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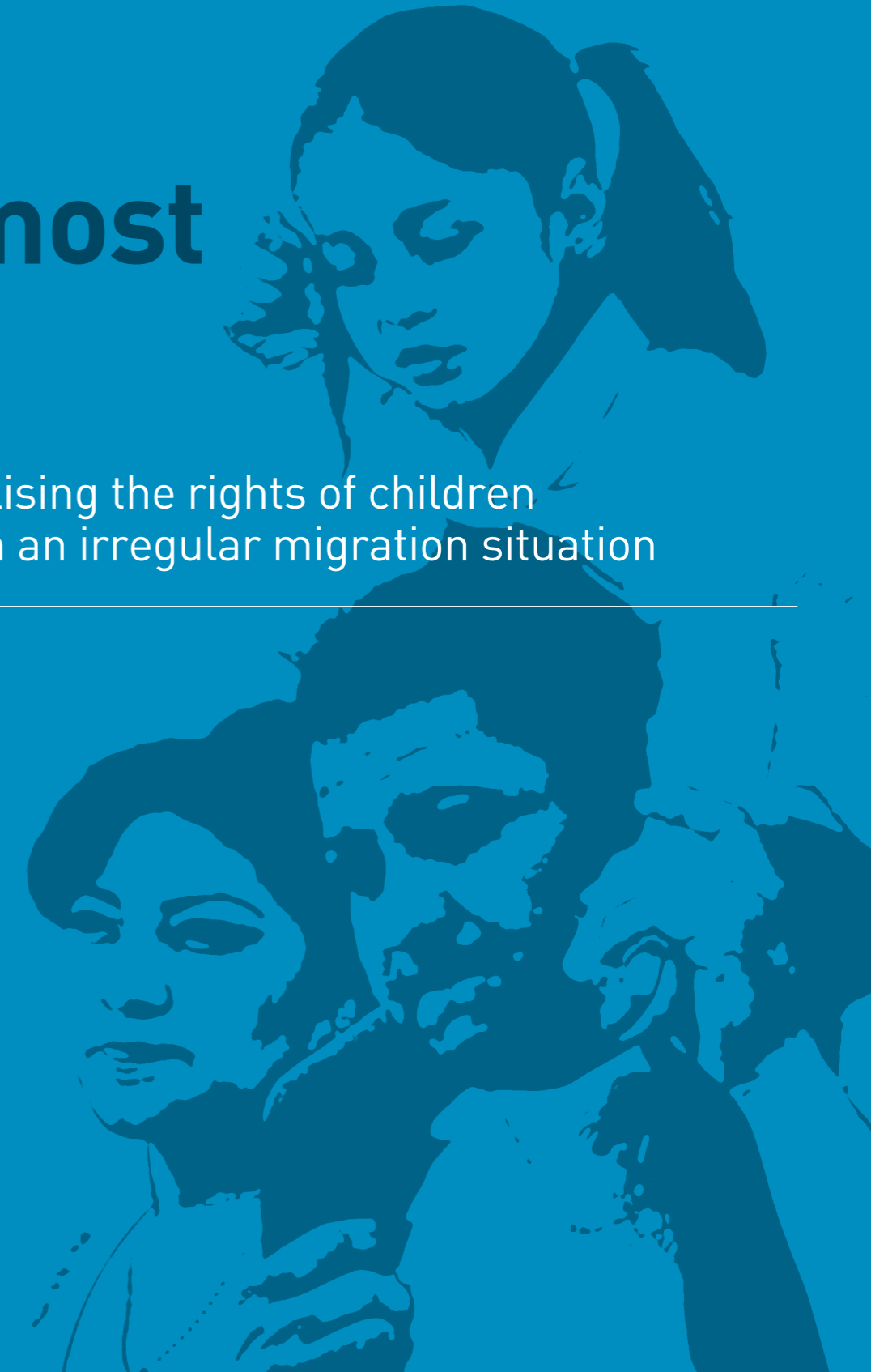
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Children First and Foremost

A guide to realising the rights of children
and families in an irregular migration situation

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PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS



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PART

3

preface

Undocumented children are children, first and foremost

Children and families in an irregular migration situation are one of the most vulnerable groups in Europe today. They are in a position of triple vulnerability: as children above all; as migrants; and finally, as undocumented migrants. Yet they are children, first and foremost.

Undocumented children, despite being a highly vulnerable group, frequently fall between the cracks in the architecture of legal protection. Notwithstanding the many legal protections in international and regional human rights instruments guaranteeing all children access to civil, economic, social and cultural rights, undocumented children still face countless barriers to exercising their fundamental rights to access healthcare, housing and education. National legislation often falls short of these standards, and even where legal entitlements do exist, practical barriers prevent the full realisation of these legal rights. As a result there is wide-spread destitution and social exclusion of irregular migrant families.

Undocumented children and families face higher risks of poverty, exploitation, social exclusion and violence. However, their access to social rights is crucial, both to safeguard their own wellbeing, and for society at large. Educated young undocumented children in good health will have better cognitive, social and physical development and be able to contribute more to society in later life than disengaged, disempowered young migrant children living in inescapable destitution. Every child has the right to life, adequate housing, quality education and continuous healthcare.

This guide is the result of the “Building Strategies to Improve the Protection of Undocumented Children in Europe” project, which aimed to spread understanding of the challenges children in an irregular migration situation face in accessing their fundamental rights to education, healthcare and housing in Europe, and to share and develop good practices and strategies to overcome these barriers.

The guide is designed to acknowledge, appreciate and endorse the crucial work being undertaken to realise the rights of children and families in an irregular migration situation. It is published in appreciation of the collective efforts, strength and perseverance of the advocates who work to realise the rights of this excluded group. This work is ongoing and it is crucial to continue to work together, to build strategies, and to strengthen solidarity for all vulnerable groups, including undocumented children and families. The voices and actions in support of undocumented children and families should continue to grow louder, more prominent and become more visible, to ensure all undocumented children are perceived and protected as children, first and foremost.

PART

1

INTRODUCTION AND
LEGAL FRAMEWORK



what is PICUM?

PICUM, the Platform for International Cooperation on Undocumented Migrants, is a non-governmental organisation that aims to promote respect for the human rights of undocumented migrants.

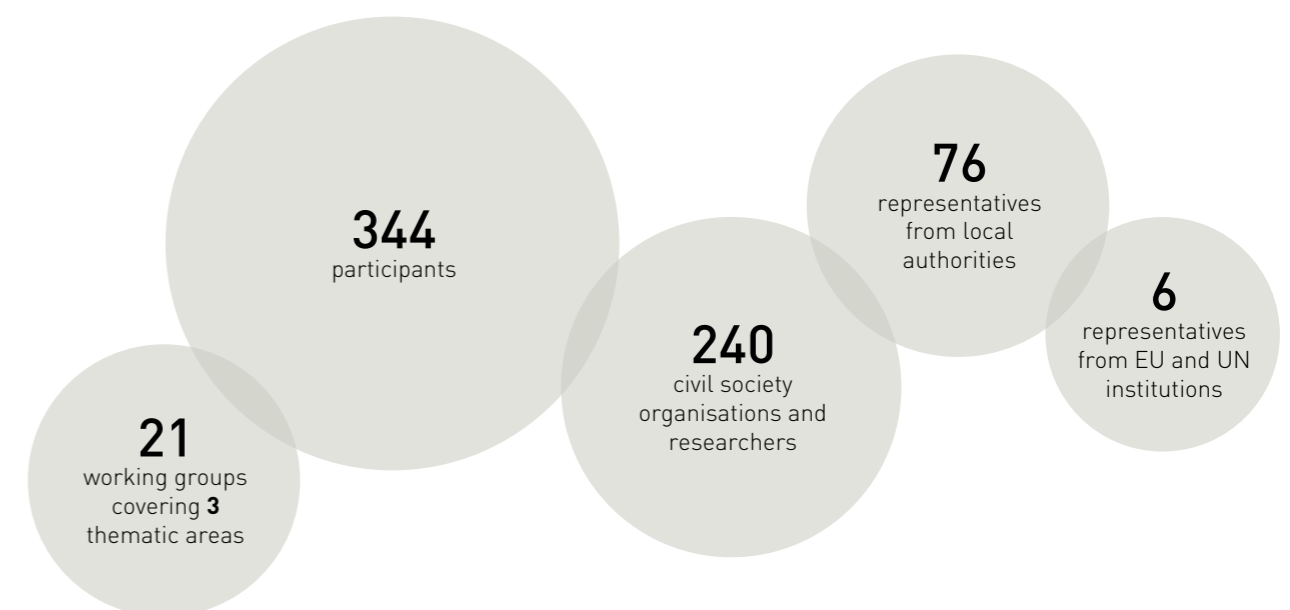
PICUM exists to ensure that all human beings are treated equally and with dignity - regardless of their immigration status. Working to achieve dignity through equal access to core rights, PICUM has led an independent network of over 150 organisations and advocates providing humanitarian support and assistance to undocumented migrants in more than 30 countries across Europe and in other world regions for over ten years. Facilitating constructive public and policy debates, PICUM addresses abuse and discrimination facing the most vulnerable and silenced migrants in our society to ensure that policy makers adhere to the international and European standards for dignity, equality, and human rights.

PICUM was established by frontline NGOs, charitable networks and churches who identified a need to address the humanitarian needs of Europe's most vulnerable migrants through lasting policy change. By addressing the fundamental rights concerns of this group in an informed, measured, and professional way, PICUM works to improve recognition regarding the presence and rights of irregular migrants in Europe and gain support from key decision makers on the issue.

PICUM's bi-monthly newsletter on issues concerning the human rights of undocumented migrants is accompanied by a cumulative quarterly newsletter which is produced in seven languages and circulated to PICUM's broad network of more than 4,000 civil society organisations and interested individuals.

project methodology

Building strategies to improve the protection of undocumented children in Europe



Through its work on monitoring and advocacy for the rights of undocumented migrants, PICUM has noted a trend towards the increasing erosion of the rights of children in an irregular migration situation.

PICUM's first project on undocumented children, which ran from February 2007 – January 2009, was concerned with developing the capacity of partners in Belgium, France, Hungary, Italy, Malta, the Netherlands, Poland, Spain and the UK to protect undocumented children from discrimination-based violence. The project's final report, 'Undocumented

Children: Invisible Victims of Immigration Control,¹ focuses on the discrimination that undocumented children face in accessing basic social rights such as education, healthcare and housing, and revealing the gap between legislative entitlements and main practical barriers.

¹ Full publication available online in English, French and Spanish at: http://picum.org/picum.org/uploads/file_/PICUM%20Undocumented%20Children%20in%20Europe%20-%20%20EN.pdf; http://picum.org/picum.org/uploads/file_/PICUM%20Undocumented%20Children%20in%20Europe%20-%20%20FR_1.pdf; and http://picum.org/picum.org/uploads/file_/PICUM%20Undocumented%20Children%20in%20Europe%20-%20%20ES_1.pdf

In March 2011, PICUM began a follow-up project, entitled "Building Strategies to Improve the Protection of Undocumented Children in Europe." This project, which will run until March 2013, focuses on building strategies to overcome barriers children in an irregular migration situation face in accessing education, health care and housing in EU member states.

Through a series of national workshops in seven EU member states – Belgium, France, Italy, the Netherlands, Poland and the UK – participants came together to build mutual understanding of the problems children in an irregular migration situation face when exercising their rights to education, healthcare and housing, and developed strategies to overcome the challenges identified. While the majority of participants who attended the workshops were civil society organisations and researchers, making up 69% of the total 344 participants, there were also a substantial percentage of local authorities (22% in total) represented at the workshops. Bringing together social service professionals, public officials, NGO representatives, teachers, doctors, lawyers, and undocumented families, the workshops were unique in creating seven national fora to develop capacities and share knowledge for the protection of undocumented children at the national level.

Country briefs² were prepared as background documents for each national workshop, in the national language(s) of each country and in English. These provide an overview of the national legislative framework protecting the rights of undocumented children in comparison to the situation they face in practice.

The seven countries were chosen to give a representative view of Northern, Southern and Eastern European regions, to include EU member states that were dealing with older as well as newer patterns of immigration, and countries with different social welfare models.

² Available to download online at: <http://picum.org/en/publications/conference-and-workshop-reports/>

project partners



Plate-forme Mineurs en exil
Platform Kinderen op de vlucht

BELGIUM

Plate-forme Mineurs en Exil
(Platform Minors in Exile)
www.mineursenexil.be

gisti, groupe
d'information
et de soutien
des immigrés

FRANCE

Groupe d'Information
et de Soutien des Immigré
GISTI (Information and Support
Group of Immigrants)
www.gisti.org



ASGI
Associazione
per gli Studi Giuridici
sull'Immigrazione

ITALY

Associazione per gli Studi
Giuridici sull'Immigrazione
A.S.G.I (The Association for
Legal Studies on Immigration)
www.asgi.it



**DEFENCE for
CHILDREN**

THE NETHERLANDS

Defence for Children
International - DCI
www.defenceforchildren.nl



PFM
POLSKIE FORUM
MIGRACYJNE

POLAND

Polish Migration Forum
www.forummigracyjne.org



RED acoge

SPAIN

Red Acoge
www.redacoge.org



**Praxis
COMMUNITY
PROJECTS**

UK

Praxis Community Projects
PRAXIS
www.praxis.org.uk



what is the guide?

PICUM invites you, as users of this guide, to share it widely through your work and in your networks and to use the examples to continue to raise awareness, and challenge the barriers facing undocumented children.

Please keep us updated about how these strategies have supported your work with undocumented children. We are always keen to hear of new developments and progress in the field of undocumented migrant children and families.

www.picum.org

Who is the guide for?

The guide pulls together the strategies and ideas shared at the national level workshops by equipping practitioners with good practices on how to secure undocumented children's access to basic social rights in Europe. The guide is intended to be accessible to and usable by all – including undocumented families, healthcare professionals, lawyers, public officials, policy makers and civil society organisations.

Who are undocumented children?

Part I of the guide illustrates and explains who undocumented children are and why there is a need to focus attention on protecting their rights. This section includes sections on terminology and legal protections that gives an overview of the national legal frameworks covering undocumented children's access to rights in Europe. We hope that this will be widely re-circulated amongst practitioners, professionals and policy makers.

What work is being done to support undocumented children?

Part II lays out the practical and administrative challenges that prevent access to those rights. As well as explaining the difficulties facing undocumented children, this section showcases good practice strategies throughout Europe that have successfully surmounted barriers to undocumented children's access to rights.

How can this work be further developed?

Each strategy has been broken down and its development traced to explain how initiatives were born, what need they are filling, how they operate, and what supporting activities campaigns were required to ensure their success. This detailed

breakdown of each strategy is intended to equip practitioners with methods in order to reproduce, recreate and redevelop the strategies presented in their own countries and contexts.

The strategies featured in this guide are a non-exhaustive overview of the positive, inspiring work underway across Europe towards undocumented children and their families. The selection of strategies is intended to reflect the diversity of approaches employed in overcoming barriers to protect undocumented children and families, and are all examples that can be followed or developed for further action.

Building solidarity and forging partnerships

In this way this guide is intended to support, inspire and offer solidarity to advocates working with minimal resources for this neglected group. The guide seeks to inform advocates of other projects in Europe in the hope of developing partnerships, and sharing knowledge amongst practitioners as well as identifying key areas where further work could be developed.

Key policy recommendations

At policy level, this publication illustrates how the vulnerability of undocumented children can only sustainably be addressed through political acceptance of the need to protect the rights of undocumented migrant children, as children first and foremost. The final section of the guide provides key policy recommendations that we urge policy makers to utilise and mainstream in all political discourse so that the vulnerability of undocumented children and the barriers precluding their access to rights are removed, and the rights granted under international law are protected.

who are the undocumented children of europe?

“A child is first, foremost and only, a child. This is the starting point for any discussion about undocumented migrant children. The status of the child is secondary and arguably, irrelevant.”³

Undocumented children are children whose lives are affected by irregular migration status. This publication will refer to undocumented children and children in an irregular migration situation synonymously.

Undocumented children are a large, varied and highly vulnerable group in Europe. They include children:

- Who live without a residence permit;
- Who have overstayed visas or were refused immigration applications as a family;
- Who have entered irregularly either alone or as a family; and
- Who have a regular status themselves but live with undocumented parent(s) or caregiver(s).

Parent(s) or caregiver(s) of undocumented children may have a regular migration status, for example in circumstances where children come to Europe to be reunited with their family but do not succeed under family reunification schemes.

Conversely, children in an irregular migration situation may themselves have regular status by gaining citizenship through one parent, or through birthright citizenship laws. In countries such as France and Ireland children are not required to have documentation until the ages of 18 and 16 respectively, and therefore in these countries cannot be de facto 'undocumented.' However living with undocumented parent(s) or caregiver(s) means they still live in an irregular migration situation and are still impacted by policies on irregular migration and practical barriers to rights that affect their accompanying parent(s) or caregiver(s).

³ 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, page 5. Full text available online at: <http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12718.pdf>

The numerous routes into irregularity demonstrate the fluidity of migration status and how transient status is. Migrants who enter through regular routes may later become irregular as a result of overstaying. Equally, irregular migrants can later become regularised.

Unaccompanied and Trafficked Children

Many European countries have legislation and put in place protection systems for unaccompanied, separated or trafficked children, and there remains a strong need to ensure that these children receive protection. Nonetheless, there remains a general lack of priority on the legislative and policy levels for undocumented children who are accompanied by their parents or other caregivers. The policy focus on unaccompanied children and victims of trafficking has been characterised by an almost complete lack of consideration for children who are accompanied by parents or other caregivers. There is an alarming lack of visibility of these children, and a lack of attention paid to how they are affected by policies on irregular migration.

Migration policies seeking to repress irregular migration are being pursued with little attention paid to the impact on accompanied children in an irregular migration situation, or the effect on their rights as children.

The nature of irregularity, compounded by the public and political exclusion of irregular migrants, can keep the experiences and hardships faced by undocumented children hidden. Undocumented families are also afraid to report any discrimination they face for fear of exposure and deportation. This makes them doubly victimised, and more vulnerable to further exploitation and on-going abuse.

