no known cases of school administrations or teachers reporting children or families to the immigration authorities. However, the trend is concerning and indeed, if the law were to be implemented, it would be highly problematic in terms of children's access to basic social rights.

Whether or not cases of detection as a result of accessing services are common, the fear of being detected is a real obstacle for undocumented parents, preventing them from accessing basic services for their children, and it can be exacerbated by even a few instances. Especially in an increasingly negative political climate, undocumented parents that are unaware of their rights are quite understandably afraid of accessing certain services. Tackling this issue is of the paramount importance in order to improve access to basic social rights for children in an irregular migration situation (as it affects both undocumented children and children who themselves might have regular status but have an undocumented parent).

Further, children's health, living conditions and access to education are all closely interlinked. To deny access of one of these rights affects all the others. For example, a report by Shelter, in the UK, warns that children in poor housing conditions have up to 25% higher risk of severe ill-health and disability during childhood and early adulthood. Both unstable and unsuitable housing and poor health affect children's ability to attend school and academic achievement.⁵³ Only by guaranteeing basic access to education, health care, and housing, are these children allowed sure and solid development.

⁵² Several civil society organizations involved in the provision of health care condemned the proposals, stating that the "duty to denounce" would create an insurmountable barrier to health care provision for undocumented migrants, and launched the campaign "Forbidden to denounce: We are doctors and nurses, not spies!" ("Divieto di segnalazione. Siamo medici ed infermieri, non siamo spie!"). The organizations involved in this initiative include SIMM (Italian Society for Migrants' Health/Società italiana di Medicina delle Migrazioni), MSF (Medici senza Frontiere/Doctors Without Borders), ASGI (Associazione Studi Giuridici sull'Immigrazione/Association for Legal Studies on Immigration), and the OISG (Osservatorio italiano sulla salute globale/Italian Observatory on Global Health). More information about their campaign is available at: <http://www.simmweb.it/index.php?id/4358> (last visited 27 Aug. 2009).

⁵³ Lisa Harker, "Chance of a lifetime: The impact of bad housing on children's lives", Shelter, September 2006

5. ACCESS TO BIRTH REGISTRATION

Birth registration is a fundamental right of the child, which is closely linked to the right to a legal identity, nationality and protection from the State. It helps to protect children against violations of their rights that are due to doubts about their age (e.g. treatment as an adult in the justice system), and that take advantage of doubts about their age (e.g. child labour). Unregistered children may also be more vulnerable to trafficking. Data from birth registrations can also be crucial for state planning and the provision of services.

Birth registration normally enables the child to receive a birth certificate, which serves as evidence of the registration and of the State's recognition of the child's legal identity. In some countries, a certificate is issued automatically, while in others there is a separate procedure,⁵⁴ and there can be difficulties in obtaining a birth certificate. A birth certificate can be very important in order to gain access to other basic social rights and services, such as education, health care and housing. This is especially the case in countries where there is near universal birth registration, such as those in Europe, as it is expected that it will be possible to produce a birth certificate and they are routinely required, for example, to enrol in school.⁵⁵

As birth registration enables the right to nationality, concurrently, lack of birth registration can also increase the risk of undocumented children becoming stateless, especially as the prevalence of birth-right or jus-soli citizenship possibilities decreases. For example, if a child is born in Europe, and not registered either in their country of birth or in their parent's country as a national, they may have difficulties in proving their nationality and accessing citizenship in either country. Efforts have been concentrated on improving rates of birth registration in developing countries, as the rates are very high in "industrialised countries" (estimated at 98%).⁵⁶ However, considering the serious risk of exclusion, and even statelessness that can be a consequence of non-registration, one or two percent non-registration is also significant.

An area which is in need of systematic comparative analysis, it is possible to elaborate a couple of examples to illustrate some of the issues regarding access to birth registration for undocumented children in EU Member States.

5.1. Access to birth registration in law

As with access to other basic rights, there is variation between EU Member States laws regarding access to birth registration for undocumented children. Some countries, such as the Netherlands, provide for undocumented children's right to birth registration explicitly in law, while in other countries, undocumented children are included only implicitly. Although it is a fundamental right, there is a lack of a clear policy on birth registration in many EU countries.⁵⁷

⁵⁴ Michael Miller, "Birth registration and the rights of the child", a report prepared for the European Parliament, 2007, p. 3

⁵⁵ Miller, *Ibid.* p. 4

⁵⁶ Miller, *Ibid.* p. 5

⁵⁷ ICMPD, personal correspondence (10/10/2011).

There may also be legal obstacles in some countries. Italy provides an interesting example. Birth registration is generally accessible in Italy. However, in 2009, the Italian government adopted a change in the immigration law, which introduced the requirement for a residence permit to be shown in order to register a birth.⁵⁸ As a result of advocacy efforts,⁵⁹ the Ministry of Interior issued a circular, the day before the change in law entered into force, clarifying that irregular migrants have the right to register their child at birth.⁶⁰ Indeed, it allows for the mother to be issued a temporary residence permit, valid for six months.⁶¹ Thus, the law is officially circumvented by the Minister's circular, and so birth registration continues to be accessible.

5.2. Access to birth registration in practice

In some countries, such as the UK, there seem to be few difficulties in accessing birth registration in practice, despite there not being explicit provisions in law. On the other hand, there are barriers which can prevent access, even where the law is explicit.

Generally, children whose birth takes place in medical facilities, or at least with a health care professional, are more likely to have their birth registered than those who are born without medical supervision.⁶²

This is perhaps due to practical obstacles to birth registration, such as parents' fear of detection, lack of awareness (on the part of parents, though this is also a problem among civil servants), bureaucratic and complicated procedures, and costs (both direct, in terms of registration fees and fines for late registration, and indirect, such as costs of travel, time off work etc).⁶³

5.2.1. Reporting obligations, fear of detection and lack of awareness

The issue of reporting obligations on civil servants and fear that accessing birth registration will lead to detection is worth elaborating further.

⁵⁸ Generally, non-EU citizens are required to present their residence permit for any authorization or registration, with some exceptions, such for emergency health care or compulsory schooling (Immigration Law Legislative Decree n. 286/98, art. 6, par. 2). These exceptions included civil registration (including birth registration) until 2009, when Law n. 94/09 cancelled this exception.

⁵⁹ The Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) launched an advocacy campaign, and sent a letter signed by dozens of associations, to the Parliament in March 2009 and a second letter to the Government and the Regions in July 2009, after the law was approved. Juvenile Judges, associations of registry officers and a number of politicians (both in the opposition and the majority) took strong positions on this issue. (ASGI, personal correspondence 23/10/2011).

⁶⁰ Re-stating that civil registrations are exempt from the obligation to require a residence permit.

⁶¹ Migration Policy Group, "New Italian law on security has come into force but little enthusiasm for citizens' street patrols", Migration News Sheet, September 2009, p. 5

⁶² Michael Miller, "Birth registration and the rights of the child", a report prepared for the European Parliament, 2007, p. 6

⁶³ Jyothi Kanics, "Realizing the rights of undocumented children in Europe" in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 135; Michael Miller, "Birth registration and the rights of the child", a report prepared for the European Parliament, 2007, p. 6

In Italy, the criminalisation of unauthorised entry or stay, also brought in 2009, introduced a duty on all public officers to report undocumented migrants to the police, as they have a duty to report any crime. In Italy, a child's birth is registered at a hospital or at a municipal registry office. Health professionals are prohibited from reporting irregular migrants to the immigration authorities, meaning that birth registration in hospitals can be accessed without fear. There is no similar prohibition for registry offices. However, the Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) argues that, as parents cannot be deported within six months of having a child, they are not technically committing the crime of irregular stay, and so there is no duty to report. Therefore, there is chance that registry offices would contact the immigration authorities, and it is equally possible that undocumented parents may fear registering their child's birth in a registry office, but in practice, it is a legal obstacle which is little implemented.

