

UN Committee on the Rights of the Child
Day of General Discussion - 28 September 2012

“The rights of all children in the context of international migration”

Undocumented Children: Barriers to Accessing Social Rights in Europe

Submission by PICUM¹

1. Introduction

This submission concerns accompanied children with an irregular² migration status in the European Union.³ These children are triply vulnerable as migrants, as persons in an irregular situation, and as children.

There is virtually no official data for the number of undocumented children in Europe. While it is estimated that there are between 1.6 and 3.8 million irregular migrants in the European Union,⁴ there are no reliable EU-wide estimates of the percentage which are children, due to issues of reliability, comparability and accuracy.

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.⁵ 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 embryonic or unimplemented in many EU countries. At the same time, the focus on separated children and victims of trafficking in the policy and public debates has also been characterised by an almost complete lack of consideration of children who are accompanied by parents or other

¹ Based in Brussels, Belgium, the Platform for International Cooperation on Undocumented Migrants (PICUM) represents a network of more than 150 organisations and 150 individual advocates working with undocumented migrants in more than 30 countries, primarily in Europe, and in other world regions. With ten years of evidence, experience and expertise on undocumented migrants, PICUM promotes the recognition of their fundamental rights, and bridges the key gap between grassroots realities and policy level debates.

² ‘Irregular’ and ‘undocumented’ are used synonymously throughout this submission and refer to people having an irregular migration status.

³ Children’s migration status is usually linked to their parents. Children may be undocumented because their parent or caregiver is undocumented, for example, because the family’s visa or permit expires, their application for international protection is refused, or they entered Europe irregularly. Children born in Europe can also be undocumented, because their parents are undocumented. It is also possible for the parent(s) or caregiver(s) to have a regular migration status, whilst the child is undocumented, such as when a child comes to Europe to be reunited with family, but does not satisfy the official family reunification scheme criteria. Some children may be sent to Europe by their families, have runaway or decided to migrate independently, but remain outside the reception systems for unaccompanied children, and are therefore alone. Some children are trafficked into Europe, either alone or with their families, and may also be undocumented.

⁴ European Commission DG Research CLANDESTINO project: 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>

⁵ 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) and Council of the European Union, *Draft Council Conclusions on unaccompanied minors*, 9824/10, Brussels, 17 May 2010.

caregivers. There is a concerning lack of visibility of these children, and lack of attention to how they are affected by policies on irregular migration.

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

This submission provides a brief analysis of the main obstacles faced by undocumented children in accessing services in three areas which are critical to their development - education, health care and housing - and is followed by policy recommendations.

2. Access to Education

Although most states in the European Union guarantee the right to compulsory education from age 6 to 16, there is a huge disparity between these legal entitlements and undocumented children's ability to access education in practice.

The level of legislative protection afforded to undocumented children accessing education can be broken down into three categories. Some countries, such as Belgium, Italy and the Netherlands, have an *explicit* reference in their legislation concerning the right of undocumented migrant children to education. Other countries, such as Spain, Poland and the UK have an *implicit* legal right to education for undocumented children, referring to the right to education for 'all children'. No country explicitly denies undocumented children their right to education, though there are cases, such as in Hungary and Malta, where the law states the right to education for children residing regularly, so *implicitly excludes* undocumented children.

In practice, uncertainty or a lack of understanding of undocumented children's rights may result in schools asking to see immigration documents to enrol the child. Even non-immigration related documents such as proof of residence, can be difficult to obtain and so their requirement is a significant obstacle to enrolment. When schools do ask for passports or immigration papers, undocumented families can face discrimination. For example, some schools resist accepting undocumented children as it is difficult to fulfil the administrative requirements to receive funding for them.⁶

Undocumented families often fear that enrolling their child in school could lead to their eventual detection, deportation or of the child being taken into care. In certain cases⁷ immigration authorities have been sent to detain students or parents at the school gates. News of even isolated incidents of such detention spread quickly through migrant communities, entrenching a fear of detection.

The additional cost of education by way of school fees, extra-curricular expenses, the cost of uniforms, books, stationery, lunches and transportation all combine to create a hefty financial burden. A lack of financial assistance, and access to grants and scholarship for undocumented families,⁸ is pervasive across most states in Europe.