This publication seeks to give voice to this neglected, vulnerable population and equip readers with practical tools to help protect the rights of undocumented children in Europe. The issues regarding access to basic social rights that this publication focuses on overcoming are also relevant to separated children who are unknown to social services and live outside reception support systems, as well as to victims of trafficking who lack identification papers.

The Council of Europe acknowledges that:

“Undocumented children are triply vulnerable, as migrants, as persons in an irregular situation and as children. The laws applicable tend to tackle their situation from a migration and status standpoint, and not from a child viewpoint. Even when there are laws providing rights and protection to undocumented migrant children, there are often huge barriers in practice, preventing them from enjoying their rights and protection. These barriers, include, inter alia, administrative obstacles, linguistic hurdles, the complexity of the administrative, judicial and other systems, discrimination, lack of information, fear of being reported, etc. To these barriers one can add that the enjoyment of most rights are interlinked with other rights, so whilst one might provide for the right of education, the absence of housing or health care will seriously prejudice the enjoyment of that right.”⁴

⁴ Council of Europe Report: “Undocumented Migrant Children in an Irregular Situation: A real cause for concern” (2011) page 5. Full text available online at: <http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12718.pdf>

terminology and key definitions

Accurate use of terminology can help explain, and demystify concepts. Equally, the misuse and inaccurate use of terminology can exacerbate discrimination and inequalities.

In the field of migration where groups of people are increasingly becoming reduced to issues on a political agenda, it is even more important to encourage the accurate use of terminology that promotes a real understanding of their situation. Indeed there is an on-going need to contest broad generalisations and crude stereotyping that contributes to the dehumanisation of migrants and threatens their fundamental human rights.

Irregular, not Illegal

When referring to migrants without a valid residence permit, PICUM advocates for the use of ‘undocumented’ or ‘irregular’ rather than ‘illegal.’

Using the term ‘illegal’ connotes criminality and discriminates against the person being described. Defining groups as ‘illegal’ denies and devalues their humanity and promotes negative stereotypes.

‘Undocumented’ or ‘irregular’ are more precise and objective descriptions of the status of a migrant without a valid residence permit.

The European Parliament⁵, the United Nations⁶ and the Council of Europe⁷ have taken positive action to use the term ‘irregular migrants’ in all official communications. No legal text or treaty in the international human rights framework makes reference to ‘illegal.’

Children, not Minors

The United Nations Convention on the Rights of the Child (CRC) defines a ‘child’ as ‘every human being below the age of eighteen years.’ However, the definition of a ‘minor’ varies from country to country.

The term ‘minor’ can raise negative connotations and be a limiting description. In this publication, and in the context of migration, referring to children as ‘minors’ rather than ‘children’ can risk their exclusion from child protection and child rights frameworks.

We therefore refer to ‘undocumented migrant children’ or ‘children in an irregular migration situation.’

⁵ The European Parliament “Calls on the European institutions and Member States to stop using the term ‘illegal immigrants’, which has very negative connotations, and instead to refer to ‘irregular/undocumented workers/ migrants’” (European Parliament, Report on the situation of fundamental rights in the European Union 2004-2008 [2007/2145(INI), Recommendation 158]

⁶ In 1975, the UN General Assembly requested “The United Nations organs and the specialised agencies concerned to utilise in all official documents the term ‘non-documented or irregular migrant workers’ to define those workers that illegally and/or surreptitiously enter another country to obtain work [General Assembly, Measures to ensure the human rights of all migrant workers, 3449, 2433rd plenary meeting, 9 December 1975, para 2]

⁷ The Council of Europe adopted a resolution in June 2006 on the human rights of irregular migrants, in which it states that it “prefers to use the term ‘irregular’ migrants.” [Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), Human rights of irregular migrants, at point 7]

legal framework

Protecting the rights of undocumented children and families

Discrimination of undocumented children and their families takes various forms, such as explicit denial of the right to enrol in a school, or discrimination caused by practical and administrative barriers to accessing rights.

Despite the advancements made in the field of human rights, national legislation and policies protecting the rights of undocumented children to access rights have not been systematically addressed. National legislation continues to either limit undocumented children, or exclude them entirely from legal protections.

There is a need for more comprehensive national legal protections to ensure the rights of undocumented children and families are protected in all aspects – political, civil, economic, social and cultural rights – and to an equal basis as those with regular migration status.

The following pages provide an overview of the international, European and national legal frameworks governing undocumented children's right to access (i) education (ii) housing and (iii) healthcare. The tables cover the national legislation of the seven project countries (Belgium, France, Italy, Netherlands, Poland, Spain and the UK). It is hoped that they will provide a visual comparative overview of the legal framework, illustrating how widely legal protections for undocumented children differ across Europe.

National governments have a legal obligation to follow the international and European laws which they have ratified or formally consented to and made valid. This means that any national law, policy or practice which is contrary to these can be challenged as unlawful. The legal frameworks overleaf demonstrate that national legislation throughout Europe still fails to comply with international standards of legal protection.

National legislation is fundamental to promoting the rights of undocumented children as, unlike international law, it is a more direct, fast and effective means of facilitating social and political change and improving national consciousness to protect the human rights of undocumented children and families. International standards still need to be appropriately reflected and incorporated into national law, policies and programmes that positively affect the lives of undocumented children and families.

We urge readers to widely display, distribute and develop these charts to raise awareness and promote the legal rights and entitlements of undocumented children in Europe.

International Legal Framework For Child Protection And Undocumented Children

A Child is a Child First and Foremost

The fundamental rights of children, regardless of immigration status, are protected in several legally binding international and European laws. States have a legal obligation to comply with international and European legal standards which it has 'ratified' or formally consented to and made valid in their State. As a result, any policy or practice that is contrary to these laws can be challenged as unlawful.

The UN Convention on the Rights of the Child (CRC)

The UN Convention on the Rights of the Child, with its three optional protocols, is the most widely ratified of all international human rights treaties. It is the fundamental and most comprehensive legal instrument protecting the rights of the child. It details a set of universal rights that constitute minimum standards that States must ensure for the protection of every child within their jurisdiction.

In the CRC's General Comment No.6 on the 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' the committee made explicit that:

“The enjoyment of rights stipulated in the Convention is not limited to children who are nationals 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.”

State Parties to the CRC are legally obliged to ensure all of the Convention's protections and standards are transposed into national legislation.

In implementing national legislation, policy and practice, States must heed the two overarching principles of the CRC: (i) the principle of non-discrimination (Article 2) and (ii) the best interests of the child (Article 3).

KEY PRINCIPLES OF THE UN CRC

Non-Discrimination

Article 2 of the UN CRC

The principle of non-discrimination ensures that all the rights protected in the Convention are guaranteed without discrimination or distinction of any kind.

The principle applies to “each child within their (States Parties) jurisdiction, without discrimination of any kind irrespective of the child’s or his or her parents’ or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status.” The Committee has explicitly stated that the principle of non-discrimination applies regardless of immigration status.

In any law, policy or decision a State takes that affects undocumented children, the principle of non-discrimination must be complied with at all times.

Best Interests of the Child

Article 3(1) of the UN CRC

The Convention recognises that 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.”

The Committee has made explicit that a determination requires States to take a clear and comprehensive assessment of the child’s identity, including their nationality, upbringing, ethnic, cultural and linguistic background, as well as any particular vulnerabilities or protection need they may have, when taking a decision that impacts any child.

Crucially, in decisions concerning family unity, the Convention obligates States to take the child’s best interests into primary consideration. Article 9 of the CRC crucially recognises that separation against the child’s wishes can only occur when necessary for the best interests of the child, and only when the competent authorities deem it necessary.

In its General Comment No.6, at paragraph 86, the Committee clarified that **immigration control and border management concerns cannot override consideration for the best interests of the child.**

The Child’s Right to Survival and Development

Article 6 of the UN CRC

The Convention recognises that “every child has the inherent right to life” which goes beyond the right to mere physical survival and includes the development of the child, as States Parties must “ensure to the maximum extent possible the survival and development of the child.” This right must be considered, respected and protected in all immigration procedures. For example, consideration must be given to the child’s right to survival and development when a State is considering deportation to their country of origin.

The right to survival and development must be applied to all children, regardless of immigration status.

The Child’s Right to be Heard in Judicial and Administrative Proceedings

Article 12 of the UN CRC

The Convention recognises that “the views of the child (be) given due weight” and “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body.”

In its General Comment No.12 the committee has made explicit that the views expressed by children should be considered in decision-making processes, particularly when assessing what the best interests of the child are. The General Comment clarifies that this right extends to ensuring that children fully understand proceedings and are able to express their views. States must therefore ensure that immigration proceedings have competent, child-friendly interpretation at all times. Further, this right ensures that children are fully informed of their proceedings and kept abreast of possible outcomes and how this will affect them.

Immigration Control vs. Child Protection

The Convention obligates States to treat undocumented children the same as ‘all’ children, without distinction. However in practice there is a tension between national legal frameworks governing immigration control, and those on child protection.

As a result, children in an irregular migration situation are adversely affected by restrictive migration control law and policies, and are not sufficiently considered and protected as children, first and foremost, under national systems for child protection.

Legal Framework For Undocumented Children's Access To Education

States have an obligation to ensure that national legislation complies with international and European laws they have 'ratified' or 'acceded' to (formally consented to and made valid). Any policy or practice that is contrary can be challenged as unlawful. This table illustrates how far national legislation complies with international and European legal standards of protection.

INTERNATIONAL LAW



Universal Declaration of Human Rights

- Article 26 (1)

"Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory."

Convention on the Rights of the Child

- Article 28(1)

"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, they shall, in particular: (a) Make primary education compulsory and available free to all."

International Convention on Economic, Social and Cultural Rights

- Article 13

"primary education shall be compulsory and available free to all; secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education."

International Convention on the Elimination of All Forms of Racial Discrimination

- Article 5

"in compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...the right to education and training."

EUROPEAN LAW



European Convention on Human Rights and Freedoms

- Protocol 1, Article 2

"No person shall be denied the right to education"

European Social Charter

- Article 17(2)

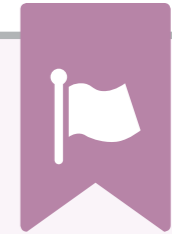
"the Parties undertake...to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."

- Precedent case-law, specifically International Federation of Human Rights League (FIDH) v France (Complaint No.14/2003) and Defence for Children International (DCI) v Netherlands (Complaint No.47/2008) found that by employing a dynamic interpretation of the Charter, its rights cannot exclude undocumented migrants if their 'human dignity' is found to be directly impacted.

Charter of Fundamental Rights of the European Union

- Chapter 2, Article 14

"everyone has the right to education and to have access to vocational and continuing training; this right includes the possibility to receive free compulsory education"



COMPARISON OF NATIONAL LEGAL PROTECTIONS

International and European laws establish minimum standards that should be applied in national legislation. The laws above clearly state the right to education for all. The following table compares legal entitlement to education, in national law, in the seven project countries.

Countries that clearly state undocumented children's right to access education

- **FRANCE**

Circular Letter of 20 March 2002

"Enrolment, into an educative establishment, for a foreign national child, of any age, cannot be subject to the presentation of a residence permit"

- **SPAIN**

Article 10 (3) of the Organic Law 1/1996 of 15 January 1996 on the Legal Protection of Minors

"Foreign children who are in Spain are entitled to education...although not legally resident in Spain"

- **BELGIUM**

French Community – Article 40 of the Decree of 30 June 1998

"Children staying illegally on French-speaking territory are, as long as they stay with their parent or guardian, admitted into educational establishments"

Flemish Community – Circular Letter of 24 February 2003

"All children residing on the Belgian territory have the right to education...A registration cannot be refused on basis of the sole finding that the residence status of the pupil or his parents is not regular...If, at the moment of registration, the pupil cannot prove his identity with documents, he can still be enrolled, under the condition that the pupil is present during the registration"

- **NETHERLANDS**

Article 10 of the Immigration Act (2000)

"A foreigner who is not lawfully resident may not claim benefits in kind...such as welfare benefits...(However, of these) the right to education...is waived"

- **ITALY**

Article 45 D.P.R. 394/1999 (1999)

"All foreign children present in the territory of the State have the right to education, regardless of the regularity of their residence status, in the forms and manners prescribed by law for Italian citizens. Foreign citizens are required to attend school under the provisions in force. The entry of foreign children in Italian schools at all levels takes place in the manner and under the same conditions provided for Italian children. The enrolment of foreign children may be requested at any time of the school year."

Countries that don't specifically mention undocumented children, but where the law grants all children access to education, implicitly including undocumented children

- **POLAND**

Article 94 Act on the School Education System (1991) establishes that foreign children can access compulsory education from public primary and lower secondary or 'gymnasia' schools on the same terms as Polish nationals.

- **UK**

Article 13A of The Education Act (1996) places a legal duty on local authorities to "secure that appropriate education is available to all children of compulsory school age (5-16) in their areas"

The national legislation in project countries clearly demonstrates an acknowledgment of the importance of the right to education for all children, including undocumented children.

Although no national legislation expressly forbids undocumented children's access to education, there is nevertheless a distinction between the levels of legal protection granted to regular and irregular migrant children, which varies from country to country.

Moreover, despite these national legal protections, access to education for undocumented children remains limited due to the practical and administrative barriers that impede their access.

Legal Framework For Undocumented Children's Access To Healthcare

States have an obligation to ensure that national legislation complies with international and European laws they have 'ratified' or 'acceded' to (formally consented to and made valid). Any policy or practice that is contrary can be challenged as unlawful. This table illustrates how far national legislation complies with International and European legal standards of protection.

INTERNATIONAL LAW



Universal Declaration of Human Rights

- Article 25

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care"

Convention on the Rights of the Child

- Article 24

"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"

International Convention on Economic, Social and Cultural Rights

- Article 12

"the States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"

International Convention on the Elimination of All Forms of Racial Discrimination

- Article 5

"in compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...the right to public health, medical care, social security and social services"

EUROPEAN LAW



European Convention on Human Rights and Freedoms

- Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
In the case of *Pretty v UK* the court European Court of Human Rights found that *"the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment...for which the authorities can be held responsible."*

European Social Charter

- Article 13 The right to social and medical assistance

"the Parties undertake...to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition...to apply the provisions of (sub) paragraphs 1, 2 and 3 of the article on an equal footing with their nationals"

- Precedent case-law, specifically International Federation of Human Rights League (FIDH) v France (Complaint No.14/2003) and Defence for Children International (DCI) v Netherlands (Complaint No.47/2008) found that by employing a dynamic interpretation of the Charter, its rights cannot exclude undocumented migrants if their 'human dignity' is found to be directly impacted.

Charter of Fundamental Rights of the European Union

- Chapter 4, Article 35

"everyone has the right of access to preventative health care and the right to benefit from medical treatment under the conditions established by national laws and policies"



COMPARISON OF NATIONAL LEGAL PROTECTIONS

International and European laws establish minimum standards that should be applied in national legislation. The laws above clearly state the right to health care for all. The following table compares legal entitlement to access publicly-subsidised health care services, in national law, in the seven project countries.

Countries that grant EQUAL access to healthcare for undocumented children as national children

• SPAIN

Article 1 of the Royal Decree 16/2012 (2012)

"In any case, foreigners under the age of eighteen receive health care under the same conditions as Spanish nationals"

- › On April 20 2012 the Spanish government issued a Royal Decree to limit adult undocumented migrants' access to healthcare to emergency healthcare only. Although the Decree does not affect undocumented children's legal entitlement to access healthcare, the new restrictions will have an impact on undocumented children's access to healthcare in practice, as their parent or caregiver's ability to access healthcare will be severely limited.

Countries that grant undocumented children access to ALL types of health care, but through a specific administrative system

• FRANCE

Article L 251-1 of the Code on Social Action and Families

"Any foreigner residing in France continuously for more than three months without fulfilling the requirement of regularity...is entitled, for himself and his dependents...to State Medical Assistance (AME)".

- › State Medical Assistance is an administrative system facilitating access to the French healthcare system for undocumented migrants. Children have free and immediate access to AME (without waiting 3 months). Through this, undocumented children have access to **all forms of healthcare, without cost**. However, there are some limitations to the amounts covered, making things like glasses, hearing aids and prostheses very expensive and difficult for undocumented children to access.

Countries that only grant undocumented children access to 'URGENT' / 'NECESSARY' / 'ESSENTIAL' health care

• BELGIUM

Royal Decree of 12 December 1996 on State Medical Assistance provides undocumented children access to "urgent medical assistance" free of charge.

- › All children under the age of 6 can access preventative care, consultations and vaccinations free of charge from specialised child and family centres. After this age, undocumented children receive health care under the same conditions as adult undocumented migrants.
- › There is no detailed definition of "urgent medical assistance". However the Decree states that the assistance should be exclusively medical, the "urgency" must be certified by a doctor, and that the care can be both preventative and curative.

• NETHERLANDS

Article 10 Immigration Act (2000)

"A foreigner who is not lawfully resident may not claim benefits in kind...such as welfare benefits...(However, of these) the right to medically necessary care and care needed for public health...is waived"

- › There is no legal definition of 'medically necessary care'. An official report by the Klazinga Committee clarified it as 'responsible and appropriate medical care', and, where the stay is expected to be long, equal to the minimum standard provided under basic health insurance.

In principal, undocumented children are expected to pay the full costs of medical treatment, but if they cannot afford to pay, there is a system in place to reimburse health care providers for 80-100% of their costs.

• ITALY

Article 35(3) National Immigration Law T.U. 286/98 (1998)

"Foreigners throughout the country, who do not comply with the rules on entry and residence, are ensured, access to public and accredited outpatient hospital care that is urgent or essential, even if they are suffering from a continuing illness or injury and are extended preventative medical care to safeguard individual and collective health. They are in particular guaranteed...(b) the protection of the health of the child pursuant to the Convention on the Rights of the Child of 20 November 1989." Therefore, 'essential medical care' is defined as both preventative and curative.

- › All care is provided free of charge to children under the age of 6, on equal terms as nationals. After this age, undocumented children receive health care under the same conditions as adult undocumented migrants.
- › Much 'urgent' and 'essential medical care' is provided free of charge. Undocumented children must pay a cost contribution for some outpatient care and treatment, but can apply for exemption or delayed payment.