In the Netherlands, it is necessary for parents to register their newly born child at the local municipality. Undocumented migrants are also subject to this requirement.

In accordance with the Convention on the Rights of the Child (CRC), the municipality is prohibited from denying the registration of a child, regardless of whether or not the parents are undocumented.

Nonetheless, parents are often hesitant to register their children's births, due to fear that this interaction with the local municipality could lead to detection. Indeed, despite the separation of tasks between civil servants and the immigration authorities, there is a lack of awareness on the part of some civil servants over whether they have a duty to report undocumented migrants to the immigration authorities. For example, Defence for Children International – the Netherlands (DCI-NL) was approached by an undocumented father who had been detained because when he went to register his newly born child at his local municipality in Winterswijk, the civil servant called the immigration authorities.

Thus, lack of awareness can also cause problems for undocumented children. DCI-NL has written a complaint to the local government of Winterswijk, different politicians and institutions urging them to issue guidelines for civil servants clarifying the right of the child to registration, regardless of immigration status, and their duties regarding the best interests of the child. However, these guidelines have not yet been created. In the meantime, DCI advises parents that are concerned about detection to request that someone else register their child, for example, the doctor that delivered the child.⁶⁴

5.2.2. Additional administrative requirements

There may also be other administrative requirements that prevent undocumented children from enjoying their right to birth registration and certification. For example, parents may have difficulties registering their child if they do not possess valid identity documents themselves, or if they are not married.

⁶⁴ Defence for Children International – the Netherlands, personal correspondence (20/10/2011).

For example, in Romania, the registry requires both the mother and father's identity documents and marriage certificate. In practice, birth registration is usually impossible for undocumented parents.⁶⁵

In Poland, undocumented women who give birth in hospital receive a document, with which they must go to the Civil Registry Office, to register the child and receive a birth certificate. However, the registry will not issue a birth certificate if the identity of the mother is not clear. It is not uncommon for the mother's birth certificate and passport with valid immigration papers to be required.⁶⁶ This also raises a question over whether, in countries where a document is issued on birth in a hospital that is not a birth certificate, and there are barriers to receiving an official birth certificate, the former document can be used to access services.

There are similar administrative requirements in some municipalities in Italy, such as Florence and Naples.⁶⁷ However, there is wide variation at the local level about which documents are required.

In many places in Italy, a birth can be registered without the parent having to show any identity document, on the basis of declared data, and sometimes testimonies.⁶⁸

The situation in Greece is also illustrative. Greek citizenship law currently only allows for a birth certificate to be issued for babies whose parents are registered on a municipal roll (*dimotologio*), on to which only Greek citizens may register. Thus, in practice, regular and irregular migrants alike are unable to receive birth certificates for their children. This can lead to exclusion from basic social rights, as for example, birth certificates are required to enrol in school, and register with health insurance foundations.⁶⁹

6. ACCESS TO EDUCATION

6.1 Access to education in national law

Access to education for undocumented children is one of the rights most well protected in law at the national level.

Generally in most EU Member States, the right to compulsory education from age 6 to 16 for undocumented children is provided for in law. The most notable difference is that a few countries, such as Belgium⁷⁰, Italy⁷¹ and the Netherlands⁷², have made it explicit that education is the right of all children regardless of immigration status.

⁶⁵ SOROS Foundation Romania contributions to discussions during PICUM Working Group on Undocumented Families and Children, 15 November 2011, Brussels

⁶⁶ Polish Migration Forum, personal correspondence (13/11/11)

⁶⁷ Elena Rozzi, "Undocumented migrant and Roma children in Italy: between rights protection and control" in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 181

⁶⁸ ASGI, personal correspondence (23/10/2011).

⁶⁹ Jyothi Kanics, "Realizing the rights of undocumented children in Europe" in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 135

⁷⁰ The Belgian Constitution (2007), Article 24, paragraph 3; Article 40 of the Decree

In others, such as France⁷³, the UK⁷⁴, Spain⁷⁵ and Poland⁷⁶ it is only implicit in their laws, which refer to “all” children or have provisions for non-citizen children (and status is not specified). No country explicitly denies undocumented children their right to education, though there are cases, such as in Hungary, where the law states the right to education for children residing regularly, so implicitly excludes undocumented children.

Some of the countries which explicitly include undocumented children have also issued official guidance prohibiting checks on immigration status or reporting immigration status to immigration authorities.

For example, in Flanders,⁷⁷ in Belgium, the circular letter of the Flemish Minister of Education which stipulates undocumented children’s right to education explicitly, also guarantees that school administrations and teachers do not have to inform the police about the administrative status of the children and their parents, and that undocumented children will not be arrested within the vicinity of the school.⁷⁸

6.2 Access to education in practice

Where the law only implicitly includes undocumented children, the resulting ambiguity can lead to contradictory rules, confusion and local variations in practice.

For example, in Germany, although the right to education for all children is enshrined in the German Constitution, there is duty on all public administrations to report undocumented migrants to the immigration authorities,⁷⁹ which effectively overrides undocumented children’s entitlement. The German Parliament and Lower Chamber have recently passed a resolution to exclude school administrations from this duty to denounce.⁸⁰ It still needs to be implemented by each Federal State, as education is managed at the federal level, and practical issues, such as whether children

of 30 June 1998 as amended under the Decree of

27 March 2002 for the French Community; circular letter of the Flemish Minister of Education for Flanders

⁷¹ Article 34 of the Italian Constitution; 1998 Immigration Act, Law 286/1998, 25 July 1998

⁷² Article 41 of the Law of 2 July 1981 concerning the Law of primary education; Article 27.1.a of the Law on the secondary education

⁷³ Code de l’Education as modified by the Law no. 2006-396 of 31 March 2006, Art. L.111-1

⁷⁴ Article 13A, Article 7 of the Education Act (1996)

⁷⁵ Article 27 of the Spanish Constitution; Article 10 of the Law on the Protection of the Minor

⁷⁶ The constitution of the Republic of Poland (1997), and the Act on the School Education System of the 7th of September (1991, and its amendments)

⁷⁷ Education in Belgium is the responsibility of the governments of the different linguistic communities.

⁷⁸ Circular of 24/02/2003 from the Flemish Minister “Het recht op onderwijs voor kinderen zonder wettig verblijfsstatuut”

⁷⁹ Paragraph 87 of the national residence law, which stipulates that public servants must inform the foreigners’ office if they learn that an individual is undocumented.

⁸⁰ “Gesetz zur Umsetzung aufenthaltsrechtlicher Richtlinien der Europäischen Union und zur Anpassung nationaler Rechtsvorschriften an den EU-Visakodex”, Bundesrat, 23 September 2011, available online at:

http://www.bundesrat.de/cln_117/SharedDocs/TO/886/erl/4_templateld=raw.property=publicationFile.pdf/4.pdf

will be able to obtain the accident insurance which is obligatory for all school children, will need to be resolved for education to be accessible in practice.⁸¹

Prior to the resolution on the national level, there have been local authorities that have issued regulations which circumvent this duty. For example, in 2009, the federal state of Hesse modified an existing regulation to allow children and teenagers to enrol in schools without having to provide proof that they regularly reside in Hesse. This meant that children could enrol without fear of deportation and school principals could register students without fear of being criminally prosecuted for failing to denounce undocumented migrants. Also, both North Rhine-Westphalia and Hamburg have prohibited school administrators from requiring students to provide proof of residence or identification documents since March 2008 and June 2009, respectively.⁸²

The UK provides an example of a more ambiguous context. In the UK, education is spoken about in terms of duties rather than rights – it is the duty of parents to send their children to school⁸³ and the duty of local authorities to ensure that education is available to all children in their areas.⁸⁴ Undocumented children are implicitly included in “all” children. The UK Border Agency (UKBA) has actually made their right explicit, stating on their website:

“It [the local authority] must ensure that all children living in its area receive full-time education, regardless of their immigration status.”⁸⁵

However, this guidance has not been issued in any official document or circular, and there exists confusion among school administrations over their duties and obligations towards both children and the UKBA, when registering undocumented children. While the majority of schools in the UK still represent safe environments, testimony from school professionals indicates that the UKBA is increasingly pressuring schools to share information regarding the immigration status of their pupils, and it is becoming increasingly difficult to register undocumented children in schools.⁸⁶

The combination of lack of clarity in the rules, or even contradictory rules, and lack of awareness among service providers, at the same time as they are faced with greater responsibility for determining immigration status and bureaucracy, is a common challenge that reoccurs across sectors.