Language can be a barrier limiting undocumented children's access to quality education, and hindering their social integration. Owing to language difficulties, migrant children are sometimes wrongly segregated into 'special assistance' classes designed for children with learning difficulties. Rather than addressing their language needs, this segregation instead minimises their scholastic development.

⁶ For example in Poland and the Netherlands, funding is based on the number of enrolled students, making it difficult to satisfy administrative requirements and declare undocumented students to receive funding adequate for the school population.

⁷ Richard Moyon of RESF (Réseau éducation sans frontières) reported how this has happened in France at the 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.

⁸ Local authorities across the Netherlands, for example, vary in whether financial support is provided to undocumented children for educational expenses. There is no universalised national system.

Undocumented children who do attend school often face administrative barriers to taking official examinations. Even when they complete their education, many do not receive their final school-leaving certificate.

Despite the importance of early education for a child's cognitive, social and physical development,⁹ pre-school/nursery remains optional or non-compulsory under most legislative frameworks. Nurseries tend to be fee-paying or require the presentation of ID documentation for enrolment. Although legally considered 'optional', the exclusion of undocumented children from accessing pre-school education is plainly discriminatory.¹⁰ When state subsidised child care or nursery is unavailable, undocumented families are forced to take their children to work, or to leave them with unlicensed child minders.

Those undocumented children who do navigate these barriers and complete their school education are often unable to access vocational courses and higher education. The psychosocial impacts of limited prospects¹¹ on undocumented adolescents is under-researched, but indeed, without the legal authorisation to work, with implausible aspirations for higher education and often times without formal certification for their achievements, what remains is a large group of disengaged, rejected and unoccupied young migrants.

Undocumented children face barriers in attending and completing primary school in Poland

The Polish constitution grants everyone the right to education, which is compulsory until the age of 18. However in practice undocumented children are frequently prevented from officially enrolling at schools. All Polish children receive a PESEL (personal identification number) at birth. Undocumented children can obtain a temporary PESEL but there is a lack of awareness about this, and practice between schools can vary. Despite national legislation¹² stating that children do not need a PESEL number to enroll, many school computer systems still require this number for registration. The requirement of documentation is often a barrier to enrollment, movement between school grades, as well as graduation.

"An undocumented boy from Ukraine was prevented from taking the exam to graduate from primary school, because the school required documents. However, his mother requested help from the mayor of the town. 'If they don't allow him to finish school, what's next? He can't go to secondary school,' she said. As a result, he was able to continue his studies in lower-secondary school."

- Testimony from Warsaw-Based NGO, Polish Migration Forum

3. Access to Healthcare

Only a few European countries¹³ grant undocumented children equal access to healthcare as national children. Access to emergency healthcare is rarely denied to undocumented children, but in some countries¹⁴ emergency healthcare is

⁹ 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>

¹⁰ The Municipality of Milan introduced a measure preventing undocumented children from being registered in pre-schools. The court of first instance in Milan found this measure to be discriminatory and contrary to the right of education to all school grades. (Decision of Tribunale di Milano - Sez. I Civile / Ordinanza n. 2380/08 R.G., 11.02.2008)

¹¹ See for example R. G. Gonzales (2011) "Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood", *American Sociological Review* 76(4) 602– 619; R. G. Gonzales & L. R. Chavez (2012) "Awakening to a Nightmare: Abjectivity and Illegality in the Lives of Undocumented 1.5-Generation Latino Immigrants in the United States" *Current Anthropology* Volume 53, Number 3, June 2012.

¹² Act on the School Education System of the 7th of September 1991, amended with the Act of the 8th of January 1999 including Provisions for the Reform of the School System and the Act of 21 November 2001 amending the Act on the School Education System

¹³ In Spain, Article 43 of the Spanish Constitution of 1978, Article 1(3) of the Ley General de Sanidad 14/1986 of 25 April 1986, and Article 12 of the Organic Law 4/2000 of 11 January 2000 on the Rights and Freedoms of Aliens in Spain and their Social Integration guarantee undocumented children the same access to health care as national children. No distinction is made on the basis of

chargeable. In some countries only 'essential' or 'urgent medical care' may be free of charge for undocumented children¹⁵ but broadly defined terms as 'urgent' and 'essential' lead to the discretionary and unpredictable application of healthcare legislation and further exacerbates the inequity of health systems for undocumented migrants.