• UK

Statutory Instrument No. 614 of 2004 on the National Health Service (Charges to Overseas Visitors) (2004) requires undocumented children to pay full costs for any other hospital treatment or diagnosis. This includes "immediately necessary" and "urgent" treatment, although treatment should not be delayed or refused if the patient cannot demonstrate means to pay.

- › Undocumented children have the right to access primary care from a GP, emergency care, family planning, treatment for communicable diseases and care serious mental health issues free of charge from the National Health Service (NHS).

Countries that grant undocumented children access to EMERGENCY healthcare ONLY

- **POLAND**

Act on Health Care Benefits Financed by Public Funds (2004) excludes all undocumented migrants, including children, from accessing the national health care system. Undocumented children only have a clear legal entitlement to access emergency care from public health services.

› *While it is clear that emergency care provided by rescue teams is free of charge, undocumented children could be requested to pay full costs for emergency care in hospitals (after treatment), as there is no law establishing responsibility for costs.*

The national legislation in project countries demonstrates an acknowledgment of the right to healthcare for all, including undocumented children.

None of the countries analysed expressly forbids or excludes undocumented children from accessing healthcare entirely, however there is wide distinction between the levels of access to healthcare. Some countries grant limited access to only 'urgent', 'necessary' or 'essential' care, with no legal definition of what this constitutes. As a result, the interpretation of such urgent care varies widely amongst service providers, and from country to country.

Moreover, despite these national legal protections, access to healthcare for undocumented children remains limited in all countries due to the practical and administrative barriers that impede their access.

Legal Framework For Undocumented Children's Access To Housing

States have an obligation to ensure that national legislation complies with international and European laws they have 'ratified' or 'acceded' to (formally consented to and made valid). Any policy or practice that is contrary can be challenged as unlawful. This table illustrates how far national legislation complies with international and European legal standards of protection.

INTERNATIONAL LAW



Universal Declaration of Human Rights

- Article 25

"Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control"

Convention on the Rights of the Child

- Article 27(3)

"States Parties, 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 the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing"

International Convention on Economic, Social and Cultural Rights

- Article 11, paragraph 1

"The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent"

EUROPEAN LAW



European Convention on Human Rights and Freedoms

- Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"

- Article 8

"Everyone has the right to respect for his private and family life, his home and his correspondence."

European Social Charter

- Article 31

"ensuring the effective exercise of the right to housing, member states undertake to take measures designed: (1) to promote access to housing to an adequate standard; (2) to prevent and reduce homelessness with a view to its gradual elimination; (3) to make the price of housing accessible to those without adequate resources"

- Precedent case-law, specifically International Federation of Human Rights League (FIDH) v France (Complaint No.14/2003) and Defence for Children International (DCI) v Netherlands (Complaint No.47/2008) found that by employing a dynamic interpretation of the Charter, its rights cannot exclude undocumented migrants if their 'human dignity' is found to be directly impacted.

Charter of Fundamental Rights of the European Union

- Article 34

"In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices"



ANALYSIS OF NATIONAL LEGAL PROTECTIONS

International and European laws establish minimum standards that should be applied in national legislation. The laws above clearly state the right to housing for all.

The right to housing is a comprehensive right encapsulating access to appropriate, secure, and sustainable accommodation. This must be distinguished from the right to shelter which is an interim solution of temporary accommodation.

Most undocumented families live in accommodation in the private rental market. In some countries, a residence permit is required to legally rent on the private market, while in others it is not. For undocumented children to enjoy their right to housing, access to the private rental market and redress in cases of exploitation are necessary.

All national legislative frameworks exclude undocumented families from social (state-subsidised) housing. Children with regular migration status whose parents are undocumented are excluded as well as undocumented children.

Regarding shelter, some countries organise access to temporary interim accommodation very differently, and there are almost no clear legal entitlements for undocumented families.

Undocumented children may have their right to accommodation when in need protected within a child protection framework, due to their status as a child. However, access to temporary accommodation for the whole family under such provisions remains highly problematic.

In some countries it is possible to access some form of shelter provided by the state or local authorities, if there is an on-going application with the immigration authorities.

For example, legal entitlements for homeless people or mothers and babies to access shelters, varies greatly from country to country.

The following table highlights entitlements for undocumented families to access a form of temporary interim accommodation in the countries examined in this project.

In Belgium, the law clearly states undocumented families' right to housing, but limits provision to designated centres.

- Constitutional Court Ruling, Arrêt No.106 (2003) established that the government must give children, regardless of immigration status, "social assistance that is necessary for their wellbeing, including housing"
- However, the Royal Decree of 24 June 2004 restricts the provision of social assistance and shelter for undocumented families to that provided in federal reception centres for asylum seekers and undocumented families
- Further, families must agree to cooperate with a process leading to regularisation or return (Fedasil and the Office for Foreigners Protocol of Cooperation, 17 September 2010).

In the UK, the law places legal duties on local authorities to provide accommodation support in specific circumstances including for undocumented families.

- Local authorities have a duty to provide accommodation support to avoid a breach of human rights.
- Section 20 of the Children Act (1989) requires local authorities to "provide accommodation for any child in need within their area".
- Section 17 of the Children Act (1989) grants local authorities the power to provide accommodation for families in order to "promote the upbringing of such children by their families"; although it confers no right to housing for families.
- Under these provisions, temporary accommodation is granted to some undocumented families in need that have an application to stay in the UK pending with the immigration authorities, or are cooperating with return proceedings.

In France, the law clearly states access to shelters and centres specifically for mothers and babies regardless of status.

- Article L. 111-2 Code on Social Assistance and Families states that foreigners, regardless of status, have access to provisions of 'Social Assistance to Childhood' (Aide Sociale à l'Enfance- ASE) and access to a various different types of shelters.
- Access to 'Social Assistance to Childhood' includes access to centres specifically for single mothers with babies under the age of 3, which also provide educational, social, psychological and financial assistance to residents.

In the Netherlands, a policy grants undocumented families who have had their asylum application refused and are living in a reception centre, access to shelter in designated centres.

- Article 10 Immigration Act (2000)
"A foreigner who is not lawfully resident may not claim benefits in kind, such as welfare benefits and social housing"
- The Dutch government has not incorporated the judgment of the European Committee on Social Rights into *law* (see text box). The right to access shelters is protected by *policy* only.
- The obligation to provide housing under Article 31 of the European Social Charter has been interpreted as a duty to prevent homelessness, rather than a positive duty to provide shelter.
- Access to designated shelters is granted to families living in reception centres for asylum seekers that have had their claim refused. Undocumented families who are already homeless, or have had no previous contact with the asylum system, do not have access to the designated shelters.

LANDMARK CASE LAW – THE EUROPEAN SOCIAL CHARTER

A complaint was brought before the European Committee of Social Rights by the NGO Defence for Children International against the Netherlands in 2008. The complaint alleged violation of Article 31 of the European Social Charter for failure to provide undocumented children with housing. The Committee found that *"States are bound by the European Social Charter to provide adequate shelter to children unlawfully present in their territory for as long as they are in the jurisdiction"* to prevent homelessness.

The national legislation in countries examined in this project demonstrates a failure to acknowledge the right to housing for undocumented children and families.

In terms of entitlements, legal provisions are scarce and limited to certain forms of shelter, often on the condition of cooperation with immigration authorities. A lack of space and other practical and administrative barriers also significantly impede access to even these basic services.

PART

2

GOOD PRACTICE
EXAMPLES
OVERCOMING
BARRIERS
TO ACCESSING
RIGHTS



chapter 1

Informing and Supporting Undocumented Families. Overcoming Practical Barriers to Access Rights.

Children without papers are not without rights

Despite an international human rights framework, with its principles of non-discrimination and equality of treatment that guarantee the protection of human rights for all people⁸, States have systematically evaded these responsibilities with regard to undocumented migrants, justifying the discrimination and destitution of undocumented children and families as a means of security control.

National policy discourse rarely creates a space for 'undocumented children' and the problems they face. As a result, there is general public and political acceptance that undocumented children can be justifiably exempted from human rights frameworks, purely on the basis of irregular status. Raising public awareness of the rights of undocumented children and their desperate need for social protection is a crucial first step to their social inclusion.

A lack of information and awareness of their rights and entitlements is often the principal paralyzing factor preventing undocumented families from accessing healthcare or enrolling in schools. Without knowing their entitlements, undocumented families are forced to unquestioningly accept discrimination and destitution as a consequence of irregularity. However, despite discrimination and imposed invisibility, undocumented children

have legal entitlements that States are obligated to protect. Informing undocumented families of their rights is a crucial first step to their social inclusion as rights-bearers. Secondly, providing support and on-going assistance to access their rights ensures that further practical barriers do not impede the realization of undocumented families' rights.

This chapter will highlight some ways to reach out to undocumented children and families in order to inform them of their entitlements and to help them to realize their fundamental rights.

The Social Protection Committee of the European Commission notes the higher risk of poverty amongst migrant children as a result of their living conditions:

“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 the risk of poverty rate they face reaches 30% or more and is two to five times higher than the risk faced by children whose parents were born in the country of residence.”⁹

⁸ Part I of the Guide provides an overview of the legal framework protecting the rights of undocumented migrant children

⁹ European Commission Directorate General for Employment, Social Affairs and Equal Opportunities, Child Poverty and Well-Being in the EU, Office for Official Publications of the European Communities, Luxembourg, January 2008 available online at: http://ec.europa.eu/employment_social/publications/2008/ke3008251_en.pdf

Raising Awareness of Rights

Undocumented children and families need on-going access to reliable sources of information about their rights in the country they live in. Guidance of the national entitlements they have a right to access, empowers them as rights-holders to challenge discrimination and realize their rights in practice.

Knowledge is also a key tool to demystify the prevalent public belief that irregular status precludes access to fundamental rights. The following example from the Netherlands demonstrates how the web can be a powerful tool to disseminate simple practical information to large groups of vulnerable people.

WEB GUIDE FOR UNDOCUMENTED CHILDREN AND FAMILIES IN THE NETHERLANDS



Context



As a first point of contact for undocumented children and families, 'www.iLegaalkind.nl' (hereafter 'iLegaalkind'), is a Dutch website that raises awareness of the rights of undocumented children in the Netherlands. The website offers practical information to undocumented families, lawyers and professionals such as teachers, by providing a thematic overview of rights and entitlements for undocumented children in the Netherlands.

'iLegaalkind' is a project supported by Dutch based NGOs, Defence for Children International (DCI) and Stichting LOS, and financed by Foundation Support Fund Pro Juventute.

Through their work with undocumented children and families, DCI identified that many had no continuous, trustworthy access to reliable information of their rights. Families would not seek fundamental services for their children, such as healthcare, purely out of the belief that their irregularity precludes them from accessing any rights.

The website seeks to fill this information gap by providing practical information, in an easy to access medium, for all undocumented families and concerned practitioners trying to overcome practical barriers to undocumented families' access to rights.

The information on the website is reproduced in a booklet, a 'Small guide to the rights of undocumented families,' to ensure that the information reaches the broadest audience, including those without internet access.

www.iLegaalkind.nl

Target Group



The website was principally designed as an online resource tool for undocumented children and families and a means to empower them to realise their rights as protected by national legislation.

However, since its launch, the utility of *iLegaalkind* has made it a key practitioner's text in the Netherlands. Its practical and clear presentation makes it an invaluable online resource for jurists and other professionals who need access to quick, up to date, and accurate information on national and international legal entitlements for undocumented children and families.

Content



The name of the website, '*iLegaalkind*' is itself a warning to its users, to society and to political decision-makers, that no child should be deemed illegal and that all children are entitled to enjoy all the rights of the child. The italicised 'i' at the outset is both a nod to its online nature, and a visual reminder that no child can be 'illegal.'

The website is intended to provide practical information to its users on the rights of undocumented children in the Netherlands. In order to help undocumented families quickly gain this information, it is structured thematically into the following pages:

- Social security and benefits entitlement
- Access to education and leisure
- Access to healthcare
- Rights of the family and protection of fundamental rights
- Police and detention
- General page with facts and figures about living in the Netherlands without a residence permit

In addition to these thematic pages, information is also divided by user-group, such that specific information for children, parents, lawyers and professionals such as teachers can clearly access information specific to their needs.

The website is maintained and updated by staff at DCI ensuring that undocumented families are always kept up to date on their rights as law and policy developments occur.

WHAT ARE THE ADVANTAGES OF USING ONLINE TOOLS?



- Reaches a broader audience
- Faster means of responding to developments
- Involves little cost to set up, run or utilise
- Interactive and can be adapted for different audiences
- Informal
- Easily updateable

Overcoming Practical Barriers to Access Education

Once aware of their rights, undocumented families need support in accessing those rights in practice. Although rights are granted and protected by legislation, several barriers obstruct the practical access to these rights. Access to schools can be a hurdle facing undocumented families, (as described in Chapter 3), with administrative difficulties at enrolment and fear of detection being significant barriers to children's access to education. In addition to the administrative barriers to access schools, practical barriers impede undocumented children's access to quality education.

Once enrolled in school children can face additional discrimination which obstructs their access to *quality* education. Undocumented children are often inappropriately channelled into 'special education' classes instead of mainstream education, as their language difficulties are often misinterpreted as learning difficulties. This can be exacerbated in countries where school systems are competitive. Undocumented children who are unfamiliar with a school system but find themselves in competitive schools that are focused on national results and comparative performance, can often get left behind or side-lined in the classroom. The segregation of undocumented children into special education classes can delay their social integration and impede their scholastic potential, as well as causing stigmatisation within the school community.

A lack of grants and scholarships available to undocumented children means parents face difficulties in meeting mainstream school and extracurricular costs – such as books, uniforms, school trips, meals and transportation. Without access to these items, children cannot access quality education. Undocumented parents or caretakers with limited formal employment opportunities may rely on their children for additional income into the family unit. Tine Debosscher from Kruispunt Migratie-Integratie, Belgium says, "*Undocumented pupils are often not where they should be in relation to their competences and ambitions. For example, many enter the part-time learning/part-time working system, not because it fits their abilities, but because of the opportunity to earn some money, and thus support their family.*"¹⁰

Reports of undocumented children performing at substantially lower levels scholastically than their citizen counterparts were common at all our national workshops. Even where there is access to schools, there are insufficient provisions addressing the inherent cultural, linguistic, financial and social barriers impeding undocumented children's performance at school.

Surmounting language barriers

Language difficulties challenge children with a migrant background in different capacities. Some undocumented (and other) migrant children speak the same language in the home setting as the country of destination, and do not face additional language difficulties in the school setting. On the other hand, citizen children with migrant backgrounds may grow up in households where only their parents' mother tongue is spoken, and so face language difficulties when starting school, either at the pre-school or primary level. Although not a problem exclusively facing undocumented children, language can be a key difficulty facing undocumented families. Language problems faced by an undocumented pupil will permeate into their family life, unbalancing home life and causing their segregation within the school community, affecting the child's ability to follow, participate and learn from classes.

At national level some governments have acknowledged this as a key barrier and taken action by offering 'welcome' language classes in schools, to integrate migrant and other non-native speakers. In Belgium both the Flemish and French communities run "welcome classes,"¹¹ year-long language support classes for newly-arrived migrant children, including undocumented migrant children.

The classes are run in various schools¹² across the country and are free of charge. There is no admission procedure per se, (although there are conditions tied to participation), and no documentation or residence permit is required for admission to the classes. These classes are a useful way for undocumented children to improve their French or Flemish language and better integrate into mainstream Belgian school

¹¹ These are organised regionally and called 'OKAN klassen' in the Flemish-speaking community, and 'DASPA' or 'classes passerelles' in the French-speaking community.

¹² The chosen schools tend to be located near open reception centres, or in large cities which tend to have a higher density of migrant populations.

¹⁰ Biccocchi, Luca & LeVoy, Michele "Undocumented Children in Europe: Invisible Victims of Immigration Restrictions" PICUM (2009)

communities. However, the classes are only run at select schools, in select areas, which can limit the number of children who can access them in practice.

Similarly in the Netherlands there are 'welcome' classes for newly-arrived children. The *Erste Opleiding* ("First Education") classes for primary-school aged children and *Internationale Schakelklassen* ("International Bridging") classes for secondary school aged pupils are open to all children, including those without a residence permit, and are offered free of charge. Unlike the Belgian model, these classes are not run from within the mainstream school system, but are run parallel to mainstream school system, and are organised by the State. Children receive intensive Dutch language classes, as well as learning what living in the Netherlands entails. Children generally attend these classes for a year, before going to mainstream school education.

Moreover these programmes are not centralised or compulsory. In practice this means where EU member states have implemented language support classes, the funding, content and structure are not centrally regulated by the EU, so programmes vary widely in their effectiveness. Several countries such as Poland and Italy offer no nationalised language assistance classes in mainstream public schools to undocumented migrant pupils. Several migrants' rights organisations (such as ACCEM in Spain, La Cimade in France and AfroAid in Spain) aim to fill this gap by offering various types of language assistance to undocumented families. Nonetheless, there is a lack of recognition and support at EU-level of the need for language support for *all* school-going children in Europe.

DIGITAL (LANGUAGE) SUPPORT TOOLS FOR UNDOCUMENTED FAMILIES IN THE UK



Context



Undocumented children themselves identify language as a specific barrier to their experience of European education systems¹³. Although their own language skills may be sufficient, their families' ability to communicate and be involved in their schools can be limited due to language difficulties.

Undocumented families can feel removed from their children's education. The inclusion of undocumented children in schools, and their *de facto* integration, can therefore cause imbalance within the family unit where undocumented parents have much more restricted access to rights and to society as a whole. Children may gain a better knowledge of the language and culture through their time in school, and so may need to assume the role of translator to assist parents. This change to intergenerational relations and responsibilities can put a strain on families and children alike¹⁴.

¹³ This was a common concern raised by undocumented parents who attended the PICUM national workshops 2011-2012

¹⁴ Prof. Dr. Chr. Timmerman et al. "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" (March 2010) pages 11-12

A UK-based social enterprise called 'Apps for Good'¹⁵ runs extra-curricular courses teaching children at secondary schools across the UK how to design, implement, and market their own mobile applications to solve daily problems. 'Apps for Good' empowers and equips its young pupils with the tools they need to solve problems they have identified.

A young group of migrant students used 'Apps for Good' to create a mobile application to assist migrant families with language barriers.