⁸¹ “Germany: Parliament passes resolution to exclude educational administrations from the duty to denounce”, PICUM Bulletin, 29 August 2011, available online at: http://picum.org/en/news/bulletins/29096/#news_29066
Spiegel Online, “Zur Schule ohne Angst vor Abschiebung”, 2 October 2009, available online at: <http://www.spiegel.de/schulspiegel/wissen/0,1518,652817,00.html> (c.f. PICUM Bulletin, October 2009, available online at: http://picum.org/picum.org/uploads/archives/nl_en_01-10-2009.pdf)

⁸³ Article 13A of the Education Act (1996)

⁸⁴ Article 7 of the Education Act (1996)

⁸⁵ See UKBA website, available online at: <http://www.ukba.homeoffice.gov.uk/while-in-uk/rightsandresponsibilities/education>

⁸⁶ COMPAS at the University of Oxford presentation by Nando Sigona at PICUM and Praxis workshop “Building Strategies to Protect Children in an Irregular Migration Situation in the UK”, 6 October 2011, London; Salusbury World presentation by Nadine Ballantyne at PICUM and Praxis workshop “Building Strategies to Protect Children in an Irregular Migration Situation in the UK”, 6 October 2011, London.

6.2.1 Documents required for registration by school administrations

In concrete terms, uncertainty about undocumented children's right to education may result in school administrations asking to see immigration documents to register the child.

In practice, even in countries where the law is explicit, there is wide divergence on the local level concerning which papers are required by school administrations for registration. Even if not immigration-related, identification documents and proof of residence can be difficult to obtain, so their requirement can be a significant obstacle for families in an irregular migration situation. Being asked to provide such information can also make parents fearful of detection.

Where schools do ask to see passports and valid immigration papers, this may also result in discriminatory treatment of irregular migrant children. For example, some schools are reluctant to accept undocumented children due to issues over funding arrangements,⁸⁷ and so use their discretion to reject undocumented students and impose requirements which will preclude their registration.

Gianni Fulvi of the National Coordination of the Community for Children (Coordinamento Nazionale Comunita' per Minori) commented on how Italian laws represent an excellent level of inclusion that could be taken as an example in Europe:

“For everybody, both accompanied and unaccompanied, in a regular or irregular situation, access to education is well protected, so registration at school is done without asking for any documents but only making an estimate on the age of the child and what he or she declares.”⁸⁸

6.2.2 Fear that registration in school could lead to detection

Fear that enrolling their child in school could lead to detection and deportation, or the authorities taking their child into care, is also a real concern for undocumented families, regardless of whether it is well-founded.

As well as the duty on schools to share information with immigration authorities, there have been cases where immigration authorities have gone to schools to detain students or their parents. Although the practice remains limited, news of such actions travels quickly and a few instances can have significant impacts.

For example, the Education Without Borders Network (Réseau Educations Sans Frontières - RESF) has described how this has occurred in France and not only caused trauma and anxiety for

⁸⁷ In some countries, such as Poland and the Netherlands, funding is based on the number of students enrolled, and it is difficult to fulfil the administrative requirements to receive funding for undocumented students (Luca Biccocchi & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p.23)

⁸⁸ PICUM, *Ibid*, p.17. See also “Memorandum by Thomas Hammarberg Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 19-20 June 2008” in which he noted that all children in Italy enjoy the right to education, even if their parents do not have a residence permit.

the children and families in question, but for the whole class and school environment.⁸⁹ RESF is a network of school principals, school teachers, pupils, parents, undocumented children, policy makers on the local and regional levels and other activists and organisations, that supports undocumented children's education in schools (including post-secondary and university level) and mobilises when their families are threatened with deportation.

RESF works quite closely with policy makers, particularly on the local and regional level. In November 2010, the Commission of High Schools and Educational Policies of the Regional Council of Ile de France issued a declaration to protect all undocumented children who would be threatened with expulsion, by placing all of these children under the protection of the regional government and also calling for the elected representatives to be “godfathers” or “godmothers” of these undocumented pupils.⁹⁰

6.2.3 Barriers associated with conditions of living in an irregular migration situation

Other barriers to children in an irregular migration situation accessing their education include difficulties in meeting school fees, where they are charged,⁹¹ as well as extra-curricular expenses, such as school uniforms, books and transportation, and language difficulties.

In the Netherlands, there is variation between local authorities in whether undocumented children are eligible for the support provided to national children for educational expenses or whether the costs must be borne by the parents.

The cooperative “Learning without papers” asked local governments to make education for undocumented children practically possible by providing financial help. Some local governments agreed and provided support to cover extra expenses necessary for children's education, such as materials, sports clothes, and fees for school trips.⁹²

There are also difficulties associated with unstable or unsuitable living conditions, such as having to move often or not having space to do homework.

⁸⁹ E.g. Presentation by Richard Moyon at Council of Europe Joint Hearing between the Sub-Committee on Migration and the Sub-Committee on Children (of the Social, Health and Family Affairs Committee) on “Children of undocumented migrants: witnesses to problems and action required”, 4 October 2011, Strasbourg

⁹⁰ Déclaration de l'assemblée régionale de l'Ile de France, “Résolution de la Commission Lycées et politiques éducatives du Conseil régional”, 3 November 2010, available online at: <http://www.educationsansfrontieres.org/article32226.html>. A video of Ms. Henriette Zoughebi, the Vice President of the Regional Council of Ile de France, responsible for high schools, reading the declaration at an assembly of the council representatives is available online at: http://www.dailymotion.com/video/xilwil_henriette-zoughebi-parrainage-de-lyceens-sp-par-des-elus-du-conseil-regional-ile-de-france_news

⁹¹ E.g. Belgium, Poland for upper secondary schools (post-gymnasia schools).

⁹² Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p.32

6.2.4 Denied formal certification

Further, undocumented children that are admitted to attend school still often face administrative barriers to taking official examinations or being issued with formal certification to recognise their achievements. As Ángel Madero of the Spanish Asociación Pro Inmigrantes de Córdoba (APIC) reports:

“The big problem we see is that access to education is not mandatory for those older than 16 in the Socially-Guaranteed Programmes (PGS) and that someone who is undocumented can be terminated from the PGS. Your friend would have a diploma, but you wouldn't have one. You would only have an unofficial school certificate.”⁹³

This, in turn, also becomes another kind of official paperwork that is difficult for undocumented children to produce, and prevents their progression to different academic institutions at the different stages of their education.

Italian law stipulates that foreign children have the right to education, including receiving the final school-leaving qualification, regardless of whether they have a residence permit or identity documents.

Vocational training carries similar complications, as it is often considered as a form of work. For example, in the Netherlands, some courses have a compulsory internship component, but students are required to have a work permit to participate. Schools and employers who provide a traineeship to a student without proper authorisation to work can be fined up to 8,000 euros. The Startfoundation has recently set up a subsidy called “Stoutfonds” to pay these fines.⁹⁴ Dutch employers and employees came together in the Labour Foundation (Stichting van de Arbeid) by writing a letter to the Dutch government and Parliament to urge them to allow students without work permits to do internships which are part of academic courses, so that undocumented children are able to complete their studies.⁹⁵ This restriction also prevents children from being awarded certification for their completed studies.