Coupled with these undefined legislative concepts, is a general lack of awareness of healthcare rights – pervading both migrant and healthcare communities.¹⁶ Rules and policies governing access to healthcare are complex and frequently changing. Healthcare professionals frequently lack the training and guidance to know what rights their undocumented child patients have, and so may refuse treating someone who does have the right to treatment.

Lack of awareness causes fear in migrant communities, as many undocumented parents do not know what health care they or their children are entitled to, or whether health care professionals have a duty to report them to the police if they seek treatment. This and the possibility of spiralling healthcare costs once treatment is first sought, often prevents undocumented families from finding healthcare accessible.

When healthcare is successfully sought, undocumented children rarely enjoy the privilege of access to continuous care. Complex rules, the cost of consultations and medicines, an inability to regularly attend appointments, frequently having to move, and language difficulties all pose obstacles to children's access of continuous healthcare.

Continuity of care relies heavily on well-maintained medical records. Undocumented parents may have to give other names, or use the insurance card of a friend or relative to overcome fear of detection. The need to move frequently also means undocumented children cannot always access health care from the same providers making it difficult to maintain a child's medical history, or accurate medical records.

Beyond primary care access, access to specialist care for undocumented children is extremely limited. Often specialists require a referral from primary carers and can also be expensive and complicated to seek. Undocumented children are at greater risk of experiencing trauma from their country of origin, en route and/or on arrival in the host country. The specific difficulties associated with living in an irregular status – constant fear of deportation, uncertainty over their future and living in a transient and often impoverished setting – can be traumatic for children. Yet undocumented children are highly limited in their ability to access essential paediatrics and mental health care.

immigration status. Further, undocumented children and undocumented pregnant women are entitled to access the Spanish national health care system free of charge and do not need to obtain an 'individual health card'¹³ to be treated. On April 20, 2012, the Spanish government issued a Royal Decree to limit adult undocumented migrants' access to health care to emergency health care only. While the decree does not affect undocumented children's legal entitlement to healthcare, health care professionals and civil society organizations working with undocumented migrants throughout the country are concerned about the impact that the new restrictions will have on undocumented children's access to health care in practice, as their parents' right to health care will be severely curtailed. For example, parents may delay seeking care for their children due to fear of contact with local authorities as well as hospitals and clinics. Children may also be negatively affected by their parents' poorer health conditions.

¹⁴ In Hungary, in principle, undocumented migrants have to pay for emergency care, but if they cannot, it is possible for the service provider to be reimbursed by the State. In Portugal, undocumented migrants will receive the same treatment as nationals if they can prove residence of 90 days. If they cannot prove residence of 90 days they must pay full cost for emergency care. Children are, in theory, guaranteed access to healthcare to the same degree as nationals, until the age of 16. However, to guarantee their access they have to register with the Registry for Undocumented Children which is managed by the High Commissioner for Immigration and Intercultural Dialogue (ACIDI). Several parents fear that registration will lead to deportation.

¹⁵ In Germany only "emergency" care is accessible by undocumented migrants. However, since 1 January 2005 those accessing non-emergency care do face a significant practical barrier as the social welfare services that administer the document for reimbursement of care (Krankenschein) are required to report the presence of undocumented migrants to immigration authorities immediately.

See also European Union Agency for Fundamental Rights, *Fundamental Rights of migrants in an irregular migration situation in the European Union*, November 2011, available online at:

http://fra.europa.eu/fraWebsite/attachments/FRA_2011_Migrants_in_an_irregular_situation_EN.pdf

¹⁶ World Health Organisation, "Migrations Internationales, santé et droits humains" (2005) available online at: http://whqlibdoc.who.int/publications/2005/924256253X_fre.pdf

Fear of detection prevents undocumented families from accessing emergency care in the UK

By law, undocumented children should have access to the following medical services free of charge in the UK: primary care, emergency care, family planning, treatment of communicable diseases (from 1 October 2012, this will include HIV) and treatment for serious mental health issues. Despite this legal protection, the lack of awareness, pervasive fear of detection and subsequent deportation often prevents undocumented parents from availing of these rights for their children, as in the case below.

“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 hospital, but the baby died. There is no evidence that the baby would have survived if she had reached hospital sooner, but the delay may have been an aggravating factor.”