Methodology



Schools submit an Expression of Interest Form to the organisation and, if successful, work in partnership with 'Apps for Good'. Once successful, the classes are run as part of the school's mainstream education programme.

Children work together to solve an issue they have collectively identified as important to people's daily lives. They then work as a team to find solutions with mobile and web applications. The group work focuses on collaboration and solving real-life issues that affect young people and the communities they live in. The course has five key steps: problem solving, research, solution design, product design and build and test enabling students to use cutting-edge technology they are enthusiastic about to gain real-world experience of the full design process.

During the course students are given full guidance and teaching on software product development. Applications that are successfully designed and prototyped will then be put forward to the 'Apps for Good National Competition', which helps identify a few applications annually that can be selected for professional build.

Transit



A group of girls from the Bengali migrant community in the UK have developed the 'Transit' application through their 'Apps for Good' school classes. Transit is a mobile phone application that aims to assist teachers, doctors and other professionals communicate with Bengali-speaking parents of migrant children.

The application has two interfaces, one in English and one in Bengali and allows users to access topics thematically. Teachers, for example, at parents meetings, can click the button entitled 'absences' to raise issues of truancy to parents. The teacher would click on relevant phrases in the application to explain their concern, and the phone then translates this into spoken Bengali for the parent to listen to. The parent similarly replies by using the Bengali interface to click their concern, which is then voiced in spoken English.

The application is a language tool for parents accessing key services, which liberates them from having to depend on their children. It is now available to download and use for free. Although this first prototype works only between Bengali and English, the concept is simple and can be reproduced for any language pair.

¹⁵ Website for "Apps for Good", an initiative of the NGO CDI Europe, is available at: www.appsforgood.org

Stop and Search



Another successful application born from the 'Apps for Good' classes is 'Stop and Search.' This is a mobile application designed to inform users of their rights and in doing so, make stop and search a transparent and fair process.

In the UK the police have the authority to stop people and ask them to identify themselves, or proceed to search them. Young people, particularly young migrants in the UK, can feel disempowered, criminalised and confused by this process.

This mobile application allows users to learn about their legal rights under the stop and account and stop and search procedures. Using easy to understand pictograms, users can quickly understand what rights they have in law and so, not feel intimidated or confused should they be subject to such a procedure.

The application has an added feature to allow users to log their experience into the centralised database. This involves rating their experience and providing simple, key data on themselves so that the application can analyse, draw patterns from and map stop and searches in the UK. Finally the application provides information to users on lodging a complaint against the police.

Stop and Search is a procedure feared particularly by undocumented migrants who harbour additional fears of detention and deportation. This simple application helps de-mystify the process and empower them with an awareness of their rights.

Although the prototype only discusses stop and search procedures, the application could easily be developed to include rights in detention centres and contacts to lawyers and migrants' rights groups.

Impact Of Digital Tools For Empowerment



With the benefit of the Apps for Good classes, and their own personal experiences of daily difficulties, documented and undocumented migrant children in the UK can be empowered to design solutions to their own problems. These developed applications offer a real insight into the worries of migrant young people and the particular difficulties in the UK.

Starting as an individual child's initiative, Transit and Stop and Search now have wider reach in assisting migrant young people and their families with linguistic and social integration in the UK and equipping them with information about their rights.

Overcoming Practical Barriers to Access Healthcare

In addition to barriers accessing education, undocumented children face several practical barriers preventing their access to healthcare. While undocumented children's right to access healthcare is protected in national legislation in some countries (see Part I), in practice, as with access to other rights, a lack of awareness of legal entitlements and a fear of detection and language barriers prevent undocumented families from accessing these fundamental services. These barriers delay, if not entirely impede, undocumented migrant families from seeking healthcare for their children, which can have a long-term impact on the health of the child. Further, fears of detection and reporting of the child's and family's irregular status can prevent undocumented children from accessing continuous care or follow-on treatment, which again, can have a lasting negative impact on their health and wellbeing.

A lack of awareness of rights

Undocumented families often have little awareness, or are misinformed, of their legal entitlement to healthcare. There is an acceptance of inaccessibility to rights that many believe accompanies irregularity. Healthcare professionals, similarly, are given little instruction on the rights of undocumented migrant families. This squeezes access to healthcare from both ends.

In a 2009 survey conducted by the NGO Médecins du Monde on access to healthcare of undocumented migrants, 32 undocumented parents were interviewed in 8 countries - Belgium, France, Greece, Netherlands, Spain, Sweden, Switzerland and the UK.

The survey revealed that only two-thirds of people aware of their rights had undertaken the necessary procedures to obtain these rights. The proportion was lowest in Belgium and France (a third and a half respectively had taken the necessary steps, alone or with some form of assistance). In both countries the bureaucratic procedures for undocumented migrants to obtain access to their rights are among the most complex. In total, only a small minority – a fifth – of undocumented migrants interviewed benefitted from access to health coverage.¹⁶

Without a real awareness of what access they are entitled to and how to go about receiving it, undocumented families frequently avoid seeking treatment even when it is desperately needed. Doctors, equally, may obstruct undocumented families' access to healthcare, or report their presence to immigration authorities, out of a simple lack of awareness of the rights of undocumented families. A lack of awareness therefore obstructs undocumented children's access to healthcare.

As a result it is often the case that only those undocumented children within the radar and reach of NGOs who fill this gap in public service provision have access to any healthcare whatsoever.

¹⁶ Médecins du Monde European Observatory on Access to Healthcare "Access to Healthcare for Undocumented Migrants in 11 European Countries" (2009) pages 69 and 70. Full text available online at: <http://www.doctorsoftheworld.org.uk/lib/docs/121111-europeanobservatoryfullreportseptember2009.pdf>

CIVIL SOCIETY HEALTHCARE SERVICE PROVISION FOR UNDOCUMENTED CHILDREN AND FAMILIES IN SPAIN



Context



Under Spanish law, undocumented children are granted access to healthcare on equal terms as their national counterparts. Yet in practice, undocumented children cannot fully access the healthcare they need.

Karibú (meaning 'welcome' in Swahili) is an association that provides healthcare to vulnerable people unable to access the national health care system.

Providing Healthcare Services



Karibú provides primary and some specialist health care to undocumented migrants. Specialist healthcare includes gynaecology, dermatology, psychiatry, psychology and ophthalmology.

Where Karibú is unable to provide specialist treatment on site, they make a reference to other service providers with whom they work in partnership. Referrals are made in this way to hospitals, health centres and universities known and trusted by Karibú.

Beyond Service Provision



In addition to the provision of healthcare, Karibú helps undocumented migrant families access the Spanish national health system by educating them on their rights and assisting them at their medical appointments.

Karibú also runs regular training programmes alongside its healthcare services. These trainings are intended to promote better health and wellbeing. Lessons cover sexual and reproductive health, food and diet, basic hygiene and maternity education.

Additional Services



Recognising the interdependence of rights, and the needs of migrant families accessing their healthcare services, Karibú has set up additional services to help with social integration.

These include offering basic interim support such as ad hoc financial assistance for food and clothing and basic legal service provision. Those most at risk are offered temporary shelter in one of Karibú's five centres for highly vulnerable migrants. The shelters give

priority to unaccompanied children and mothers with children, although they readily accept 'at risk' undocumented families.

Additionally, the association runs vocational courses and trainings on domestic service provision, child care and care of the elderly, as a first step to the social and professional integration of migrants.

Karibú Niños



In addition to providing healthcare, the association now runs a specialist project for the reception and integration needs of migrant youth and children aged between 3 and 18, from an African background and whose parents are undocumented. Youth and child social integration is encouraged by organising leisure, sport and cultural activities, as well as school support activities. Additionally, the project offers parents a 'safe space' where their children can learn Spanish, and play with peers, whilst they are at work.

Several similar initiatives offering healthcare service provision and support have sprung up across Europe as an immediate response to the practical barriers obstructing undocumented children's access to healthcare. However several of these barriers can be overcome by ensuring service providers are aware of the rights of undocumented migrant families.

Project:London¹⁷, a health advocacy project run by Doctors of the World UK (Médecins du Monde)¹⁸, provides primary healthcare to vulnerable people in a volunteer-run clinic. However the main focus of their work is advocacy to ensure healthcare professionals and medical staff are aware of their responsibilities towards undocumented migrants. The project runs training days for community migrant organisations as well as health care professionals and medical students explaining the health system and the current legislation. Project:London aims to ensure access to healthcare for all by targeted advocacy at

all levels, from helping individuals to get registered to lobbying for policy change. Project:London aims to increase understanding of the NHS and uptake of primary health care among migrant populations, to educate existing health care professionals about the legislation and how GPs' discretion can be applied to positively impact the healthcare of patients and, last but not least, Project:London hopes that by training upcoming generations of healthcare professionals, the social inequalities in access to healthcare will slowly be equalized.

¹⁷ Website for Project:London, a UK-based programme of NGO Médecins du Monde is available at: <http://doctorsoftheworld.org.uk/projectlondon/default.Asp>

¹⁸ Website for Médecins du Monde available at: <http://www.mdm-international.org/>

Gaining Access to Housing

Children in an irregular migration situation in Europe usually have no formal access to social housing with their families. Indeed it is the right least protected by national legislation. Austerity measures and cuts to public spending on the provision of housing and social assistance have increased the demand for low-cost accommodation on the private housing market. As a result undocumented families are dependent on the unregulated private housing market and unscrupulous landlords. With limited possibilities, a growing number of families are attempting to access care from homeless aid systems in Europe, and are doing so for longer durations. Nonetheless, shelters are generally not financed to support undocumented families and so support is limited, ad hoc and volunteer-based.

Access to the private housing market

Undocumented children's access to housing is inextricably linked to their social exclusion and poor economic situation. Financial limitations caused by limited access to formal employment streams, the lack of a residence permit, and limited access to social housing or assistance overwhelmingly consign undocumented families to the margins of the private housing market.

A lack of access to social housing forces undocumented families to seek alternatives on the private housing market where they are uniquely vulnerable, may face racism, exploitation and discrimination by private landlords. Residence permits are often required by letting agents and 'official' landlords. As a result, having an irregular status creates an added vulnerability that unregulated landlords can exploit by offering poor condition housing at exorbitant rates, knowing that undocumented migrants have limited options. Undocumented families can therefore be forced to live in sub-standard, overcrowded and unsanitary accommodation, often shared with several other unknown people, with safety and security being compromised. The housing agreements undocumented families enter into are rarely written or formalised. Informal and open-ended 'agreements' offer no personal security or certainty of accommodation for undocumented families. As a result families may have to change accommodation frequently, move at short notice and rely on the hospitality of friends or family, or homeless support agencies for housing. In this way, they have no stability or certainty in their living situation.

Undocumented families rarely report exploitation, discrimination, adversity or abuse suffered by landlords or landlords. The fear of losing their housing, fear of detection, and a fear of losing their children to social services, often means that undocumented families accept and endure discrimination rather than report or denounce landlords.

The Observatory of the Paris Samusocial¹⁹, in partnership with UNICEF France, has begun a programme of research into understanding the needs of this population:

“The limited available data suggests considerable social difficulties, and a worrying state of health, both physical and psychological. The situation of children – the majority of whom are not considered children at risk despite unsafe living conditions – seems particularly alarming... The tightening of policies on asylum and immigration, along with the limitation of planned lodging solutions, seems to relegate more and more people, including families, to the domain of assistance to the homeless.”²⁰

¹⁹ Website available at: <http://observatoire.samusocial-75.fr/>

²⁰ Observatoire du SamuSocial de Paris "The Study of Homeless Families" (ongoing). Project page available at: <http://observatoire.samusocial-75.fr/index.php/en/our-surveys/family>

HOSTING SCHEMES IN THE UK



Context



A lack of social or community support, and limited means of self-support or access to formal employment streams leave undocumented migrant families highly vulnerable, yet frequently neglected.

Unlike the various initiatives dedicated to housing and protecting the rights of unaccompanied children, or asylum-seekers and refugees, accompanied children in an irregular situation have limited help and assistance from local authorities and civil society organisations.

A lack of access to housing, or the threat of, or actual homelessness, can have a negative impact on children's physical and mental health, cause vulnerability and increase exposure to exploitation.

'London Hosting' Scheme



Run by PRAXIS²¹, 'London Hosting'²² is an initiative that seeks to develop and foster private hosting capacity as a community-based response to the desperate need for a reliable, alternative accommodation network in London.

PRAXIS's team of advisers support guests of the hosting scheme by offering holistic support. Issues concerning legal status, health needs and access to social welfare benefits are dealt with by PRAXIS's team of advisers.

How it Works



London Hosting recruits, assesses, trains and supports people who are willing to host migrants. Hosts and guests are 'matched' according to forms submitted to the organisation. Hosting is done on a purely voluntary basis and the organisation does its best to ensure neither party is exploited.

London Hosting also carries out capacity building work in the community to promote and foster further hosting initiatives developed through local churches, other faith organisations, and voluntary and refugee support groups.

For those unable to host, but eager to help, London Hosting runs a destitution support fund to assist with travel, medical, and food expenses that may be incurred by hosts or guests.

²¹ PRAXIS is a centre based in East London that provides advice and support services for migrants and refugees. Further information available at: <http://www.praxis.org.uk/>

²² Website for London Hosting available at: http://www.praxis.org.uk/index.php?page=2_10

Hosting Schemes are a valuable way of garnering community support for destitute migrants, and raising awareness of the social exclusion and forced homelessness undocumented families are facing, as well as a means of providing immediate and trustworthy housing to those in need.

However, in an attempt to suppress irregular migration, there has been a development throughout Europe of legislation that criminalises irregular migration, which creates an additional barrier dissuading fair and willing landlords (and potentially also hosts) from housing undocumented migrants. The 2002 EU Facilitation Directive²³ is aimed at combating the trafficking of people, although it can be interpreted to affect those assisting undocumented migrants for profit. The transposition of the Directive into national law did not overwhelmingly lead many EU member states to directly criminalise those who enter into contact with undocumented migrants for profit (e.g. landlords). Nonetheless, in recent years there has been a development of national criminal legislation in some member states to suppress irregular migration. For example, in Italy national legislation has been developed to increase fines and introduce the confiscation of property from those who rent to undocumented migrants²⁴.

Temporary Accommodation

In exceptional circumstances, some EU member states do offer temporary accommodation to undocumented families, although even this is usually limited to single mothers with children. Authorities often indicate their reluctance to house undocumented families out of a fear that they will be an on-going burden on public funds. These financial considerations overlook the best interests of the child and the fundamental right to private and family life enshrined in international and EU law.

When temporary accommodation is provided, it manifests as hostel rooms or space in shelters that are designed for single men or those suffering from alcohol or substance abuse. In the Netherlands a study undertaken by Dutch child psychologists has looked at the living conditions of children living in homeless shelters²⁵. The study highlights the importance of treating children in shelters as 'children with unique needs and not just as children accompanying their parents.' The deficiencies in temporary accommodation for accompanied children in an irregular migration situation emphasise the critical need for housing that is decent and appropriate for children.

²³ Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence [OJ L 328/17 5.12.2002]

²⁴ 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) page 189

²⁵ Brillleslijper-kater, S.N., Beijersbergen, M., Asmoredjo, J., Jansen, C., and Wolf, J., "Not just a bed, a bath and a peanut-butter sandwich: Characteristics, health, well-being and care for children growing up with their parent(s) in shelters for homeless people or female victims of domestic violence." (2009) Full text available online at pages 21-23: http://www.feantsa.org/files/freshstart/Communications/Homeless%20in%20Europe%20EN/PDF_2010/Homeless_in_Europe_Autumn2010_EN_Final.pdf.pdf

PROVIDING HOUSING FOR UNDOCUMENTED FAMILIES IN SPAIN



Context



ACCEM²⁶ is an N.G.O., a Non-profit Making Organisation that provides attention and reception to refugees and immigrants in Spain promoting their social and labour integration, as well as promoting equal rights and duties of everyone regardless of its origin, sex, race, religion, opinions or social group. ACCEM began one of its housing projects for undocumented families in 1999. ACCEM's initial work focused on supporting undocumented children in their access to education. However, through this work they quickly identified the urgent need for housing for undocumented families.

²⁶ Website for ACCEM available at: <http://www.accem.es/refugiados/inmigrantes/>

Since then, ACCEM has been developing this current housing project. Nowadays, ACCEM, in co-ordination with the Madrid City Council Family and Social Services, manages two centres to temporarily shelter vulnerable undocumented families. ACCEM's housing project is run as part of the framework of the Plan for Social and Intercultural Co-Existence of the Madrid City Council (2009-2012), known as "Proyecto de Intervención Socicomunitaria con Familias Inmigrantes" (Social and Community Intervention Project with Migrant Families).

Project Aims



The project aims to provide accommodation and social integration services specifically to migrant families, ethnic minorities and those of Eastern European backgrounds, under the following criteria:

- who are experiencing social exclusion
- who lack housing and economic resources
- with children under 18 years old.
- one parent families
- large families
- involved in social emergency situations

In addition to offering accommodation, the project also provides on-going support and assistance to the families in accessing basic additional services, such as education, healthcare and more.

The project seeks to guarantee access to education and healthcare for families, but works towards the larger goal of facilitating migrant families' social integration and the regularisation of undocumented families in their care.

How it Works



The project is comprised of two "levels":

Level 1: Social Integration Preparation Phase

This level offers families immediate housing in two temporary shelters. The project has the capacity for 52 families (about 208 people of an average of 4 members in each family). All families in these shelters receive comprehensive care and access to facilities that include studying rooms, play spaces for children, laundry, kitchen, and bathrooms. The family's socio-educative process begins at this level with classes and support assessments in the following areas:

- Information and social assessment
- Adults capacity building
- Support on work and home searching
- Professional training
- Socio-educative animation work for children aged 3 to 16 years old
- Socio-educative animation work for children aged 0 to 3 years old
- Intercultural mediation and follow-up with family
- Community integration

The minimum period of stay at this level is for 6 months. This period is extendable depending on the family's progress, needs and achievement of integration goals.

Level 2: Integration in the Community

Once the integration objectives are achieved at the Centre, the families have two ways to proceed: they may move to an ACCEM autonomous flat, or ask for assistance in finding and moving into an independent home. Their choice depends on their needs and circumstances.