6.2.5 Pre-school education

The importance of early education has recently been expressed in new EU policies, for child development in general, but also particularly for migrant children. For example, the European Commission has said the following on the issue:

“There is strong evidence that participation in ECEC programmes can be highly beneficial for migrant children's cognitive and linguistic development. Providing early language

⁹³ Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, pp.35-36

Start Foundation, “Stoutfonds opgericht om boetes te betalen”, 30 September 2011, available online at: http://www.startfoundation.nl/Leesvoer/Nieuws/Stoutfonds_opgericht_om_boetes_te_betalen?se=stout; Stichting Los Newsletter, Year 1 no.17, 10 October 2011, available online at: <http://www.stichtinglos.nl/>

⁹⁵ Spits Nieuws, “Illegaal kind op stage”, 23 May 2011, available online at: http://www.spitsnieuws.nl/archives/binnenland/2011/05/illegaal_kind_op_stage.html (c.f. PICUM Bulletin, 7 June 2011, available online at: <http://picum.org/en/news/bulletins/27050/>)

assistance to children with a different home language is an important part of improving their school-readiness and allowing them to start on an equal footing with their peers.”⁹⁶

However, undocumented parents often experience difficulties in practice in gaining access to public pre-schools and kindergartens for their children. While this schooling is optional, it can be considered discrimination to exclude undocumented children.

For example, debate over access to non-compulsory education in Italy was provoked by the Municipality of Milan introducing a measure preventing undocumented children from being registered in pre-schools. The measure was found by the court of Milan to be discriminatory and contrary to the right to education enshrined in the CRC and domestic legislation,⁹⁷ which it interpreted to include all school grades. However, this interpretation is not always accepted and implemented, with undocumented children often denied access to non-compulsory education, particularly vocational courses.⁹⁸

There are examples of inclusive practice by local governments. In March 2010, the municipality of Florence publicly acknowledged the right of undocumented children to attend nursery school.⁹⁹ Other major cities have followed suit: Torino and Genova both explicitly announced, almost immediately after Florence, a declaration that their municipalities have no obligation to check the residence permits of parents.¹⁰⁰

Another issue is that parents who are unable to access publicly subsidised child care and nursery facilities may be left with no other option than to take their children to their workplace or leave their children with unlicensed child minders, in order to work to support their families.

6.2.6 Progression through school career

A key issue raised by education professionals as well as non-governmental organisations who work with undocumented children, is the lack of access to vocational courses and higher education. Although this schooling is optional, to exclude undocumented children specifically from such public services is discriminatory.

⁹⁶ European Commission, COM(2011) 66 final, “Early Childhood Education and Care: Providing all our children with the best start for the world of tomorrow”, 17 February 2011, available online at: http://ec.europa.eu/education/school-education/doc/childhoodcom_en.pdf; see also Council of the European Union, “Conclusions on early childhood education and care”, 6 May 2011, available online at:

<http://register.consilium.europa.eu/pdf/en/11/st09/st09424.en11.pdf>

⁹⁷ Court of First Instance (Milan) decision of 11.02.2008

⁹⁸ Elena Rozzi, “Undocumented migrant and Roma children in Italy: between rights protection and control” in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 189

⁹⁹ La Repubblica, “*Maternecomunali per baby clandestini*”, 12 March 2010, available online at:

<http://ricerca.repubblica.it/repubblica/archivio/repubblica/2010/03/12/materne-comunali-per-baby-clandestini.html> (Cf. PICUM Newsletter, March-April 2010, p. 13, available online at: http://picum.org/picum.org/uploads/archives/nl_en_01-0304-2010_0.pdf)

¹⁰⁰ La Stampa, *Padoin: "Siaifiglideiclandestini al nido, lo dice la legge"*, 1 April 2010, available online at:

<http://www3.lastampa.it/torino/sezioni/cronaca/articolo/177332/> and Elvio Pasca, “*Bologna. Asili nido vietati ai clandestini*”, 8 April 2010, available online at: <http://www.stranieriinitalia.it/attualita-bologna.asili.nido.vietati.ai.clandestini.10732.html>

Further, it is important to consider the psychosocial impacts that limited prospects have on undocumented adolescents. Still an area in need of systematic research, the research that exists, as well as testimony from non-governmental organisations working with undocumented families, indicate that some children only find out that they are undocumented migrants during their adolescence, or even transition to adulthood.¹⁰¹ Not only is this an important time in children's psychosocial development, it is the time when they begin to lose the protections afforded to them as children. What would be the impacts on such children to find that their aspirations for higher education are implausible?¹⁰² And indeed, that they do not have authorisation to work? How do they adjust to the reality of living without migration status and the limitations this has? What are the social impacts on communities of having disaffected, rejected and unoccupied youths?

There is a concerning lack of stable and long-term regularisation possibilities for undocumented children in many EU countries, and it is an issue which deserves further attention.

Nevertheless, it is also worth noting at this juncture, that some undocumented children do qualify for regularisation, or even citizenship, based on their long residence and ties to the country. In this context, the negative effects of their exclusion are longer term for society as well as the individual. Further, some regularisation schemes, such as in France and Italy, consider regular school attendance in country as an important factor in granting regularisation, so exclusion from education due to immigration status could, perversely, prevent children from regularising their status.

7. ACCESS TO HEALTH CARE

7.1 Access to health care in law

Laws regarding access to health care for undocumented children at the national level vary enormously across Europe. In most EU countries, undocumented children receive health care under the same conditions as adult undocumented migrants, with no extra protection.

Emergency health care cannot be denied in any European Union Member State. However, in some countries, such as Ireland, Hungary, Sweden and Poland, even this care may be subject to charging,¹⁰³ though Sweden and Poland have extended access for certain categories of children.

¹⁰¹ E.g. Roberto G. Gonzales, "Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood", *American Sociological Review*, Volume 76, n°4, 2011, pp. 602–619; Carola Suárez-Orozco et al., "Growing Up in the Shadows: The Developmental Implications of Unauthorised Status", *Harvard Educational Review* Vol. 81 No. 3, 2011, pp. 438-472.

¹⁰² Even where they are able to attend university, high fees make it unattainable for many.

¹⁰³ In Ireland, emergency care is not provided free of charge, but health provider's have discretion over payment. In Hungary, in principle, undocumented migrants have to pay for emergency care, but if it is not actually possible, it is possible for the service provider to be reimbursed by the State. In Poland, while it is clear that emergency care provided by medical rescue teams is free of charge, it is not clear whether such care would be free of charge in hospital emergency departments, as there is no legislation establishing who would bear the costs. Hospitals can request cost coverage. In Sweden, undocumented migrants are liable to pay the full costs of emergency treatment. Following an official enquiry, the government is considering whether to extend access. (Fundamental Rights Agency

In Poland, children attending public schools may access medical and dental prophylactics, including mandatory vaccinations, medical check-ups and screening tests, free of charge.¹⁰⁴ In Sweden, children whose asylum application has been refused may access health care under the national health system.¹⁰⁵

Many countries provide emergency care free of charge. Other care that is commonly provided inclusively and free of charge includes treatment of communicable diseases (excluding HIV) and in serious mental health cases.

Otherwise there is wide variation in the care that is provided to undocumented children, and at what cost, in the different EU Member States. Undocumented children are usually excluded from the national health insurance system, with the result that while care may be available, it is subject to charges that are often prohibitively expensive. For example, in Belgium and in France, separated children have equal access to the national health insurance system as national children, but undocumented children living with their families are excluded. Belgian legislation guarantees only “essential” health care or “Urgent Medical Care” free of charge for undocumented children (and adults) when medically certified as such. This care can be both preventative and curative.¹⁰⁶ In France, there is a parallel system to provide publicly subsidised health care for undocumented migrants called “State Medical Assistance” (Aide Médicale de l’Etat – AME).¹⁰⁷ Adult undocumented migrants are able to access to AME, subject to renewal every year, if certain conditions are met, such as being able to prove that they have lived in France for over three months and are below an economic threshold (634 euros per month), for an annual fee of 30 euros.¹⁰⁸ Children are able to access AME immediately, without having to wait for their parents to prove their eligibility,¹⁰⁹ and are exempt from the annual fee.¹¹⁰

(FRA), *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, 2011, p. 16, 17, 27).