- Testimony from the London-based NGO Praxis

4. Access to Housing

Undocumented children’s access to adequate housing is enshrined in international law and general child rights protection systems, but there tends to rarely be any specific reference at the national level in Europe. Any legislative protection in this regard usually covers only unaccompanied children, or children in isolation, ignoring a family’s right to remain together. Undocumented children cannot access social housing with their family unless one member has a residence permit, and undocumented families are not eligible for housing support.¹⁷

In very extreme circumstances, temporary accommodation may be provided to families, or more often to a single mother and child, if they have contacted the authorities to request support. Nonetheless, many undocumented families fear that contact with the authorities will lead to detection by the immigration authorities, and do not avail of these entitlements. If temporary accommodation is granted, it is usually provided in shelters and hostels, which is inappropriate for children, and not a long term solution. A lack of supply of temporary accommodation also often leads to undocumented families being de-prioritised.

Generally, local authorities have a duty to protect all children in their area. However this duty is often interpreted such that accommodation is made available for undocumented children, but not for their accompanying families. International jurisprudence has established that it is not in the best interests of the child to separate a child from his or her family, and that this breaches Article 8 of the European Convention on Human Rights. Yet, the separation and housing of children alone continues in practice.

The impact of not having clean, safe, stable and adequate housing is felt most significantly by children.¹⁸ Children who live in poor conditions are more likely to develop respiratory problems, be more vulnerable to infections and suffer from mental health problems. The impact of housing on a child’s development is felt both immediately and long-term – poor living conditions in early childhood have been linked to poor health in later life, as well as knock-on effects with attendance at school and cognitive development.¹⁹

Without being able to avail of social housing, undocumented families most commonly resort to the private housing market. Preying on their desperation, unscrupulous landlords often rent poor housing at exploitative rates to undocumented families, who rarely report such abuses because of their fear of detection, and anxiety that they might lose their housing altogether. Moreover, landlords often do not give undocumented families a housing contract, leaving

¹⁷ Bill Edgar, Joe Doherty and Henk Meert “Immigration and Homelessness in Europe, FEANTSA” (The Policy Press, Bristol, 2004), p.101.

¹⁸ Lisa Harker, “Chance of a Lifetime: The impact of bad housing on children’s lives”, SHELTER, UK (2006)

¹⁹ Nando Sigona and Vanessa Hughes COMPAS study “No Way Out, No Way In” (May 2012) available online at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO_WAY_OUT_NO_WAY_IN_FINAL.pdf

them with no security or certainty. Families often build up debts to landlords due to their unstable financial situation, creating a dependence and added vulnerability.

Governments have yet to encourage alternative strategies for housing undocumented families. EU legislation²⁰ as well as recent laws enacted by EU member states²¹ that criminalise people for their facilitation or assistance of irregular migration has sometimes been interpreted to cover landlords who rent property to undocumented families, further decreasing housing prospects for undocumented families. In countries such as the Czech Republic, Germany, Italy and Spain for example, police must be notified of the presence of foreigners in accommodation, making it near impossible to host, sublet or rent to undocumented migrants.²²

Undocumented families excluded from social housing cram into single, uninhabitable rooms in Belgium

A Belgian Constitutional Court ruled on 22 July 2003 that the government is required to give children, regardless of immigration status, social assistance that is necessary for their wellbeing, including housing. However, the subsequent Royal Decree of 24 June 2004²³ restricted the provision of social assistance and shelter for families in an irregular migration situation, to only that provided in reception centres for asylum seekers. However, a number of social welfare offices refuse to accept applications for social assistance from undocumented families and since 2009, the shortage of places in the reception network of Fedasil Agency has led to the systematic exclusion of undocumented families. Although there is a right for undocumented children to obtain material aid, this does entail a certain 'duty to report' for the social welfare centres (*Centre Public d'Action Sociale – CPAS/ Openbaar Centrum voor Maatschappelijk Welzijn - OCMW*), meaning that undocumented families are only accommodated in a reception centre and protected against eviction if they are cooperating with a process leading to regularisation or return.²⁴ For these reasons, undocumented families thus resort to finding housing on the private market where they face sub-standard conditions and exploitation.

"In Anderlecht (district in Brussels) 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 uninhabitable and all of the occupants were expelled directly to his or her country of origin (most were from Brazil)."