In the second case the family receives temporary economic support from the Project. In the first case, the project has a total of 3 flats with a capacity for 22 people. The purpose of the level 2 move is to facilitate the sustainable, social integration of undocumented families and nurture their ability to eventually live autonomously and access services independently. Families can stay in level 2 accommodation for up to 4 months.

After these four months, the families, with the help of professionals, select the appropriate neighborhood for them, taking into account the price of housing in the area, the family's social network, work possibilities and any other criteria that might support the families' integration. Through this process families are given support and counseling on how to maximise resources and fully integrate into society.

The Project's main goal is promoting the social and community integration of migrant families by facilitating their access to standard public services as well as providing them with a home, thereby stimulating the autonomy of every family.

Analysis of families housed



During the first quarter of 2012 the project housed 98 families (301 people in total, of which 125 were children). In terms of migration status, the project helps significantly more families in an irregular migration situation, reflecting their increased needs, vulnerabilities and destitution. Within one quarter, the project housed 28 families in an irregular situation, which comprised 46 adults and 37 children.

Housing Not Shelter

Whilst these strategies have looked at access to temporary housing or interim 'shelter' this must be distinguished from the right to access 'housing', which is a secure, sustainable, more permanent form of accommodation. Although civil society can provide interim or temporary accommodation for undocumented families, advocacy work must continue to promote the social, political and legal recognition of the right to housing for all undocumented families and children.

Maria Segurado, Coordinator of the Legal Network of Caritas Espanola asserts the need to advocate for housing as a universal and fundamental right that undocumented children and families must have access to:

"We have to enforce the right to housing. It is a universal right, but I'm afraid that we have not started this fight yet." ²⁷

²⁷ Maria Segurado, Caritas Espanola, speaking at the PICUM national workshop "Building strategies to protect children in an irregular migration situation in Spain" on 21 June 2012

UK-based NGO, Shelter²⁸, provides a model for tackling the root cause of lack of housing for undocumented families by not offering any physical accommodation or shelter, but rather taking a two-fold approach to access to housing. Firstly, Shelter offers confidential advice and assistance to anyone with a housing problem. Many undocumented families with children have sought assistance in this way. Secondly, Shelter advocates by lobbying both government and local authorities to develop legislation and policy to more effectively prevent homelessness and protect badly-housed people. Shelter's campaigns are widely distributed and help raise public awareness for the issue.

Interdependence of Rights

The right to housing, healthcare and education are inter-linked and inter-dependent. A report by Shelter warns that children in poor housing conditions have a 25% higher risk of severe ill-health and disability during childhood and early adulthood. Precarious and unhealthy living conditions will impact on mental and physical health, and in turn, affect the scholastic potential of a child²⁹.

Sue Lukes, Director of MigrationWork UK explains the inter-dependence of rights, reflecting the need to take a holistic, cross-sectoral approach in advocacy for undocumented children and families:

"If a child doesn't have a place to do their homework, or if a child doesn't have a warm home, access to education or access to health care are secondary." ³⁰

²⁸ Shelter is a UK-based charity which helps over a million people a year struggling with bad housing or homelessness by campaigning to prevent the very causes of homelessness. Website for Shelter available at: www.shelter.org.uk/

²⁹ Harker, Lisa, Shelter, "Chance of a lifetime: The impact of bad housing on children's lives" (2006) available online at: http://england.shelter.org.uk/_data/assets/pdf_file/0009/66429/Chance_of_a_Lifetime.pdf

³⁰ Sue Lukes, Director of MigrationWork UK, speaking at the PICUM national workshop "Building strategies to protect children in an irregular migration situation in the UK" on 6 October 2011

It is therefore necessary to take a holistic approach when informing and supporting undocumented children and families. 'Right To Dream' is an example of a holistic support initiative which was set up in 2012. Run as a project of PRAXIS³¹, a charity which has been working with vulnerable migrants across London since 1983, the project seeks to support undocumented young people and children in the UK by helping them make informed decisions, cope with crisis and plan their futures.

The two-year project takes a manifold approach to supporting the lives of undocumented children. Firstly the project will offer a holistic advice service to children and young people addressing immigration, housing and education concerns. Secondly, it will develop a peer support and advocacy group for undocumented young people. The direction of this group will depend on the young people themselves, but it will involve campaigning (in the widest sense of the word), experience sharing, peer learning ways to support each other, and the development of leadership and project management skills. There will also be a 'text' service enabling advice and continuous contact with project members who do not want to, or are unable to attend the group in person. Thirdly, the project will work to support a wider social understanding of the needs of undocumented children and young people by developing a manual for people advising undocumented children, and organising a conference and exhibition to showcase and disseminate results of the pilot project. By offering holistic support the project will hopefully succeed in helping undocumented children access all basic rights, rather than focusing on one specific right.

As access to one right can facilitate access to other rights. This is true of several of the strategies described in this chapter. Gaining access to housing through ACCEM's project helps undocumented migrant children gain access to education and healthcare services. The interdependence of rights requires a cross-sectoral approach to protecting the rights of undocumented children and families.

³¹ Website of PRAXIS available online at: <http://www.praxis.org.uk/>



TOOLS AND STRATEGIES

OVERVIEW OF TOOLS AND STRATEGIES TO OVERCOME PRACTICAL BARRIERS TO RIGHTS

- Informing undocumented children and families of their rights is crucial to their social inclusion as rights-bearers.
- Ensure all undocumented migrant families have continuous access to reliable, up-to-date information.
- National-level language support classes in schools, such as the Belgian 'Classes Passerelles', can be a useful way to improve children's language skills as well as foster their better integration into school communities
- Support services for undocumented children should be twinned with support for their families to ensure no imbalance is caused to the family unit, and children do not have to assume, for example, the roles of translator or mediator within their families.
- There is an inter-dependence of rights so access to one right can facilitate access to other rights. All work should take a cross-sectoral approach to promoting undocumented children and families' access to rights.

minimum resources, maximum impact

Structuring and Building an Advocacy Strategy

SET CLEAR GOALS

At the outset, set clear goals of what you would realistically like your advocacy work to achieve, taking into account the political, social and economic climate you are working in. Consider what positive impact your work will have on the group concerned.

KNOW YOUR AUDIENCE

Fully research your stakeholders and target audience: Who are they? What do they want / need? What tone / approach will best target them?

CHOOSE THE RIGHT TOOL

There are many approaches to disseminate advocacy strategies. Make sure you choose the right one for your advocacy goals:

- protest
- blogging
- online video dissemination
- photo sharing
- bringing a test case
- email campaigns
- newsletters
- online petitions
- presentations at events / workshops
- meeting decision makers

CLARIFY YOUR KEY MESSAGES

Tailor-make your key messages using precise terminology so that it is clear, short, simple and easily understood. Link your key messages to relevant activities and make the messages instructive / action – focused, calling on decision makers to do something. Use testimonies to re-assert the human experience behind your message.

MONITOR, ADAPT AND EVALUATE

Continually evaluate the impact of your work, and adapt it when necessary to better achieve your advocacy goals. Be transparent – always publish and present results to funders and policy-makers. Objectively evaluate your work to ensure better results next time.

chapter 2

Building an Evidence Base. Documenting Undocumented Migrant Children.

Obtaining a clear and accurate picture of the numbers, presence and situation of undocumented children in Europe is problematic. The very nature of irregular migration defies official statistics or data collection; additionally, there is limited data on children in the context of migration. In its 2009 human development report, the United Nations Development Fund estimated the number of undocumented migrants to be between 20 and 30 million people globally;³² however this figure gives no indication of breakdown of numbers of children and families. Accompanied undocumented children in families tend to be considered and recorded as part of undocumented adult migration streams, without the data for children being disaggregated.

A 2011 report of the Council of Europe Parliamentary Assembly stated:

“The rapporteur is at a loss to estimate the number of undocumented migrant children in Europe.”³³

As a result, there is an overwhelming lack of accurate or adequate data on undocumented children in Europe. To overcome the lack of data, researchers can piece together an image of undocumented children in Europe by compiling estimations of numbers pulled together from broader data on irregular migration generally, on figures of migrants in detention as well as regularisation programmes. Creating an evidence base on this population helps re-focus policy-makers’ attention on the impact of having two divergent policy and legislative frameworks – one securitising immigration, and the other protecting the welfare of children – which creates a large chasm in protection that undocumented children fall through.

³² UNDP “Human Development Report, Overcoming Barriers: Human Mobility and Development” (2009) page 23. Full text available online at: http://hdr.undp.org/en/media/HDR_2009_EN_Chapter2.pdf

³³ 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, paragraph 9, available online at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc11/EDOC12718.htm>

ESTIMATES OF UNDOCUMENTED CHILDREN IN EUROPE

The European Commission DG Research Clandestino project analysed existing data on irregular migration flows in Europe in an attempt to create a clearer picture of irregular migration and numbers of irregular migrants. The Clandestino project estimated that there were between 1.6 and 3.8 million undocumented migrants in the EU in 2008.³⁴

The project classified member states into categories of data reliability, with only the UK and Greece achieving the highest classification for data on irregular migration – that of medium reliability. The low classifications are a result of a lack of sufficient base data to work from.

The Clandestino project estimated between 44,000 and 144,000 UK-born undocumented children out of a total of 417,000-863,000 undocumented migrants. Following on from the data collated by Clandestino, the COMPAS research project³⁵ at the University of Oxford found an estimate of 120,000 undocumented children in the UK in 2011, of which over 85,000 are thought to be UK-born.

For comparison, Clandestino estimated 26,314 undocumented children in 2007 in Greece. This number was derived from taking the number of third country nationals on the school and birth registry, and subtracting an estimated number of regularly residing children aged below 18. In 2009 draft proposals were brought forwards for a regularisation scheme for children born in Greece to migrant parents, or for children who had been in Greece from early, formative years, and undertaken Greek school education. Official discussion over the proposed scheme anticipated it to affect about 250,000 children, many of whom would have been undocumented. It is unclear how figures were sought in the latter instance.

The wide discrepancy between these figures demonstrates that any estimation of numbers of undocumented children are only an estimation, and become quickly out-dated with fast changing migration streams, the EU’s expansion and regularisation schemes. What these two country-specific figures demonstrate is that the population of undocumented children is significant and must be given due consideration.

³⁴ Triandafyllidou, Anna “CLANDESTINO Project Final Report”, November 2009, page11, available online at: http://clandestino.eliamep.gr/wp-content/uploads/2010/03/clandestino-final-report_-november-2009.pdf

³⁵ 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>

Means of Identifying Numbers and Flows of Undocumented Children

Although retrospective, regularisation schemes can provide useful baseline figures from which to gain a picture of irregular migration in a country. For example, in France more than 85,000 people were regularised for the sake of family unity between 2002 and 2006. In Spain 20,000 people were reported regularised in 2006 for 'family and employment reasons,' and owing to long residence.³⁶ These figures do not shed light on specific numbers of undocumented children living with their families in Europe, however it does give an idea of numbers of families in an irregular migration situation that apply for regularisation.

Similarly, academics have used statistics of detention and deportation to infer numbers of irregular migrants, however national legislation, policy and data differ widely, and so such figures are not comparable across the EU. Moreover, figures of detention and deportation are not reliable for ascertaining the numbers of irregular migrants in any State, specifically undocumented children. State data categorisation, even of detention and deportation figures, fails to account for the specific group of undocumented children in families. Instead accompanied children tend to be classified individually, as adults or not at all.

Data collection systems are not universalised, and the inclusion of accompanied irregular children in data systems has not yet been formalised. Available data does not give a definitive picture for undocumented children, and a lack of national, European or international systematic data collection for accompanied children in an irregular situation makes it impossible to adequately appreciate the extent of the population, assess their needs, or analyse the impact of immigration control policies upon them.

Utility of Data

Accurate data on accompanied undocumented children in Europe is valuable for professionals, migrants' rights organisations and policy makers. Accurate and reliable data helps professionals identify vulnerable social groups who need special attention, gives weight to policy work conducted by migrants' rights organisations and helps policy makers visualise and understand the gravity of the issue and assess how securitisation policies and restrictions on access to social rights affects undocumented children.

This chapter will outline steps civil society has taken to build a fuller picture and work to construct an accurate evidence base of accompanied undocumented children, raising attention specific to their needs and experiences in accessing social rights in Europe.

Each of the following strategies is concerned with qualitative, rather than quantitative research. Quantitative research on the numbers and flow of undocumented children in Europe is best collected by States, especially as States should be encouraged to invest in systematically gathering such data. The following strategies instead look at building a solid evidence base.

Building an evidence base is a powerful way of raising public and political awareness of the presence of undocumented children in Europe. The process involves collaborative work and knowledge sharing between practitioners and professionals working with undocumented children, which can be a constructive way of network building in itself. Evidence bases use testimonies and interviews from undocumented children and their parents to humanise what can sometimes be perceived as an abstract, distant, political problem. Presenting reliable data helps to show policy makers and government officials how migration control decisions adversely impact and affect the children in their territory.

³⁶ Applicants who demonstrated special family links were regularized only if they demonstrated an additional 'employment' criteria, by demonstrating that they have been working, albeit without status, in Spain for at least one year, and that they have lived in Spain for at least three years. For this reason the regularisation criteria is grouped as 'family and employment reasons.'

SHARING KNOWLEDGE OF ACCESS TO HEALTHCARE: RESEARCH ACTIVITIES OF PROFESSIONAL BODIES - ITALY



Context



The Italian Paediatric Society National Working Group on Migrant Children (GLNBI) was established within the network of SIP (The Italian Paediatric Society).

The working group was initially established to identify trends of health problems and challenges facing migrant children in Italy on a daily basis. To this end the group undertakes local and national epidemiological investigations, creating the evidence base for GLNBI's research initiatives.

Research Process



GLNBI conducts categorised epidemiological research. By conducting isolated research on specific groups of migrant children, the study is able to compare the core barriers to accessing healthcare for each 'category' of migrant child. The working group builds on the shared knowledge and experiences of paediatricians and practitioners from civil society organisations.

The wide reach of the professional body allows the working group to disseminate its research and findings to a broad group of health care providers, and members of the national paediatric society, helping to shape the practice of paediatrics nationwide.

Research Categories



The studies fall under the following five research heads:

- 1) Children born in developing countries who migrated with their families,
- 2) Children adopted from foreign countries,
- 3) Roma children,
- 4) Children whose parents are refugees or asylum seekers and
- 5) Unaccompanied teenage migrants.

Category 1 includes undocumented children and their families. By focusing on the prevalent health needs of undocumented children nationwide, the group of professionals is well placed to advise government on gaps in service provision.

To collect data on migrant children, the GLNBI use ISTAT, Italian national statistics as a baseline. Nonetheless, ISTAT statistics tend not to reflect monitoring of irregular migrants, and so GLNBI also cross-refer to CARITAS/MIGRANTES data.³⁷ This data, published in annual reports on migration, is disaggregated to provide specific data on irregular migrants. GLNBI's methodology includes the comparison of data from official sources such as ministerial data from police reports, with other data from regularisation programmes and the Italian social services and border controls.

Research Findings



Categorising research into these five heads helps GLNBI depict a macroscopic picture of national access to healthcare in Italy, as well as analyse more microscopically, the specific health problems of different vulnerable migrant groups, and answer why their access and needs differ.

Analysing data presented across all the above categories, the GLNBI has identified that the vast majority of migrant children present in Italy are Italian born. Further, that the rate of illness and disease, and the mortality rate of migrant children, are far higher than that of their Italian national peers.

Evidence also demonstrates that social disadvantages specifically suffered by migrant children, such as poverty, inadequate housing and poor hygiene, further exacerbate migrant children's health conditions. This evidence-backed research raises awareness of the realities of access to healthcare specific to this social group of children, as seen by professionals in the field.

Whereas this Italian working group separates migrants' experience of access to healthcare from mainstream access to healthcare, a recent research study in Poland considers migrants' access to housing within the context of a nationwide homeless crisis. In doing so, one can perceive the disparity of treatment between nationals and non-nationals during a crisis.

³⁷ This can be found online at: <http://www.dossierimmigrazione.it>

Studying Undocumented Migrants in the Context of a National Crisis

Poland has long been suffering from a housing crisis, which the national infrastructure is unable to correct. Applying for social housing from the municipalities is fiercely competitive with insufficient supply of housing to meet the high volume of demand. There has been no significant increase in the surface area of social housing supplied. As a result, applicants often wait several years to be granted social housing, which tend to be in old poorly kept buildings, so even once received can pose further problems such as expensive repairs.³⁸

Spurred by the national housing crisis, UNHCR financed a three-month study³⁹ in August 2010 to assess the situation of migrants facing homelessness in Poland, and their experiences. The study pays specific attention to the experience of those previously granted refugee status, although it looks broader at all migrants' experience during

³⁸ Dębski, Maciej, Nowak, Agnieszka and Popow, Monika "Poland – A New Reality, Old Problems", National Report, European Social Watch Final Report "Time for Action – Responding to Poverty, Social Exclusion and Inequality in Europe and Beyond" (2010) available online at: <http://www.socialwatch.eu/wcm/documents/Poland.pdf>

³⁹ Full text available online at: http://www.ecoi.net/file_upload/2016_1328104355_refugee-homelessness-poland.pdf

the homelessness crisis, and also examines the experience of undocumented families who have become homeless.

The research is divided into three sections: the first section tries to determine numbers of refugees in absolute homeless, defined literally as 'rooflessness.' The second section gives an overview of activities civil society practitioners have undertaken to fill the gap in the provision of housing, and the final section gathers testimonies and experiences from those migrants enduring homelessness.

Until this study, there had been no previous research or estimation of numbers of homeless refugees, or migrants, and equally, no migrant homelessness monitoring programmes exist at the national level in Poland. This study fills this gap and helps better understand the reality of homeless migrants by carrying out a preliminary assessment of the situation facing migrants under threat of homelessness.

Through gathering and systematising information on the causes and consequences of homelessness, the study was able to present policy recommendations on measures to prevent homelessness and housing exclusion.

The study revealed findings of systemic discrimination against migrants in accessing private and social housing. This is only worsened by a lack of council and social housing, unemployment and lack of welfare support, and a social reluctance to rent privately to migrants.