¹⁰⁴ Articles 92 (1)(2) of the Law on education system of 7 September 1991 and Regulation of the Minister of Health on the organization of the prophylactic healthcare for children and youths of 28 August 2009 (c.f. HUMA Network, *Access to Health Care and Living Conditions of Asylum Seekers and Undocumented Migrants in Cyprus, Malta, Poland and Romania*, 2011, p. 101).

¹⁰⁵ Fundamental Rights Agency (FRA), *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, 2011, p. 27.

¹⁰⁶ Loi organique des Centres Publics d’Action Sociale of 8 July 1976 and Arrêté Royal relative à l’Aide Médicale Urgente of 12 December 1996 (c.f. HUMA Network, *Access to health care for undocumented migrants and asylum seekers in 10 EU countries: Law and practice*, 2009, p. 23).

¹⁰⁷ See Article 36 Loi n° 93-1027 relative à la maîtrise de l’immigration et aux conditions d’entrée et de séjour des étrangers en France, of 24 August 1993 and Loi n°99-641 portant la création d’une Couverture Maladie Universelle of 27 July 1999 (c.f. HUMA Network, *Ibid*, p. 42).

¹⁰⁸ S. Da Lomba “Health care charges for undocumented migrants: how France is making life more difficult for undocumented migrants at all costs” PICUM blog, 14 March 2011, available online at: <http://picum.org/en/news/blog/25643/>; Le Monde “Rendre payante l’aide médicale aux sans-papiers coûtera plus cher à l’Etat”, 4 January 2011, available online at: http://www.lemonde.fr/societe/article/2011/01/04/un-rapport-denonce-les-restrictions-d-acces-aux-soins-des-sans-papiers_1461024_3224.html

¹⁰⁹ HUMA Network, *Access to health care for undocumented migrants and asylum seekers in 10 EU countries: Law and practice*, 2009, p. 51

¹¹⁰ Official website of the French administration, Service-Public.fr « Aide médicale de l’État (AME) : bénéficiaires et prestations », available online at : <http://vosdroits.service-public.fr/F3079.xhtml>

In the UK, undocumented children (as with all undocumented migrants), can access primary care from a General Practitioner (GP) free of charge and community care services, but any secondary treatment from a hospital is subject to charging.¹¹¹ Whether or not such treatment will be provided, and whether it will be provided regardless of ability to pay before treatment, depends on whether the treatment is considered “immediately necessary”, “urgent”, or “non-urgent”.¹¹²

In Spain, Greece, Romania, Estonia and Portugal undocumented children can access to health care free of charge on the same terms as national children.¹¹³

7.2 Access to health care in practice

7.2.1 Varied interpretation of urgent/ essential/ immediately necessary treatment

Health systems across the EU Member States afford different levels of care to undocumented migrants, including children, using definitions such as “urgent”, “essential”, and “immediately necessary” treatment. The interpretation of these terms on the local level can be both inclusive and exclusive in practice. For example, in Belgium, the system described above allows for interpretation of “Urgent Medical Care” for children to include much secondary care. In Italy, the interpretation is quite open, and allows for all continuous care. In Poland and Hungary, on the other hand, the interpretation is much more restrictive.¹¹⁴ Interpretations also vary on the local level, subject to doctors’ discretion.

7.2.2 Discretion on the local level

Undocumented children’s access to health care is often subject to the goodwill of health professionals. In the UK, for example, while undocumented children can access primary care from a GP free of charge, it is at the GP’s discretion whether or not to register them in the first place. Similar issues have been reported in the Netherlands.

There are also times when the discretion in making such decisions is made at the financial desk rather than by medical practitioners. For example, in the UK, despite clear guidance stating that decisions regarding the urgency of care must be taken by a medical doctor, charging arrangements are carried out by Overseas Visitors Managers (OVM). There have been situations where patients are initially referred to the OVM instead of a doctor, and been refused “immediately necessary” or

¹¹¹ Statutory Instruments No. 614 of 2004, The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2004, March 2004.

¹¹² Department of Health, “Implementing the Overseas Visitors Hospital Charging Regulations”, 2011, paragraph 4.8-4.9, available online at:

<http://api.ning.com/files/RkT5lfagSCnOuOIIIMAwk9biclB1U93nCschPWokBQyZobCI24JRhuTKzTkMIWFuT3uKGZVmn7azUjhahl3cQ-jg40I44JKme/DHGuidanceJune2011.pdf>

¹¹³ FRA presentation by Ann-Charlotte Nygård at the 3rd Annual Dialogue between the Committee of the Regions and the European Union Agency for Fundamental Rights (FRA) on Multi-level Protection and Promotion of Fundamental Rights on Implementing fundamental rights of irregular migrants – towards multi-level governance, Monday 17 October 2011, Brussels.

¹¹⁴ Luca Bicocchi & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p.53.

“urgent” treatment, which is not to be delayed pending payment.¹¹⁵ With complex rules, and lack of training for staff, there are numerous examples of undocumented families and children being inappropriately denied medical treatment by hospital management or administrative staff.

Complex and bureaucratic systems for reimbursement, in countries where health care can be provided through national health insurance schemes, can also cause GPs and hospital administrations to be reluctant to treat undocumented children. This has been reported as an issue in the Netherlands and in Belgium, for example.¹¹⁶ In such circumstances, undocumented migrants are particularly vulnerable to discrimination.

7.2.2 Lack of awareness and complex rules

As noted above, the rules governing access to health care are complex and subject to change. At the same time, health care institutions in many countries are being given greater responsibility to determine immigration status and provide treatment accordingly. Without adequate training of health care professionals and clear guidance, it is inevitable that there will be a lack of awareness or understanding of the rules that can lead to inappropriate denial of care.

The British Medact Refugee Health Network devotes a large proportion of their resources to finding GPs who will treat undocumented migrants, focusing specifically on maternity care and health care for children. Their advocacy for undocumented children has taken the form of awareness-raising in the health community, for instance with talks at the Royal College of Paediatrics and Child Health, and recruiting high-profile members of the medical community. They have also worked on publicising the NHS scheme which allows a ‘care first, pay later’ approach for immediate necessary care.

Lack of awareness on the part of undocumented parents is also a barrier. Many undocumented migrants do not know what health care they or their children are entitled to, and outreach and information is fundamental to ensure that they access care when possible.

7.2.3 Excessive costs

As undocumented children are often excluded from national insurance schemes, or only have limited access (such as in France), health care that must be paid for is prohibitively expensive. For example, the cost of a normal procedure for delivery of a baby can be more than 2,000 euros¹¹⁷ (child birth is considered emergency health care and cannot be denied but maybe be charged for in some countries). Such excessive costs can be a major barrier to undocumented children’s access to health care.

¹¹⁵ Department of Health, “Implementing the Overseas Visitors Hospital Charging Regulations”, 2011, p. 43-44, available online at: <http://api.ning.com/files/RkT5lfagSCnOuOIIIMAwk9biclB1U93nCschPWokBQyZobCi24JRhuTKzTkMIWFuT3uKGZVmn7azUjhahl3cQ-jg40l44JKme/DHGuidanceJune2011.pdf>

¹¹⁶ Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p.57.