- Testimony from the Brussels-based NGO Abraço

²⁰ European Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. This Directive criminalises the facilitation of irregular migrants entering, remaining or transiting in Europe. The term 'facilitation' is broadly construed and can include landlords knowingly housing / renting to undocumented families.

²¹ For example in Italy the 2009 Law on Public Security (*Disposizioni in materia di sicurezza pubblica, Legge 15 luglio 2009, n. 94*) available online at: http://www.immigrazione.biz/upload/dcl_sicurezza_2_lug_2009.pdf comes after the 2002 EU Directive. This law not only criminalises irregular migration and the very presence of an undocumented migrant in Italy, but also criminalises the assistance and facilitation of undocumented migrants.

European Union Agency for Fundamental Rights, "Fundamental Rights of migrants in an irregular migration situation in the European Union" (November 2011) at page 62, available online at:

http://fra.europa.eu/fraWebsite/attachments/FRA_2011_Migrants_in_an_irregular_situation_EN.pdf

²³ Royal Decree of 24 June 2004 Fixing the Conditions and Modalities For the Granting of Material Help for a Foreign Minor Residing Illegally in the Kingdom with his Parents, which was again later modified by the Royal Decree of 1 July 2006.

²⁴ Protocole de coopération entre l'Office des Etrangers et Fedasil (17 septembre 2010) concernant le trajet d'accompagnement des familles avec mineurs qui séjournent irrégulièrement sur le territoire et qui sont accueillies en vertu de l'arrêté royal du 24 juin 2004 (available online at http://www.adde.be/J_15/index.php?option=com_docman&task=doc_download&gid=840&Itemid=120).

5. Conclusion

Countries across Europe have been progressively restricting access to basic social rights for irregular migrants. 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 poverty²⁵ 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 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. 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 of undocumented families of their rights are also common barriers.

States must take strong proactive measures to ensure that the rights enshrined in the CRC are realisable in practice. Children’s health, living conditions and access to education are directly interlinked, and cannot be considered as mutually exclusive. To deny an undocumented child access to one of these rights, directly affects their enjoyment of the other rights.²⁶

Countries of destination must find ways to improve the legal position of undocumented migrants and promote regularisation programmes as well as amending restrictive laws that feed irregular migration. A comprehensive, rights-based approach to migration policies must be developed, focusing on child protection over migration control. Comprehensive migration policies should be implemented that recognise and champion the importance and need for the protection of the economic, social and cultural rights of undocumented migrant children.

²⁵ Social Protection Committee of the European Commission Report “Child Poverty and Well-Being in the EU – Current Status and the Way Forward”(January 2008) available online at: <http://www.ec.europa.eu/social/BlobServlet?docId=2049&langId=en>: ‘Children living in a migrant household face a much higher risk of poverty than children whose parents were born in the host country. In most countries, undocumented children face at least a 30 per cent higher chance of living below the poverty line than children whose parents were born in the country of residence.’

²⁶OHCHR, “Economic, Cultural and Social Rights: Handbook for National Human Rights Institutions” (2005), p.74 available online at: <http://www.ohchr.org/Documents/Publications/training12en.pdf>

ANNEX

Recommendations

1. States should ensure that all children on their territory have access to all forms of healthcare. Access to healthcare should not be limited in any way and should include emergency, primary, specialist and preventative care. Legislation should explicitly include the rights of undocumented children to access both preventative and curative healthcare. Any practical barriers to accessing healthcare should be addressed with a positive child-protection focused policy.
2. All children must have access to adequate, safe and stable housing *with* their families. Accompanied children cannot be considered in isolation, but as part of the family unit. Legislation should be amended to include the right of undocumented families to live together in adequate housing, and have access to social assistance.
3. States must facilitate enrolment in schools for undocumented children and ensure that these children are not discriminated against in practice. Legislation should explicitly include the right of undocumented children to access education at all levels. Administrative barriers to enrolling in school and gaining full academic accreditation and certification must be removed.
4. States should promote regularisation schemes and act towards improving the legal position of undocumented children in their territory. Restrictive laws that foster irregular migration should be repealed and replaced with accessible, uncomplicated mechanisms for undocumented children to secure their residence status.
5. States must adopt a child-protection approach to ensure that a child's irregular status does not act as a critical barrier in their ability to access economic, social and cultural rights, which states recognise to be essential for the protection and development of all children.