A systematic analysis of the causes of homelessness amongst undocumented populations and the barriers that they face in trying to work out of it has yet to be done. However the groundwork done by this preliminary research paves the way for building an evidence base on undocumented families' experience of housing in Poland.

WHAT ARE THE ADVANTAGES OF BUILDING AN EVIDENCE BASE?



- Accurate and reliable data can help reveal vulnerable social groups
- An evidence base on undocumented children and families can help understand the extent of the population
- It helps decision-makers assess the specific protection needs and vulnerabilities of undocumented children and families
- It helps policy-makers analyse the impact of immigration control policies on undocumented children and families
- An evidence base can give weight to the policy work of migrants' rights organisations
- An evidence base with testimonies and interviews helps raise public and political awareness of the presence of undocumented children and families
- Testimonies can help policy-makers humanise and visualise what is otherwise seen as an abstract political issue
- The process of building an evidence base is a collaborative one which can build useful alliances between civil society and other professionals

Socio-Demographic Research

Whereas the previous strategies have looked thematically at healthcare and housing, and considered accompanied undocumented children's experience of accessing these rights, the following projects take a different perspective, looking instead at undocumented children as a social group, and how their status precludes their access to various rights.

NO WAY IN, NO WAY OUT – IRREGULAR MIGRANT VOICES IN THE UK



Context



The Centre on Migration, Policy and Society (COMPAS),⁴⁰ at the University of Oxford, conducted a research report⁴¹ into the realities of undocumented children and families in the UK to give voice and visibility to the reality of the estimated 120,000 irregular migrant children who have been born or brought up in the UK.

The report highlights the causes into irregularity, and the political decisions that compound the vulnerabilities faced when in irregularity. It responds to the increasing number of confusing and contradictory immigration laws that the UK has enforced in recent years.

Funded by the Barrow Cadbury Trust, the project is part of a larger comparative project on undocumented children in the US and UK.

Research Aims



The research aims are four-fold:

1. To profile the undocumented child in the UK – outlining their rights, entitlements and exploring how immigration legislation and child welfare legislation affects the child and their ability to access public services
2. To create better understanding of the realities of living in an irregular situation in the UK by investigating how their legal status shapes their lives, and what strategies they have developed to cope
3. Offer an overview of practitioners and professionals' experience working with migrants and revealing what difficulties they face in practice, particularly during economic downturn
4. To analyse the implications of two divergent policy objectives governing undocumented children.

⁴⁰ The mission of COMPAS is to conduct research in order to develop theory, and knowledge, inform policy-making and public debate and engage users of research within the field of migration.

⁴¹ Full report available online at: http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO_WAY_OUT_NO_WAY_IN_FINAL.pdf

Research Process



Given the 'invisibility' of undocumented populations and lack of quantitative base data on this group of vulnerable children, this study is based on qualitative interviews with migrant children and families and other key stakeholders such as healthcare and education professionals, social workers, local authority officials and political figures.

Research Outputs



The report is structured in three parts. The first gives facts, figures, an outline of legal entitlements and key definitions affecting undocumented children. The second part is entitled 'irregular voices' and maps routes to irregularity as well as giving explanations for 'why Britain?' This section explains the difficulties irregularity creates in daily life – at home and in a family unit. The final section shifts focus to the public eye, analysing undocumented children's access to education, healthcare, housing, before finally offering recommendations for policy makers.

Parallel Activities



The report is one element of a larger body of research work that the project has undertaken on undocumented children.

A preliminary background paper on children in irregular migration was released in 2010 offering a critical review of terms, concepts and evidence for the qualitative study as well as providing a preliminary mapping of undocumented children in the UK.

The project held a workshop with key policy makers and stakeholders in May 2011, and kept this forum alive with its online blog 'Irregular Voices.' Writing journal articles to disseminate the project and its initial findings also helps garner support for the issue of undocumented children.

Research Findings



The study found that although national legislation provides entitlement to public services, in practice this access is limited. The study continued to analyse how the increased cooperation between public service provision and immigration authorities undermines the ability of service professionals to fulfil their statutory entitlements to undocumented children, causing discrimination and de facto expulsion.

The study also reveals the extent to which immigration systems contribute to the destitution of undocumented children, which negatively impacts upon their health, education, and general cognitive development. The study highlights that more attention should be paid to the impact of current policy and practice on the early years of undocumented migrant children's lives, starting even before birth, with antenatal care.

The recommendations suggest the enactment of specific legislation to address the causes of irregular migrant child destitution, in line with the recent UK Supreme Court's judgment⁴² which reaffirmed that the best interests of the child should supersede any consideration of immigration status.

The study also highlights the centrality of the family unit for this social group of children, and suggests that undocumented children cannot be considered in isolation from their families. The report encourages "*positive protection for stable and strong families*" at the centre of all policies on irregular migration.

Finally the report highlights the need to support the regularisation of children, as the only sustainable solution to their vulnerabilities.

⁴² ZH (Tanzania) v Secretary of State for the Home Department (2011)

A similar study was undertaken in France in 2009 looking at the rights and reality of undocumented migrants in France. GISTI, Le groupe d'information et de soutien des immigrés, an NGO that defends the rights of migrants through training, publications and policy participation, released the fifth edition of its guide on the rights of undocumented migrants in France.⁴³

Presented as a practitioner's guide to the rights of undocumented migrants, the book explains the reality of undocumented migrants in France and the effects of securitization measures on their access to rights. Providing a thematic analysis of undocumented children's legal entitlements to social rights, and then reflecting this against the situation in practice, the publication reveals the protection gap that undocumented children fall through.

Formalising Systematic Data Collection

Opening up data collation and research to irregular migration streams, and to children in contexts other than 'trafficking,' 'separated' or 'asylum', allows policy makers to see what other vulnerable groups exist outside the remit of institutionalized categories for migration, and what vulnerabilities they suffer from. It is key data that could and should be used in legislative and policy development.

By collating, analyzing and publishing data on undocumented children, these studies give voice and value to the existence and experiences of undocumented children. In doing so undocumented families gain solidarity by knowing their struggles are shared. These valuable insights into the realities of undocumented children accessing rights in practice, reveals critical gaps and discrimination in legal protection. Reliable data and evidence can thus be useful in revealing which social groups, in what numbers, and to what consequence, are not taken into account in relevant legislative frameworks.

Nonetheless, the collation and analysis of data on undocumented children needs to become methodical across all EU member states so that local governments, State parliaments and decision makers at EU level all systematically include consideration for the protection needs of undocumented children in policy considerations. It is also crucial that data is collated and used for policy considerations only, and not used for immigration enforcement purposes.

⁴³ Full text available online at: http://www.gisti.org/IMG/pdf/np_sans-pap-pas-sans-droits_5e.pdf



TOOLS AND STRATEGIES

OVERVIEW OF TOOLS AND STRATEGIES ON DATA COLLECTION

- Providing a reliable evidence base on the realities of undocumented children at local, national, European and international levels is key for revealing deficiencies in migration mechanisms
- Ensure data is analysed thematically and by social group to give a comprehensive analysis of the discrimination undocumented families experience
- Well analysed data helps identify vulnerable social groups who need special attention
- An accurate evidence base can give weight to policy and advocacy work
- Advocate for the systematic collection of data on undocumented children and families in Europe

collaborate and communicate

Participation and Empowerment Strategies for Undocumented Families

WHY?

- Undocumented children and families are frequently discriminated against and disengaged from legal, social and economic structures. It is crucial that they are empowered by the support and assistance services they access.
- The opinions, needs and direct voice of undocumented families should always be included and incorporated in any advocacy work.
- Participation activities with undocumented families helps enrich and improve the collective voice of the community.

HOW?

Bringing together the collective voice and experiences of undocumented children and families can be a powerful exercise in solidarity and peer support:

Empowerment Strategies:

- Organise workshops and training sessions to equip undocumented families with key skills for their self-support.
- Organise peer-learning sessions for undocumented families to come together in a safe space to share their experiences and support each other in identifying solutions.

Participatory Action Strategies:

- Organise child / youth participatory action groups where young people can document their collective experiences and build crucial leadership skills.
- Undocumented children can come together in participatory action groups and organise (online) campaigns, petitions, exhibitions and mobilise support for their rights.

CHOOSE THE RIGHT TOOL

The problems faced by undocumented children are often neglected as a mere 'migration issue.' By giving voice and visibility to the problems undocumented children face, using their own words, experience and method of communicating helps humanise their problems in the public and political sphere.

chapter 3

Tools to Overcome Administrative Barriers in Accessing Civil, Economic, Social and Cultural Rights.

Ensuring Undocumented Children's Rights Are Protected in Public Services and Policies.

The realities of undocumented children and families living in Europe are widely misunderstood, if not overlooked. At national level, the political discrimination they face is often misconstrued as migration management and hidden under the guises of 'security control' or 'border management.' Therefore, the prevalent negative perception surrounding irregular migration justifies migration policy that overlooks considerations for child protection and the well-being of the child.

Political discourse tends to focus only on the needs of unaccompanied children, or the negative implications and financial burden states have in managing irregular migration generally. Little to no attention is given to undocumented children living with their families in Europe, and the administrative difficulties and discrimination they face in accessing fundamental rights.

The administrative barriers form as a result of a lack of separation of powers. In practice, local authorities and service providers implement national migration policy. Local authorities have a duty to protect, and support all children in their area, including undocumented children. However they have to balance migration policy mandates requiring them to ask for immigration papers, to deprioritise undocumented families from their care, or

worse still, to report them to the police, against their inherent duty to protect and support children and families in their care. In this way, central government is outsourcing the task of migration management to local authorities who are taking on the dual, and conflicting identities of immigration authorities and service providers, without any training on the former.

Speaking at the PICUM Netherlands National Workshop on the Local Reception of Undocumented Families, Professor of Family Law and Child Rights, Caroline Forder, explained the need for local authorities to apply human rights principles to everyday decisions:

“You are the local representative of the government, and you have to comply with human rights. Your task is therefore to make sure that you understand how to apply human rights. To do that it will be necessary to follow judicial decisions regarding human rights closely.”⁴⁴

⁴⁴ Caroline Forder, speaking at PICUM National Workshop “Building Strategies to Protect Children in an Irregular Migration Situation in the Netherlands – Workshop on the local reception of undocumented families” 23 February 2012, Leiden, Netherlands.

There are two steps to overcoming administrative barriers to undocumented children's access to rights: the first is to permanently place the issue of accompanied children in an irregular migration situation, on all political agendas. In doing so, accompanied undocumented children must gain recognition as a unique socio-economic group with specific difficulties that must be addressed, integrated and incorporated into all mainstream political and public discourse.

Having given voice and political visibility to this substantial group of marginalised children, the second step is to mobilise politicians, practitioners, professionals, parents and undocumented migrants to advocate for the removal of all administrative barriers that prevent undocumented children's access to civil, economic, social and cultural rights.

Giving a permanent place to undocumented migrant children and their families in political discourse, and bringing about change to administration in practice is a sustainable means of ensuring undocumented children's access to rights will continue to be protected, regardless of political agendas.

The Right to Have a Legal Identity – Birth Registration

Birth registration is a fundamental right of every child and a crucial means of protection. The right to birth registration is linked to the right to State protection, to nationality, and to a legal identity. Unregistered children become invisible and unaccounted for and are more vulnerable to violations of their rights due to their age (e.g. treatment as an adult in justice systems), and to exploitation that takes advantage of doubts about their age (e.g. child labour), as well as to trafficking, and to becoming stateless. The presence of unregistered children means that data from birth registrations is misrepresentative of child populations. This makes it difficult for state planning and the allocation of resources for sufficient provision of services.

When a child is registered at birth, they are normally issued with a birth certificate. The birth certificate provides evidence of their registration and of the State's recognition of the child's legal identity. Birth certificates are key documents that facilitate access to other basic social rights and services – enrolment in school, proof of eligibility to access social housing, and proof of identity and age to access healthcare.

Being unable to register increases the possibility of undocumented children becoming stateless. Children who are born in Europe, and not able to register in their country of birth, or in their parent's country of origin, have difficulty in proving nationality, and in accessing citizenship and state protection in either country.

Legal Right to Birth Registration

The UN Convention on the Rights of the Child⁴⁵ makes explicit the legal right to birth registration at Article 7(1):

“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.

(2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

This right is conferred on the child as an individual, independent of the parents' status or identity. The CRC specifically mandates States to take steps in their national law to prevent children from becoming de facto stateless.

⁴⁵ United Nations Convention on the Rights of the Child (1989). Full text available online at: <http://www2.ohchr.org/english/law/crc.htm>

National Legal Right to Birth Registration in Europe

As with access to other basic social rights, EU member states' national legislation varies widely with regards to legal protection of the right to birth registration for undocumented children. The Netherlands, for example, explicitly provides for undocumented children's right to birth registration in national law⁴⁶, whereas in other EU member states one can only imply an implicit right to birth registration for undocumented children⁴⁷. There is a clear lack of policy attention paid to undocumented children's right to birth registration.

⁴⁶ Article 19 of the Civil Code (Artikel 19 Burgerlijk Wetboek Boek 1) and Artikel 19e(8) of the Burgerlijk Wetboek Boek 1 available online at: <http://maxius.nl/burgerlijk-wetboek-boek-1/artikel19e>

⁴⁷ UNICEF, "Rights of Accompanied Children in an Irregular Migration Situation" (November 2011) available online at: <http://fra.europa.eu/fraWebsite/frc2011/docs/rights-accompanied-children-irregular-situation-PICUM.pdf>

UNREGISTERED AND INVISIBLE: SECURING THE RIGHT TO BIRTH REGISTRATION IN ITALY

ASGI
Associazione
per gli Studi Giuridici
sull'Immigrazione

Context

On 3rd June 2009 the Italian government proposed a new Bill, the Security Package (or "Pacchetto sicurezza"⁴⁸) to the Senate of the Republic. The proposed bill introduced many measures prohibiting undocumented migrants' access to social and economic rights.

Specifically, the proposed Security Package would amend Article 6 of the Immigration Law 286/1998 that regulates cases where a non EU citizen is required to provide evidence of regular residence when obtaining "licenses, authorisations, registrations and other measures." The original remit of Article 6 excluded civil status registrations (such as birth, marriage and death registration), whilst the Security Package would cancel out this exemption. As a result, non EU citizens would be required to provide evidence of regular residence for all civil status registrations, including birth registrations, thereby preventing undocumented parents from registering their children at birth.

Impact of Proposed Bill

Such a provision would have created a social group of unregistered children, entirely unknown to any institution and who, with no recognisable identity, would be de facto invisible.

⁴⁸ Full text legislation available in Italian online at: https://docs.google.com/viewer?a=v&q=cache:r4PPsrvgDAwJ:www.interno.gov.it/mininterno/export/sites/default/it/assets/files/16/0189_legge_15_luglio_2009_n.94.pdf+Gazzetta+Ufficiale+n.+170+del+24.07.09,+la+legge+n.+94/2009&hl=fr&gl=be&pid=bl&srcid=ADGEE5i1tZbHNpVeYZD0zQ9CQjB45SwtNWDGqs23Q5zosCGqftC1MNworX52KegaobeQ2Nv4sS7dYTuJF0uZvTsA_R0kVZ0R0GErvYaJ5bCXBwGR-pZTXdTbgWyM69LLhMKgRr5Gq7a&sig=AHIEtbTQZS-9fFN-_2BhYPIkUUs9vVto9g

The absence of official documentation proving the parent-child relationship can easily result in the child becoming stateless or separated from their family. This invisibility makes the child more vulnerable to succumb to abuse, exploitation and destitution.

Mere knowledge of such a provision would impact upon expecting mothers. Fearing that their children will be taken away from them at birth, mothers may not be willing to give birth in a hospital, and so make do with unsanitary underground facilities to avoid fears of detection, separation or deportation.

Civil Society's Letter



The Associazione per gli Studi Giuridici sull'Immigrazione (ASGI), an Italian NGO, launched an advocacy campaign in response to this proposed provision. Working alongside several other associations, NGOs, migrants' rights and children's rights organisations, ASGI developed a letter sent to the Italian Chamber of Deputies hearing on the 9th March 2009.⁴⁹

The letter sought to dissuade the Chamber of Deputies to adopt the provision contained in Article 45.1(f) of the draft law. The letter stated that the prevention of birth registration is a measure which contravenes child protection, and in doing so, is both unconstitutional and in breach of Italy's international legal obligations (ICCPR and UNCRC⁵⁰).

The draft law was nonetheless approved by the Parliament. Three days before its entry into force, ASGI sent letters to the Government and to the Regions, proposing an interpretation of the new law that would ensure the right to birth registration to children born to undocumented parents.⁵¹

Impact of Civil Society Action



In response to civil society's action, the Ministry of Interior issued an Administrative Circular No.19/2009 on 7 August 2009⁵², the day before the change in law entered into force, clarifying that undocumented families do have the right to birth registration. The purpose of the circular was to clarify the final Bill.

Some Italian regions, such as Piemonte, have also issued local circulars re-stating that civil registries are exempt from obligations to require a residence permit.

Ongoing Difficulties



Despite the triumph of the Circular in asserting undocumented families' right to birth registration for their children, other provisions of the Security Package do still affect access to birth registration in practice.

Birth registration in Italy is conducted at a hospital or municipal registry office. The Security Package criminalises irregular entry or stay in Italy, and so introduces a duty upon all public officials to report undocumented migrants to the police. Health professionals are

⁴⁹ Full text letter available online at: http://www.asgi.it/public/parser_download/save/comunicati.110309.pdf

⁵⁰ Italy is bound by the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (UNCRC) that it has ratified. Article 24 of the ICCPR and Article 7 of the UNCRC obligate States to protect a child's right to be registered immediately after birth and to acquire a name and nationality.

⁵¹ Full text letter available online at: http://www.asgi.it/home_asgi.php?n=497&l=it

⁵² Full text Circular available online at: http://www.asgi.it/public/parser_download/save/circolare.271109.pdf

prevented from reporting irregular migrants to immigration authorities, however there is no similar provision for municipal registry offices.

The Associazione per gli Studi Giuridici sull'Immigrazione (ASGI) argues that municipal officials should also be prohibited from reporting irregular migrants who come to register their children. They argue that as parents cannot lawfully be deported within six months of having a child in Italy, they are not committing a criminal offence of irregular stay when they come to register the birth, and so officials do not have a duty to report them.