¹¹⁷ Data for Sweden from 2005 indicated that child delivery cost 21 000 sek = 2 197 euros (at the time of print). Source: Médecins Sans Frontières “Experiences of Gömda in Sweden: Exclusion from health care for immigrants living without legal status”, 2005

7.2.4 Linking of payment to immigration status

A worrying development in the UK is the new obligation on NHS staff to provide details of patients owing £1,000 (approximately 1,150€) or more to UK Border Agency (UKBA). Pending applications with UKBA (new visas, extensions of stay, re-entry) can be refused until the debt has been paid.¹¹⁸ Thus payment of health care is being linked to immigration status. For example, someone who may otherwise be eligible for regularisation may have their application rejected because they are unable to pay debts for health care. This may exacerbate parents' fear of incurring large debts for medical treatment, and pose a further obstacle to health care for children.

Such interaction between the health service and immigration authorities will likely also increase fear that accessing health services will lead to detection.

7.2.5 Fear of Detection

Fear of detection, and subsequent deportation or separation of the family, is a fundamental obstacle to undocumented children's access to health care. It is a constant aspect of undocumented families' interaction with statutory authorities, and so can prevail even when there are no instances of health care administrations sharing information with the immigration authorities.

Research by Pharos, UNICEF Netherlands and Defence for Children International – the Netherlands in 2008 and 2009 found that undocumented children and their parents were afraid that hospitals had the duty to report them to the police. Parents of undocumented children were also afraid they would not be able to pay hospital bills. These concerns caused parents to delay going to hospital when their child was unwell.¹¹⁹

A case received by a London-based NGO, Praxis, illustrates the potential tragic consequences of such circumstances. An undocumented family placed their young baby with an unregistered child minder while they worked. The child minder shook the baby causing severe injury. Instead of taking the baby straight to hospital, the parents sought the help of an unlicensed medical practitioner due to fear that their immigration status would be exposed if they went to hospital. The family did later present to the Accident & Emergency Department, but the baby died. There is no evidence that the baby would have survived if she had reached Accident & Emergency sooner, but the delay may have been an aggravating factor.

¹¹⁸ The government announced these changes on 18 March 2011, but they are not yet in force, and further guidance will be issued (Department of Health, "Implementing the Overseas Visitors Hospital Charging Regulations", para 5.55, available online at:

<http://api.ning.com/files/RkT5lfagSCnOuOllMAwk9biclB1U93nCschPWokBQyZobCi24JRhuTKzTkMIWFuT3uKGZVmn7azUjhahl3cQ-jg40l44JKme/DHGuidanceJune2011.pdf>

¹¹⁹ Marjan Mensinga, "Undocumented children and the access to healthcare at the hospital" (English summary of research, June 2010 (available online at:

http://www.pharos.nl/uploads/site_1/Pdf/Documenten/Lampion/Summary_Study_acces_of_illegal_children_in_NL_at_hospitals.pdf).

7.2.6 Lack of access to continuous care

In some EU Member States, undocumented children are able to access continuous care, through inclusive regulations or inclusive interpretations of legislation. However, other obstacles, such as lack of awareness, complex rules, costs of consultations and medicines, fear, inability to regularly attend appointments (due e.g. to indirect costs such as transport, time off work), and language difficulties, can still present obstacles to children's access to continuous health care.

7.2.7 Lack of medical records

The maintenance of medical records can also be an issue. Undocumented parents may give false names and contact details, or use insurance cards belonging to family members or friends, because of fear of detection or in order to access health care they would otherwise not be able to receive.¹²⁰ Medical records may also not be kept when undocumented children access health care services informally.

Further, undocumented families that have moved often or otherwise do not access medical services from the same provider may not have any records of their or their children's medical history. For example, a doctor in Belgium, Saphia Mokrane, reported a case where a four-year old undocumented child had moved with her family through four different countries on their journey to Belgium, and had received different vaccinations in each one, but her mother had no record of which vaccinations they were. Being afraid that her daughter was not protected, the mother considered it safer to have the vaccinations again.¹²¹ Two NGOs in the Netherlands, Pharos and Médecins du Monde Netherlands have proposed the introduction of a medical file for children to carry with them.

Thus, undocumented children are often not able to access continuous medical care. This is not only detrimental to their health, but more costly than preventative care.

7.2.8 Lack of access to specialist care

Access to specialist care for undocumented children is extremely limited in Europe. Even where it is possible to access some secondary and continuous care, for example in Belgium and Italy, there are serious difficulties for children to receive care from paediatricians, dentists or optometrists.¹²²

¹²⁰ PICUM, *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels, 2007, p. 9; Fundamental Rights Agency (FRA), *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*, 2011, p. 49

¹²¹ Presentation by Doctor Saphia Mokrane, General Practitioner, Council of Europe Hearing on "Undocumented migrant children in an irregular situation: a real cause for concern", 15 March 2011, Brussels

¹²² Luca Bicocchi & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p. 54.

7.2.9 Lack of access to mental health care

Lack of access to mental health care is also a significant issue, especially considering that undocumented children can be more vulnerable to mental health needs. There is a lack of specific information about undocumented children's mental health needs, as with data about their needs in general, but it is particularly necessary for undocumented children to have access to mental health care because the experiences related to being undocumented may cause strain on mental health.

For example, children may have experienced trauma over events in their countries of origin, on route, and in Europe itself, such as in detention. The uncertainties of living with an irregular status can also be very traumatic for children; living with the threat of deportation (of themselves with their families, and of one of their caregivers), and uncertainty around what will happen when they reach the age of majority and about the future in general.

As well providing information sessions and language and cultural classes (related to both Belgium and Brazil) to support undocumented families, the Belgian NGO Raiz Mirim provides psychological counselling for undocumented parents and children.

The inclusion of undocumented children in school, and their *de facto* integration, can also cause imbalance within families in an irregular migration situation, where parents have much more restricted access to rights and society as a whole. Children with better knowledge of the language and country's culture and systems, often assume the role of translator to assist parents. This change in intergenerational relations and responsibilities can put a strain on families and children.¹²³

8. ACCESS TO HOUSING

8.1 Access to housing in national law

Even if the right to decent housing exists on the international level there is no specific reference for the protection of this right for undocumented children at national level.¹²⁴

Children in an irregular migration status usually do not have access to social housing with their family unless one member of the family has a residence permit, and undocumented families are not eligible for housing support.¹²⁵ Where accommodation is made available it is in extreme

¹²³ E.g. Prof. Dr. Chr. Timmerman et al. « Synthèse du rapport : « Quel droit à l'enseignement pour les enfants en séjour précaire ? Une analyse de la situation des enfants sans titre de séjour légal ou avec un titre de séjour précaire dans l'enseignement fondamental en Belgique. », Droit de l'enseignement pour des enfants sans titre de séjour (UCARE), March 2010, p. 11-12, available online at:

http://www.belspo.be/belspo/home/publ/pub_ostc/AP/rAP46sum_fr.pdf

¹²⁴ Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p. 71

¹²⁵ Bill Edgar, Joe Doherty & Henk Meert, *Immigration and Homelessness in Europe*, FEANTSA, The Policy Press, Bristol, UK, p. 101. There are also cases where there were provisions previously, which have subsequently been restricted. For example, in Belgium, a ruling in 2003 from the constitutional court established that the government was

situations, to avoid a breach of human rights. The absolute prohibition of inhuman and degrading treatment (Article 3) and the right to private and family life (Article 8) of the European Convention on Human Rights (ECHR) are the relevant legal provisions. Whilst there is no general duty to provide housing, European Court of Human Rights jurisprudence indicates that these rights can imply a positive obligation on States to avoid imposing “intolerable living conditions” that would breach these rights.¹²⁶ This can imply the provision of material support, including accommodation. For example, in the UK, where case law on this issue has developed over several years, local authorities have a duty to provide housing to avoid a breach of human rights.¹²⁷

Under the general systems for protecting child rights (see Section 3), local authorities in most European Union countries have a duty to protect all children in their areas (including providing them with adequate housing), and specifically separated children, but nothing is provided for undocumented children with their families.