Lessons Learnt



- Legal recognition is the first step to accessing other rights
- Analysis of supplementary legislation may reveal other administrative barriers to accessing a fundamental legal right, in practice
- Successful campaigning for specific legal protections is only the first step to ensuring access to rights
- Monitoring of policy and administration in practice must occur continuously

Educational Integration: Gaining Access to Schools

Fear of detection, detention and deportation reappears when undocumented families are seeking enrolment for their children in schools.

Generally, across Europe, the right to access compulsory education for undocumented children is well protected in national law. National legislation tends to either provide an explicit right⁵³ for undocumented children's access to compulsory education, or the right is implicitly⁵⁴ read into national laws that grant the right to 'all' children in the territory. The right to access education is not explicitly denied under any European national legislation.

Yet administrative barriers to education still exist. Where national legislation only implicitly includes the right for undocumented children, a lack of national policy guidance can cause confusion for officials and undocumented families, on their rights in accessing education. Ambiguous national legislation causes contradictory policies and rules to emerge in practice.

Barriers to Enrolment

Despite national legislation granting access to education for undocumented children, official policy and administrative practice still requires identification documents to be presented at enrolment, excluding undocumented children from attending schools.

As the threat of detection, detention and deportation is a continual and real concern for undocumented parents, requests for documentation pose a real barrier to accessing schools.

Identification documents requirement justified by funding

Schools across Europe have justified requests for identification documents as a funding issue, as schools⁵⁵ often receive funding proportionate to the number of pupils enrolled. Undocumented pupils cannot be accounted for without proper identification documentation, when declaring numbers for State funding.

⁵³ As in Belgium, Italy and the Netherlands [c.f. Part I of the Guide]

⁵⁴ As in France, UK, Spain and Poland [c.f. Part I of the Guide]

⁵⁵ PICUM National workshops 2011-2012 revealed this was particularly true for schools in Poland and the Netherlands

This creates an added layer of indirect discrimination that prevents willing schools, from being able to register undocumented pupils, for fear of receiving insufficient funding for their overall student population. Undocumented pupils become seen as unwanted liabilities.

Enrolment of undocumented pupils then falls to the exceptional discretion of liberal school directors who have no funding concerns, a rare exception in the current economic crisis.

Identification documents required for proof of residence in the area

Whereas justification for public funding can indirectly discriminate against undocumented children, requests of documentation proving local residence directly discriminates against undocumented children's enrolment in schools.

In France education is provided geographically, for those children who reside in the local catchment area. For this reason, documents proving local residence are requested at enrolment.

Families living in an irregular migration situation rarely have access to proof of residence in the local area to enrol their child, particularly given the insecure and impermanent nature of housing for irregular migrants.

Schools frequently impose the added requirement of proof of local residence with their parents. Given the nature of living in an irregular migration situation, undocumented children often live with extended family members. Even when these family members are able to provide proof of residence for enrolment, schools object, demanding that only parents, with local residence documents, can register their children.

These administrative barriers clearly discriminate directly against undocumented children's enrolment in education.

Fear of Detection

Despite international, regional and national legal protections of access to education, schools are being used as battlegrounds to combat irregular migration.

Since 2004, the Former French Minister of the Interior, Nicholas Sarkozy, used schools as a means of detecting and deporting undocumented migrant families. Mr. Sarkozy had set an annual quota for deportation at 25,000 deportations annually.⁵⁶ In order to keep his political promise, Mr. Sarkozy sent French police into schools at the end of the school day, to detain undocumented parents whilst they were collecting their children.

The raids that took place in 2006 have not been repeated since, however even solitary instances of raids and detention will embed lasting fear of accessing schools in migrant communities.

⁵⁶ Government-set quotas for deportation in France have been steadily increasing, with nearly 30,000 deportations conducted in 2008, exceeding the 26,000 set- target.

RESF: A SOLIDARITY AND SUPPORT MOVEMENT BORN IN THE SHADOW OF SCHOOL RAIDS



Context



Two years prior to the 2006 school raids, (please see previous section), a network of support for undocumented pupils in France was born.

On June 26, 2004, supporters of all kind, gathered at the Bourse du Travail in Paris to voice solidarity and support for the situation of school-going undocumented pupils. Migrants' rights organisations, teachers, staff members in the national education system, undocumented parents, youth social workers, lawyers, associations, trade unions and human rights organisations met to protest against the arrest and deportation of many young undocumented migrants (over the age of 18) who had been enrolled in secondary education.

From this initial meeting of supporters, the Réseau Education Sans Frontières (RESF) (Education Without Borders Network) was born.

The Movement



Described more as a movement than an organisation, RESF is constituted of volunteer students, parents, French nationals and other migrants' rights organisations. The movement is a response to the French government's use of schools and children as a means of detecting and deporting undocumented families.

RESF's wide-reaching national presence is intended to inform undocumented pupils that a support network exists for them, seeking to protect and regularise them.

Their slogan "Let them grow up here" promotes the organisation's belief that a child should be allowed to begin, continue and finish their education in France, even if the completion of further education goes beyond the age of 18.

Activities



Although RESF runs several projects aimed at the holistic integration of undocumented children in schools, its principal aim is to mobilise support for undocumented children's secure access to schools. The network regularly runs petitions, organises rallies and teacher strikes to raise political awareness and gather support for undocumented families seeking to gain access to education for their children. This visible campaigning action ensures school directors, staff and teachers take note of undocumented children's access to education.

RESF also organise regular legal drop-in sessions where undocumented families can seek advice on their rights and entitlements, and assistance to help complete documents.

In addition to offering political and legal support to undocumented children, RESF runs activities intended to support access to education in practice. An example is the 'godparent' scheme, a mentor scheme where undocumented children can have a civil 'godparent,' who were sometimes even an elected official, a mayor or deputy. This scheme is run across France, but is most successful in regions that tend to fall towards the political Left. Although the godparent mentor scheme has no legal effect, it is symbolic in integrating undocumented children into French society. It also provides an additional layer of support for undocumented families. If a parent is ever detained, the 'godparent' of the child is well positioned to access legal assistance for the family.

Similar campaigns have taken shape across Europe, revealing how widespread administrative barriers to undocumented children's access of education are. The need for such campaigns reflects that the circumvention of fundamental legal rights using administrative barriers is becoming a commonplace instrument for States to repress irregular migrants.

Overcoming administrative barriers to access of non-compulsory education in Italy

In Italy, ASGI took similar advocacy action to ensure the 2009 Security Package provisions didn't form administrative barriers to undocumented children's access to education. As with the draft provisions for birth registrations, the provisions regarding access to all education were construed in a similarly restrictive manner.

Article 6.2 of the Immigration Law 286/98, as amended by the Security Package, imposed a new duty on migrants to provide evidence of regular residence when obtaining "licenses, authorisations, registrations and other measures." This law contained three exceptions: (i) access to temporary sports and leisure, (ii) access to urgent or essential healthcare services and (iii) access to compulsory education services. The legislation provides no further clarification on what legally constitutes "compulsory education," thus not clarifying whether proof of regular status is required for non-compulsory education, nursery access, or internships and vocational training. The requirement of such documentation would definitively exclude undocumented children.

ASGI responded by widely distributing a letter of clarification⁵⁷, reaffirming that, as per constitutional

and international legal protections, Article 6.2 of Law 94/2009 can only be interpreted as not imposing a duty to provide proof of regular residence for children to access all constitutional education. This would include access from nursery, until the completion and attainment of a secondary school diploma, irrespective of what age this is attained at.

The letter seeks to draw national attention to the law and the overarching constitutional legal protection for access to education for undocumented children that national legislation is bound to comply with, in order to ensure the administrative barrier of requesting residence documentation, is not administered in practice.

The letter continues to outline that, in accordance with the constitution, authorities should not seek to verify the residence status of migrant children's parents, or report children or families who fail to produce proof of regular residence status. Such discriminatory actions would amount to an administrative abuse of power.

In clarifying both the interpretation and remit of the new Law's provisions, ASGI's letter prevents administrative barriers from being created when undocumented children seek enrolment in school. The letter also ensures undocumented families do enrol their children, and do not perceive schools as a means of detection.

In response to questions posed by some municipalities, the Ministry of Interior officially stated that there is no duty to present a residence permit for the enrolment of foreign children in schools of any grade (including kindergarten).⁵⁸

⁵⁷ Full text letter available online at: http://www.asgi.it/public/parser_download/save/asgi_istruzione_dopolalegge94.09.pdf

⁵⁸ For further information see the press release from the Prefetto di Torino available online at: http://www.asgi.it/home_asgi.php?n=925&l=it and the note from the Ministry of Interior in response to the Commissioner of the City of Bologna available online at: http://www.meltingpot.org/IMG/pdf/Parere_Ministero_Interno_nido_per_minori_stranieri.pdf

Administrative Barriers to Accessing National Healthcare

Legal Right to Access Healthcare

As detailed in Part I, which provides a comparative analysis of legal frameworks, undocumented children's right to access healthcare is protected in international, European and national law. National legislation in several countries in Europe offers some form of access to healthcare, although to various degrees and 'categories' of access.

Exceptionally in Spain, as opposed to other EU member states, access to healthcare is granted in national law at the same level as for Spanish children. Yet various practical barriers still prevent undocumented children from accessing health care. In addition, recent legislation restricting access to health care for undocumented adults will also have repercussions on undocumented children's access when they need to approach health facilities accompanied by an undocumented parent or other caregiver.⁵⁹

In some EU Member States, separated children are distinguished and granted equal access as nationals, whereas undocumented children with families are granted access to only 'essential' healthcare.⁶⁰ Although accompanied children in an irregular migration situation are equally at risk, and suffer from their own specific set of vulnerabilities that arise from living in an undocumented family, they are somehow distinguished from separated children and afforded only limited access to rights in this second category of access to healthcare.

A third category of access is one in which legislation neither explicitly grants, or excludes undocumented children from access to healthcare, leaving their ability to access health services up to the discretion of General Practitioners (GPs). GPs then give treatment based on whether it is essential for the recovery of the child.

⁵⁹ 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. Although the decree does not affect undocumented children's legal entitlement to healthcare, the new restrictions will have an impact on undocumented children's access to health care in practice, as their parents' ability to access health care will be severely limited. The restrictive legislation may delay parents from seeking care for their children due to fear of detection from contact with local authorities, hospitals and clinics. Undocumented children's living conditions will also be negatively affected by their parents poorer health conditions.

⁶⁰ For a comparative analysis of access to healthcare in Europe for different categories of undocumented migrants see HUMA (Health for Undocumented Migrants and Asylum Seekers) "Access to Healthcare for Undocumented Migrants and Asylum Seekers in 10 EU Countries" (2009). Full text available online at: http://www.episouth.org/doc/r_documents/Rapport_huma-network.pdf

A final category of access, groups together countries whose national legislation does not stipulate any legal protections specific to undocumented children, and so in practice they have the same access to healthcare as undocumented adult migrants, which is always very limited.

Ambiguity Creates a Gap in Legal Protection

Using terms such as 'urgent' and 'essential', which are nebulous and legally undefined, creates wide and differing interpretation between states, local government, and healthcare providers. There can be no clear understanding of what the correct application of the law is, giving no clear legal protection to undocumented children's access of healthcare. This gap in legal protection is filled with administrative barriers that impede undocumented children's access to national healthcare systems.

A lack of clear legal protection creates strong discretionary power at the local level, where undocumented parents rely on the 'goodwill' of willing doctors to grant them access to healthcare. Such discretion amounts to discrimination. Doctors can use discretion to positively treat undocumented children beyond the remit of 'urgent' care, or can apply discretion to exclude undocumented patients from their care. Those undocumented children who fall in the gap between discretion and ambiguous legal protections rely solely on civil society to treat their healthcare needs.

The ambiguity in legal protection is compounded by a general lack of awareness of undocumented children's entitlements to access healthcare. Migrant families may not understand complicated healthcare systems and what their entitlements are, doctors equally are unaware of the rights of undocumented migrant families, and so can obstruct their access. Migrant families may again fear accessing healthcare for fear of detection. Owing to this lack of awareness, it is not uncommon that those undocumented migrant families with the protection and support of NGOs or other support organizations gain access to healthcare, whilst others remain excluded and invisible to healthcare systems.

The administrative barriers created by healthcare professionals are created unwillingly by a lack of awareness of the rights of undocumented migrants. The following advocacy action overcomes administrative barriers by building a network of support and solidarity for professionals working with undocumented migrant children.

BUILDING A HEALTHCARE POLICY NETWORK TO ENSURE ADEQUATE SERVICE PROVISION FOR UNDOCUMENTED CHILDREN IN ITALY



The Context



In Italy undocumented children below the age of six receive free access to healthcare. Above this age undocumented children are treated the same as undocumented adults: they are eligible to receive 'urgent' and 'essential' care only. Undocumented migrant children do not have the right to access general practitioners or paediatricians. Continuous medical care is prescribed by law, but achievable only through hospital services or clinics where ongoing access to the same paediatrician is not possible.

In practice, accessing even urgent or essential healthcare is shrouded in administrative barriers. The process is complicated and can be unaffordable for vulnerable migrant families.

Undocumented children do not have the right to enrol in the National Health Service (NHS). To access NHS services, parents must obtain an STP code (Stanieri Temporaneamente Presenti – temporary residing foreigner code) for their child. Application for the code is free, and can be applied for at any time, even when the child is not unwell, but it only has a validity of six months and must be renewed thereafter. To obtain the STP code undocumented families must also apply for "indigence status" (stato di indigenza), which is a formal declaration of poverty.

The STP code enables the cost of healthcare to be reimbursed by the state to the healthcare provider. However undocumented migrants with an STP card can only access some NHS services free of charge, otherwise services are payable (although, according to the law, everybody would be entitled to NHS services free of charge).

Additionally, the implementation of healthcare laws varies widely between Italian regions, rendering the access to healthcare complicated, unpredictable and expensive for undocumented migrant families with children.

The Group and Its Ideology



The Grls (Local Group for Immigration and Health), were set up twenty years ago as the local organs of SIMM⁶¹, the Italian Society of Medicine and Migration. Grls is a local healthcare policy network that seeks to promote, support and advance the work of professionals who provide healthcare assistance to undocumented migrants.

Each Grls centre serves as a localised meeting, advocacy and project-development hub bringing together healthcare workers of all disciplines, with the 12 centres situated throughout Italy.

⁶¹ Website of SIMM, Società Italiana di Medicina delle Migrazioni, available online at: <http://www.simmweb.it/>

The centres provide regional and local support for the management of access to public healthcare. Additionally the centres advocate on a local level, targeting healthcare service providers and managers. They identify key administrative barriers to undocumented migrants' access to healthcare and propose solutions at the local level for a better provision of healthcare to undocumented migrants in Italy.

Activities



- Promote local initiatives and campaigns that raise awareness about the issue of undocumented families accessing healthcare in Italy
- Create a local-level policy network – each Grls centre brings together local civil society groups, researchers and professionals who work together on policy proposals, drawing on the advantages of each other's specific skill-sets and experiences. Nationally, SIMM then collates the work of the local Grls centres.
- Advocate for change amongst institutions and public authorities – using shared knowledge and experience from the local centres, Grls advocate for administrative reform of healthcare provision to undocumented families

Elements of Good Practice



- Localised centres have stronger links to the community and so can more effectively draw on first-hand experiences of undocumented families' access to healthcare
- The national network of Grls centres is a useful way for successes to be multiplied. Positive action in one regional office can be used as a model for change in other regions.
- Building co-operation for a joint cause. The network builds co-operation between willing healthcare professionals, and in doing so increases visibility to the issue of undocumented migrants' access to healthcare in the professional sphere

"WE ARE DOCTORS AND NURSES, NOT SPIES!"⁶²

In addition to co-ordinating the Grls centres at local level, SIMM also responds at national level to discriminatory legislative or policy proposals. For example, in February 2009, the Italian government sought to introduce a provision requiring public officials and health professionals to report the personal details of undocumented migrants they came into contact with to the immigration authorities.

In requiring doctors to report the status of their undocumented patients to the authorities, the proposed provision contravened Article 32 of the Constitution, which protects the right to health without limitations or qualification.

In response to the proposed provision, SIMM, Medecins Sans Frontiers (MSF), Associazione Studi Giuridici Immigrazioni (ASGI) and the Osservatorio Italiano sulla Salute Globale (OISG) came together to launch a joint public statement entitled "Prohibition of Reporting:

⁶² "Divieto di Segnalazione: Siamo medici e infermieri, non siamo spie"

We are doctors and nurses, not spies.” The statement⁶³ drew attention to the discriminatory proposed provision, highlighting that uniting healthcare provision with the detection function of immigration authorities would marginalise health for undocumented migrant patients and propel them into a health protection chasm. The statement continued to admonish that the proposed provision would only create alternative, underground healthcare provision that would not fall under the supervision or control of Italian authorities.

Beyond the impact for undocumented migrant populations, the statement highlighted the impact of an excluded population’s health on public health in Italy more generally. Financially, civil society urged that imposing such an exclusionary administrative barrier to undocumented migrants would be more expensive to the national budget, as undocumented migrants without access to preventative or early intervention healthcare would be forced to seek costly emergency care at a later stage in the health cycle, which will be more expensive in the long-term.

The statement was co-signed by healthcare professionals and lay members of civil society before being sent to the Italian Senate and subsequently to Parliament.

To raise awareness about the discriminatory provision and to support the joint statement, the coalition organised a torchlight procession on 2 February 2009 in front of the Italian Senate. Health professionals, NGOs, representatives of civil society and concerned citizens joined the procession to show solidarity for the statement and the greater symbolic concern for undocumented migrants’ access to healthcare.

In the end, the proposed provision was not implemented in Italian law. The Italian Home Office issued a Circular on 2 December 2010⁶⁴ publicly confirming that access to healthcare services does not impose any sort of duty to report upon healthcare professionals or public security authorities except where the Law explicitly imposes a duty upon public officials to report.

⁶³ Full text statement available online at: <http://www.ordinemedicivenezia.it/files/Brochure%5B1%5D-1.pdf>

⁶⁴ Available online at: http://www.ordinemedicitermi.it/index.php?option=com_docman&task=doc_download&gid=361&Itemid=86

Access to Housing

Previous chapters have looked at overcoming practical barriers to access housing. Although many civil society organisations support undocumented families’ access to shelters, and temporary accommodation, very little successful action has been taken to remove administrative barriers to accessing housing.