Further, undocumented families are often denied access to reception centres for asylum seekers and homeless shelters.

8.2 Access to housing in practice

8.2.1 Temporary accommodation

In extreme circumstances, to avoid a breach of human rights, temporary accommodation is sometimes provided to families, or more often to a single mother and child. This temporary accommodation in hostels or shelters tends to be inappropriate for children. Authorities are reluctant to house families in social housing due to shortage of housing and funds. This is exacerbated by the perception that undocumented families will be a burden on the local authority funds in the long-term due to lack of authorisation to work. For example, Antoine Math of the organization Groupe d’Information et de Soutien des Immigré (GISTI) in Paris, describes the situation in France as follows:

“The method of reasoning of the councils is to say, ‘We have to intervene when a child is in danger. If this danger is due to a lack of housing, we can easily pay for a hotel room or find them a place in a family. The problem is, without papers, this family will still be on our hands in ten years’ time and will still be paying for them’. They believe, therefore, that the fact of having no papers means that there is no way to insert them into the workplace and this in turn means that the government will be condemned to pay for them for the rest of

required to give social assistance necessary for the wellbeing of the minor even to irregular families. In 2006 however, the law was modified and now provides help only for those families that are lodged in the Fedasil centres (the government agency for asylum seekers) (Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2009, p. 77).

¹²⁶ Ryszard Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights*, Council of Europe Publishing, 2005, pp. 32-33.

¹²⁷ E.g. *Gillow v. UK*, judgement of 24 November 1986 (Application no. 9063/80), *Buckley v. UK*, 15 September 1996 (20348/92), *Connors v. UK*, 27 May 2004 (66746/01). Local authorities do not receive funding from the government for the provision of such services.

eternity. So we arrive at a situation where many local government bodies do whatever they can to avoid taking responsibility for the most vulnerable members of their communities”¹²⁸

Also in the UK, local authorities are obliged to support people with No Recourse to Public Funds (NRPF) to avoid a breach of their human rights. Families supported are usually those with applications pending with the UK Border Agency (UKBA) for leave to remain on human rights grounds, so are in a process by which they will be granted leave to remain or be issued a deportation order, and be expected to leave the country. However, the local authority does not receive any central government funding for providing support and accommodation to these families. Therefore, areas with a high number of undocumented migrants, which tend to be poorer in any case, struggle to reallocate the necessary funds, and may not be able to meet their responsibilities in all cases. In practice, this means turning away families despite urgent need. There is a high level of discretion and divergence in practice in whether support is provided.¹²⁹

The London-based NGO Praxis has been working closely with its Local Authority in the Borough of Tower Hamlets to address this issue. Tower Hamlets Council has issued guidance to its frontline staff on local authority duties and how to deal with people with NRPF, in order to harmonise standards of response.

8.2.2 Threat of separation

Local authorities have a responsibility to protect all children in their areas, but as stated, are often reluctant to provide suitable accommodation for undocumented families. As the laws stipulating the duty of local authorities to provide housing for children in need in their areas are usually not explicit that housing must be provided to children *with* their families, it allows for the interpretation that the obligation is to house only the child. There is sufficient case law establishing that to separate a child from its parents in such circumstances, where it is not in the best interests of the child due to other protection concerns, is a breach of the right to family life (Article 8 ECHR).¹³⁰ However, when families do not have legal representation or know their rights, they are sometimes threatened with separation nonetheless, in order to scare them away, or otherwise, as some are desperate enough to agree, since it is easier to accommodate separated children than whole families.

8.2.3 Inadequate housing and vulnerability to exploitation

Due to the lack of access to social housing, the most common channel utilised by families in an irregular migration situation is the private market. Although a residence permit is not required to access the private market in most European Union Member States, families face strong discrimination and difficulties of access in the private market.

¹²⁸ Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, 2009, p.75.

¹²⁹ Contributions from participants during PICUM and Praxis workshop “Building Strategies to Protect Children in an Irregular Migration Situation in the UK”, 6 October 2011, London

¹³⁰ E.g.s of relevant case law include: *Wallová and Walla v. Czech Republic*, judgment of 26 October 2006 (Application no. 23848/04, para.74-75), *Saviny v. the Ukraine*, 18 December 2008 (39948/06, para. 57), *Havelka and others v. Czech Republic*, 21 June 2007 (23499/06, para. 61), *Moser v. Austria*, 21 September 2006 (12643/02, para. 70, 73)

A shortage of social housing is a common issue, which makes affordable and decent rental housing difficult to find. Undocumented families often face racism and are vulnerable to having their precarious legal status exploited by unscrupulous landlords, who offer housing in poor conditions at exploitative prices. The conditions are often overcrowded, with families having to share a flat with several other people, and sometimes quite unsanitary. For example, Mônica Pereira of the Belgian NGO Abraço came across the following situation in Brussels:

“In Anderlecht an apartment block had been sub-let, the flats inside had been sub-let again, and finally the rooms were also sub-let. Each room was filled with six to eight people, and even the cellar was full. In 2006 the whole block was inspected. In the basement they found a mother with a 15-week old child. The building was declared insalubrious and all of the occupants were expelled directly to his or her country of origin (most were from Brazil).”¹³¹

Undocumented migrants rarely report such abuses. The fear of being identified, in addition to losing their housing, results in families remaining in these living conditions rather than risking denouncing their landlords and finding themselves in the street, or worse, repatriated.¹³² Families often also end up with debts to landlords due to their unstable financial situation, which forces them into an even more vulnerable position. Instability of housing contracts with private landlords and financial difficulties mean that families often have to move regularly, at times relying on friends and family.

An interesting example of good practice is the work done by the NGO Shelter in the UK. Shelter does not offer housing directly but rather gives confidential help to people with all kinds of housing problems. Within this kind of activity they have also offered support and confidential help to undocumented families with children. Shelter tackles the root causes of bad housing by lobbying government and local authorities for new laws and policies, and more investment, to improve the lives of homeless and badly housed people. Their influential campaigns bring aspects of bad housing to the attention of the media and the public, who can then be engaged in the search for solutions.¹³³

It is important to emphasise the significance of housing that is decent and appropriate for children. The situation in the Netherlands around access to housing provides an interesting illustration. Two years after the successful collective complaint at the Committee of the European Social Charter,¹³⁴ and successful challenge to the initial response from the Dutch government, which was to provide “housing” by detaining families, the situation remains problematic. Families that were evicted prior to the decision were not readmitted or provided any alternative support. Families who were not evicted as a consequence of the decision have subsequently spent the last two years in centres that are designed for temporary stay before deportation. Thus, undocumented children’s right to housing is still not being met.

¹³¹ Luca Bicchieri & Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, 2009, p.79

¹³² PICUM, *Ibid*, p. 79

¹³³ PICUM, *Ibid*, p. 79

¹³⁴ Defence for Children International (DCI) v the Netherlands, complaint No. 47/2008, decision on the merits of 20 October 2009, available online at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47SummaryMerits_en.pdf

8.2.4 Penalties for facilitation of irregular migration

There has, in recent years, been an increase in legislation which criminalises people for their facilitation of irregular migration (at EU level, the Facilitation Directive¹³⁵). Such laws are largely targeted at smugglers and traffickers, but could potentially have negative implications for anyone who is considered to be assisting undocumented migrants for profit, which could include those that rent them accommodation. For example, in Italy, provisions have been introduced which increase fines and introduce the possibility for confiscation of property from those that profit by renting to undocumented migrants.¹³⁶

PART 4 - CONCLUSION

9. CONCLUSION

9.1 Concluding Remarks

The analysis in the preceding sections demonstrates that the best interests of the child are regularly superseded by migration control interests that result in the restriction of basic social rights for children in an irregular migration situation. Children are often excluded from the general systems for protecting child rights and subjected to the same immigration control measures as their parents. Where children are protected by the state, it is sometimes done at the expense of their right to family life, by separating children from their families. This creates a tension between the right to family life and access to other basic rights, and contradicts the best interests of the child.

Service providers need not only be aware of undocumented children's rights and their duties, but be prohibited from sharing information with immigration authorities. A firewall between public service provision and immigration control must be erected, in law, and in practice, through the issuing of clear guidance for both service providers and undocumented parents. At the same time, undocumented families need to be well-informed of this division, as well as their rights, so that they can have confidence in accessing services and seeking redress when their rights are violated.

The lack of long-term and stable solutions for undocumented children is an issue that deserves further attention. A stable migration status is one of the key mechanisms to addressing one of the biggest barriers to accessing civil and social rights for undocumented children, notably the fear experienced by many undocumented parents of detection and deportation. Even when cases of

¹³⁵ Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence (OJ L 328/17 5.12.2002)

¹³⁶ Elena Rozzi, "Undocumented migrant and Roma children in Italy: between rights protection and control" in: Jacqueline Bhabha (ed.) *Children without a State: a global human rights challenge*, MIT Press, Cambridge, Massachusetts, 2011, p. 189

detection as a result of accessing services are not frequent, the fear of being detected can prevent undocumented parents from accessing basic services for their children, and it can be exacerbated by even a few instances.

Some EU Member States have provisions for regularisation of children based on long residence.¹³⁷ However, there are numerous obstacles to achieving this status, including a lack of good quality free legal representation, discretion and poor quality initial decision-making, application fees,¹³⁸ lack of awareness on the part of both families in an irregular migration situation and their advocates, and complex procedures and requirements.

Further, permits granted on human rights grounds are often only short term, and the instability and long periods of uncertainty and irregularity associated with growing up with an irregular migration status are highly detrimental to children's wellbeing. It is imperative for children to have durable solutions – pathways into a regular migration status and documentation.

9.2 Recommendations

1. Children first and foremost

Undocumented children should be entitled to the same treatment and rights as national or resident children and should be treated as children first and foremost. The immigration status of the children should not be of relevance for the state; the only concern of the state should always be the best interest of the child as outlined in international standards of protection for children.

2. Respect international obligations

EU member states should comply with their obligations under international human rights law and therefore guarantee undocumented children equal access to services and protection as to national children. All the rights granted in the Convention on the Rights of the Child should apply to all children present in the territory irrespective of their immigration status; any reservations on the UN Convention on the Rights of the Child (CRC) should be withdrawn.

¹³⁷ For example, in France, regularisation is possible after 10 years of continuous residence, or 15 years for students ('Chevènement Law' Loi n°98-349 du 11 mai 1998 relative à l'entrée et au séjour des étrangers en France et au droit d'asile, published in the Official Journal 12 May 1998, c.f. Karin Sohler, "Country Study: France" in Martin Baldwin-Edwards and Albert Kraler (eds.) "REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU - Appendix A: Country Studies", ICMPD, Vienna, January 2009, available online at: http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/regine_appendix_a_january_2009_en.pdf). In the UK, regularisation is possible after 14 years of continuous residence (UK Border Agency, "Immigration Directorate Instructions", Chapter 18, available online at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/IDs/>).

¹³⁸ For example, in the UK, an application for Indefinite Leave to Remain costs a minimum of £750. Applications through the asylum system do not attract fees. Where an application is made on human rights grounds and the applicant is destitute, the UK Border Agency should waive the fee on application, but this may require a lawyer to insist. High fees have also been noted as a barrier to regularisation in Greece, for example (ICMPD, "REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU – Final Report", Vienna, January 2009, available online at: http://research.icmpd.org/fileadmin/Research-Website/Project_material/REGINE/Regine_report_january_2009_en.pdf).

3. Access to birth registration

All children should have access to birth registration in accordance with the Convention on the Rights of the Child (CRC). Children in an irregular migration situation should not be prevented from accessing their right to birth registration as a result of their parent's migration status. Administrative requirements for parents should be minimal and testimonial confirmation of identity accepted when necessary. Any form of limitations to the enjoyment of this right should be removed as they are contrary to international obligations. All the administrative and financial barriers that impede correct access should be eliminated, and registries prohibited from denying the registration of a child, due to the parents being undocumented or sharing their personal information with the immigration authorities.

4. Access to education

All migrant children irrespective of their status should have access to the same statutory education as national children, with legal entitlements made explicit. Clear guidance to school administrations on the rights of undocumented children and appropriate admissions requirements should be issued. Schools should represent safe environments, with school administrations forbidden from reporting undocumented children to the immigration authorities and immigration authorities forbidden from arresting children or parents within the vicinity of schools. Possibilities for delaying deportation for children to finish their education should be introduced. Formal recognition of undocumented children's education through the issuing of recognized diplomas should be undertaken. Access to vocational training and non-compulsory education should also be promoted. Any form of limitations to the enjoyment of this right should be removed as they are contrary to international obligations. All the administrative and financial barriers that impede correct access should be eliminated.

5. Access to health care

All migrant children irrespective of their status should have access to health care on an equal basis with national children. Access to health care should not be limited to emergency care but also include continuous care granted by GPs and specialists. Access to mental health care should also be promoted. Clear guidance to health professionals and administrators on the rights of undocumented children should be issued. The maintenance of medical records that undocumented families can keep with them should be promoted. Any form of limitations to the enjoyment of this right should be removed as they are contrary to international obligations. All of the administrative and financial barriers that impede correct access should be eliminated. Health care providers and administrators should be prohibited from denying health care to undocumented children, solely due to the parents being undocumented or their inability to pay before treatment. Sharing personal information with the immigration authorities must also be prohibited.

6. Access to housing

Housing provisions should not be denied to undocumented children on the grounds of their irregular status, particularly given the importance of the right to adequate housing for the enjoyment of other social rights. States must take care whenever is possible of the entire family unit and avoid dividing the child from his/her family; undocumented families with children should receive social assistance to prevent destitution.

7. Clear separation between service provision and immigration enforcement

A firewall between public service provision and immigration control must be erected, in law, and in practice, through the issuing of clear guidance for both service providers and undocumented parents. States should ensure that information about undocumented children's entitlements is accessible to all actors involved. EU member states should take the necessary measures to guarantee that undocumented children's entitlements are uniformly implemented by regional and local authorities.

8. Promote better knowledge of the realities faced by undocumented children in Europe

Research needs to be promoted as a tool of knowledge for improving the knowledge of the situation of undocumented children. The collection of comparable data on undocumented children's access to basic social rights should be promoted by states with the active participation of NGOs and other actors who work in this field. In no case should the information collected be used against the best interests of the child and his/her family in the realm of immigration control.

9. Include undocumented children in EU social policies

Undocumented children are a particularly vulnerable group and should be included in all EU and member states' legislation for the protection of children, including the National Action Plans on social inclusion (within the EU Social Inclusion-Social Protection Process), the Strategy on the Rights of the Child, the Integration Strategy, the Fundamental Rights Agency (FRA), and other relevant EU policy processes and agencies. The impact of EU directives and policies on asylum, migration and external borders on undocumented children's rights should be evaluated.

10. Promotion of more secure residence status

Permanent and long-term mechanisms for children to regularise their status should be promoted. Pathways to permanent residence status and citizenship should not exclude people without regular residence, when other criteria, such as years of residence and attendance in school have been met.

ANNEX A
CONVENTION ON THE RIGHTS OF THE CHILD SPECIFIC PROVISIONS CITED

- The right to birth registration (Article 7(1)):

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

- The right to education (Article 28, see also Article 29)

“States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.”

- The right to health care (Article 24 (1), see also Articles 25 and 39)

“States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”

- The right to housing (Article 27 (1), (3))

“States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development” and “in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”