Across all of PICUM’s national workshops participants reported that access to housing is nearly impossible in EU member states. Even extremely vulnerable families living in poverty are prevented from accessing social housing, as irregularity precludes access to social housing.

“In all EU Member States, their irregular situation disqualifies undocumented immigrants from claiming public (national/federal or local) benefits or assistance. Likewise, they are not eligible for any temporary or supported accommodation measure. The only facilities accessible to this group of immigrants are those based on anonymity, like drop-in centres, advice centres, night shelters, meal kitchens, medical outreach teams, etc.”⁶⁵

⁶⁵ European Federation of National Organisations Working with Homeless (FEANTSA), “Immigration and Homelessness in the European Union” October 2002 available online at: http://www.feantsa.org/files/immigration/imm_rept_en_2002.pdf

Of all rights, undocumented families’ right to access housing is least protected in national legislation. In fact, no national legislation in any European member state explicitly protects undocumented children’s right to shelter or housing.⁶⁶

Campaigning action tends to be most successful when national legislation falls short in practice. However when national legislation omits legal protection to that right entirely, advocacy action must be brought to first create a legal protection (see Chapter 4 on legal tools which refers to a case brought before the European Social Charter that successfully re-affirms the right to housing under the European Social Charter).

Barriers to Access Social and Temporary Housing

Analysing national housing policy across the EU one can see a systematic failure to incorporate and include migrants. National social housing shortages are now common across most EU member states, creating increased competition for social housing for which undocumented migrant families are already low priority.

Temporary housing is exceptionally offered to families, but more commonly to single mothers and their children. In these cases, temporary housing is lodging in a hotel or hostels that mainly cater to men, or sufferers of alcohol and substance abuse. Child rights organisations have raised continued concern that such accommodation is unsuitable for children.

A lack of available social housing is compounded by a lack of social assistance for families. Countries such as Italy and the UK who previously offered social assistance in the form of housing allowance to vulnerable undocumented families at risk of destitution, have progressively removed any assistance. The de facto exclusion of undocumented families from social assistance is justified as the encouragement of voluntary returns schemes. In this way, destitution and child poverty is being used as a means of migration control.

In some countries social support is not explicitly linked to residence status, as in France⁶⁷ where the ASE (State social services for child care) has no legal linkage to regular residence requirement, however in practice undocumented families do not receive this aid. Local ASE offices refuse undocumented families on the basis of inability to check the family income or other administrative issues.⁶⁸

Unaccompanied undocumented children however, are given housing support in most EU member states. The policy distinction cast between unaccompanied and accompanied children fails to give global recognition to fundamental child protection principles. Moreover this can lead to separation of the family unit. Undocumented parents recognise that unaccompanied children are given better access to housing and social services, and so for the greater good of their children’s wellbeing may be forced to hand them over to social care. Equally local authorities who find families in destitution but who have no mandate to house and support families, may take the child into care, thereby separating them from their family.

Informal Solutions

PICUM’s workshop in the Netherlands on 23 February 2012 brought together local authorities, lawyers and practitioners working with undocumented migrants for a training day on the local reception of undocumented families. Co-hosted by Defence for Children International and the municipality of Utrecht, the training session allowed local authorities to share informal strategies they have developed to house undocumented families.

Niene Oepkes, Policy Officer for the City of Utrecht explained how informal innovative strategies had to be developed to fill the gaps created by national legislation. She highlighted that rejecting undocumented families’ housing applications contravenes their human rights and “As a municipality, we want to know what the individual case is, then you may go to a court to ask what you should actually do. What if you would reject the case of such a vulnerable person. If you reject an application, this contravenes human rights legislation, so you have to know about human rights. Certainly if you are going to contravene such legislation.”

⁶⁷ As per Article L 111-2 of the Code for Social Action and Families, full text legislation available online at: <http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006074069&idArticle=LEGIARTI000006796415&dateTexte=20120604>

⁶⁶ Refer to Part I of the Guide for an overview of the international legislative framework governing undocumented children’s rights.

⁶⁸ Gisti, Sans-papiers mais pas sans droits, Paris (2006) available online at: <http://www.gisti.org/doc/publications/2006/sans-papiers/index.html>

The Municipality of Utrecht's method is to train local authorities to take a case-by-case approach, that is, to assess a family's vulnerability and circumstances firstly, and try to find solutions, instead of rejecting all undocumented families from their care. However such 'informal reception solutions' can be seen as a temporary, 'symptom control' measure in contrast to what is actually needed which is a formalised statutory protection and sufficient funding to prevent undocumented families becoming homeless.

Moving Forwards: Separating Service Provision from Immigration Control

These examples show how legal protections of access to civil, economic, social and cultural rights can be invalidated in practice as political aims for irregular migration 'management' trump concerns for child protection. Administrative barriers are erected because of a lack of separation between service provision and immigration control.

Isabel Lazaro, Professor at the Universidad Pontificia Comillas in Spain, highlights the protection gap between international standards, national legal entitlements and the situation for undocumented children in practice:

“There is a huge gulf between international and national protection for children, and the protection they actually get in practice.”⁶⁹

Whether real or imagined, the risk of being detected prevents many undocumented families from seeking services they may desperately need. The only way to eradicate this fear is to completely separate the function of service provision from immigration authorities. Until this can be achieved, undocumented families will continue to fear detection, and so be prevented from accessing fundamental services.

Civil society's continued and persistent oversight and management of law, policy and practice is necessary to ensure that political discrimination and practical, administrative barriers to accessing rights are entirely removed.

⁶⁹ Isabel Lazaro, Universidad Pontificia de Comillas, speaking at the PICUM national workshop "Building strategies to protect children in an irregular migration situation in Spain" on 21 June 2012



TOOLS AND STRATEGIES

OVERVIEW OF TOOLS AND STRATEGIES TO OVERCOME ADMINISTRATIVE BARRIERS

- Ensuring access to rights means securing a place for undocumented families in political and public discourse
- Mobilise practitioners, professionals and migrants to advocate collectively for national legal protections for undocumented families that are in line with international norms and standards
- Local level administrative barriers require local level responses
- Local governments can be key actors to target for influencing national policies and can help link local and national level politics
- Advocacy should focus attention on the need for national recognition of undocumented families' fundamental legal right to access to housing

the power of the written word

Challenging Discriminatory Policy or Practice

WHAT IS THE ISSUE?

- What law, policy or practice are you challenging?
- What rights does it affect?
- Clearly define the affected group
- What was the social, political and economic context in which the relevant law, policy or practice developed? How does the current context differ?
- What were the intended aims of the original law, policy or practice? How does the practical application of the original law fail to achieve these intended aims for the affected group?

CONDUCT LEGAL RESEARCH AND BUILD AN EVIDENCE BASE

- Fully research all other pertinent national laws and policies affecting undocumented children and families.
- Is the affected right protected by international law? If so, ensure your letter sets out what the international legal framework is.
- Fully document all testimonies and interviews with the affected group to use as supporting evidence.

WHO TO ADDRESS?

- Understand how local, regional, national and international politics are structured to identify and define the principal actors (all the individual decision-makers, organisations and bodies) who can change the relevant law, policy or practice.
- Consider whether there is an oversight body monitoring the impact of laws and policies at national level.

BUILD ALLIANCES

- Work together to gain the support of a wide range of actors such as other civil society organisations, national bodies (such as the Ombudsman for Children), professional bodies (such as national paediatric bodies), and international organisations (such as UNICEF).

WIDE DISSEMINATION

- Ensure your complaint is widely read, widely redistributed and widely understood. Send a copy to all relevant decision-makers, journalists, civil rights lawyers and other civil society organisations for wider re-distribution.
- Consider other means of raising awareness of rights violations, such as social media, online petitions, online videos, newspaper articles and blogs which are equally as powerful a means of challenging policies and practice.

chapter 4

Law as a Tool for Social Change. Pushing Legal Limits to Create Progressive Jurisprudence Protecting Undocumented Children's Rights.

Whilst the preceding chapters have explored different strategies campaigning for, and informing of, existing legal rights undocumented children and families have in Europe, this chapter will explore the different tools available for expanding existing rights and creating necessary additional entitlements for undocumented children in Europe.

Understanding and using the law is a critical component of a practitioners' toolbox. The law plays a decisive role in strategies to overcome barriers to social rights, particularly as legal status is increasingly a prerequisite for accessing rights and services. However, alongside migrants' rights and child rights' movements advocating for the legal protections of undocumented children, there is a parallel movement of migration legislation governing irregular migration, which is increasingly exclusionary. Law can therefore be both a substantial barrier and an enabling tool for undocumented migrant families accessing basic social rights.

By analysing various legal actions brought before the different levels of courts, this chapter will show how migrants' rights activists have pushed the limits of national and European legislation to realize more legislative protections for the rights of undocumented children.

This chapter will outline the significance and role of strategic litigation for undocumented migrant children and families, and detail the essential components of key legal action taken, analysing what parallel advocacy activities can help bolster and foster the development of progressive jurisprudence. Giving examples of good practice legal strategies, we will show how legal action must be taken across all legislative frameworks – national, European and international – and work cooperatively to bring sustainable development in law and in practice, for undocumented children and their families.

Direct Remedies at National Level

If we take the standards of international protection (laid out in Part I) as the norm, we can see that no national legal framework fully meets international standards of protection for undocumented children in Europe.

National courts are divided into courts of first instance, and appellate courts (courts of appeal). Courts of first instance rule on points of facts in a case, and whether specific legislation applies to particular facts presented in an individual's case.

A court of appeal however, decides on points of law and rules on whether provisions of legislation have been correctly interpreted by courts of first instance, in their application to an individual case. When an appellate court rules on misapplication of law or legislative misinterpretation, the appeal court's ruling sets a precedent that must be followed by all subsequent national court rulings.

Strategic Litigation – Positive Responses to Restrictive Legislation

Strategic litigation involves bringing a case with the aim of creating broader social justice and impacting upon legislative change. The cases usually form one component in an overall advocacy campaign designed to raise awareness, promote rights, and influence government and decision makers to change laws, policies and practice.

Unlike traditional legal service provision, strategic litigation is not individual-case focused. The individual whose case is brought, suffers from a systemic violation of human rights, discrimination, or fundamental failing in national legislation, that is suffered by many others of the same socio-political group. Using the individual's story and circumstances, strategic litigation gives voice to a larger group's cause and macroscopically influences change in legislation, policies, practice and patterns of behaviour for subsequent generations of undocumented migrant children across Europe.

Strategic litigation is instrumental in reforming national laws that fall below the standards of international human rights law and creating progressive jurisprudence aimed at promoting the rights of undocumented migrant children.

The realization of broader rights through strategic litigation can be an empowering experience for civil society and the individual whose case it is. The mere engagement with legal systems is a necessary part of legal integration and a crucial step for the social integration and inclusion of undocumented migrants. Any perceived differences of legal norms, or actual legal differences between nationals and migrants, only serves to reinforce discrimination.

Strategic litigation at national-level can influence and change judicial and political perception of undocumented migrant children, by humanising an otherwise unpopular issue. National change to judicial interpretation can also be a crucial milestone regionally, acting as a progressive model for other states to follow.

Strategic litigation can be led by private individuals, as well as judicial enterprise whereby the judiciary applies to a higher court for interpretative assistance, in order to set definitive standards on a provision of pluralistic legislation.

Judge of the International Chamber of the Administrative High Court of Utrecht, Judge Teun de Vries presides over the highest court in the Netherlands with regards to social security matters. He urges:

“The possibility of applying international human rights in national procedures, both to enforce the rights of undocumented persons and to build case law which can influence decisions in the future. While they are small results in exceptional cases, they are still results.”⁷⁰

⁷⁰ Judge de Vries (Netherlands) speaking at PICUM Workshop 'Using Legal Strategies to Enforce Undocumented Migrants' Human Rights', 15 June 2012, Brussels, Belgium.

The following is an example of a judiciary-led test case brought in Spain at national level, by one of the Autonomous Communities seeking to clarify whether

undocumented children can access all forms of education.

A NATIONAL TEST CASE: ACCESS TO NON-COMPULSORY EDUCATION IN SPAIN

Federación de Asociaciones de S.O.S Racismo del Estado español



S.O.S. RACISMO

Context



Under international law (see Part I of the Guide) all children are guaranteed the right to access education. In Spain, access to education is a fundamental legal right of all children and is enshrined in the Spanish constitution⁷¹. However, until 2007, no legislation or judgment had defined whether the constitutional right to education for all children included access to non-compulsory education for all undocumented migrant children.

Constitutional Right to Education



Article 27 of the Spanish Constitution is the principal legal mechanism guaranteeing access to education for undocumented children:

*'Everyone has the right to education', that 'education is compulsory and free' from age 6 until 16 and that 'the public authorities guarantee the right of all to education, through general education programming.'*⁷²

These rights and obligations are applicable to all children living in Spain, regardless of immigration status.

National Legislation Governing Access to Education



In addition to the Spanish Constitution, there is only one supporting piece of national legislation that considers access to non-compulsory education for migrants.

Article 9 of the Organic Law 4/2000 of the Rights and Freedoms of Foreigners⁷³ granted foreign migrants under the age of 18 the right to post-compulsory education, which includes obtaining the corresponding academic degree and access to the public scholarship and grant system in the same conditions as those of Spanish citizens.

⁷¹ Article 27 of the Spanish Constitution of 1978

⁷² Article 27 of the Spanish Constitution of 1978 full text available online at: http://www.senado.es/constitu_i/indices/constitu_i.pdf

⁷³ Full text legislation available online at: http://noticias.juridicas.com/base_datos/Admin/lo4-2000.html

However, in its draft form, the 2000 Organic Law did not allow for the post-compulsory education of 16-18 year olds living in an irregular immigration status. The law only granted this right to migrant children with regular immigration status.

Political Pressure



Arguing that the Organic Law of 2000 was unconstitutional in its denial of access to non-compulsory education for undocumented migrant children, the Parliament of Navarra, the regional legislative body of Navarra, brought a test case to the Constitutional Court in 2007. The case brought by Navarra was taken as a test case (or model judgment) by the High Court as there were nine other constitutional challenges to the same Act, submitted by various other regions.

The case was brought following political pressure applied by a coalition of NGOs led by SOS Racismo,⁷⁴ a Spanish social movement working for equal rights within Spain. It is an independent and multi-ethnic movement bringing together all those who actively oppose racism and xenophobia.

Through its community outreach work, SOS Racismo observed that some schools were asking for legal residence in order to qualify for non-compulsory education and transportation and school lunch grants. The NGO compiled all these examples, and together with the Education Union, brought the issue to the attention of the Basque Government's Education Department. The Government's Education Department took the issue up further, asking for the Parliament of Navarra for legal clarification.

Building Blocks Up to the Constitutional Court



ACTOR

NGOs
NGOs
Local government
Regional Parliament



ACTION

collect data from undocumented migrants
build relationship with local government departments
seeks guidance from its regional parliament
brought an appeal to the Constitutional Court of Spain

In this schema, civil society work with undocumented migrants to learn what the issues are, and this is relayed to the representative body of local government as a systematic issue. Local government uses the evidence collected and presented by civil society to build a dossier on the issue to present to the regional parliament. The regional parliament submits the community-level data as well as local government's concerns to the national Constitutional Court to seek a definitive ruling that would be applicable throughout all regions.

All actors work together, maximising on their political reach and impact, to gather evidence, raise institutional awareness, build a case, and support undocumented children's constitutional right to access all forms of education.

⁷⁴ More information on SOS Racismo is available online here: <http://www.sosracismo.org/>

The Constitutional Court of Spain



The Constitutional Court of Spain⁷⁵ is technically the highest judicial body in Spain as it holds the exclusive power to rule on the constitutionality of legislation. However, in practice, it is not seen as part of the judiciary, but as an independent branch of the State responsible for constitutional interpretation.

The Court hears cases brought by individual Spanish nationals who are directly affected, and public officials such as the President of the Government, members of Congress and the Senate and members of an Autonomous Community.

Given the breadth and pluralistic nature of constitutional provisions, the Constitutional Court of Spain holds a unique role in its ability to chart and influence political and social development with regards to fundamental and human rights in Spain.

Legal Arguments



The test case raised the issue of post-compulsory education for all migrant young people living in an irregular situation.

The argument brought forward was that the constitution, as well as the international legal framework governing access to education, intended that national legislation construe access to education in its broadest terms, and that access to all levels of education be granted to all children on Spanish territory.

Therefore, to exclude undocumented children from access to non-compulsory education would be to narrowly and mistakenly construe Article 27 of the Constitution.

The Judgment⁷⁶



The Constitutional court in Spain accepted the argument that the Organic Law 4/2000 is unconstitutional as per the fundamental right to education enshrined in Article 27 of the Spanish Constitution. The court ruled that all migrants, regardless of immigration status, have the constitutional right to compulsory and non-compulsory education in Spain:

"This right to access non-compulsory education of juvenile foreigners, forms part of the content of the right to education, and its exercise may be subject to the requirements of merits and capacity; however exercise of that right shall not be subject to any other circumstance such as the administrative situation of the minor..

...Therefore, we should declare the unconstitutionality of the term "residents" of Article 9.3 of the Organic Law 4/2000 of 11 in the new wording given to Article 1, point 7 of the Organic Law 8/2000 of 22 December"⁷⁷

⁷⁵ The Constitutional Court of Spain is defined in Part IX of the Constitution of Spain. Its functions are further governed by Organic Laws 2/1979, 8/1984, 4/1985, 6/1988, 7/1999 and 1/2000.

⁷⁶ Full text judgment available online at: <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC2362007en.aspx>

⁷⁷ Full text judgment available online at: <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC2362007en.aspx>

Wider Impact of Ruling



The ruling, STC 236/2007 triggered the subsequent reform to the Organic Law of 2000. The Organic Law 2/2009 of December 11, 2009 repealed and replaced the Organic Law of 2000. The crucial change being that Article 9.1 of the 2009 Act now reads to explicitly recognise the right of all children to post-compulsory education, regardless of immigration status. The amended Act continues to grant access to public scholarships and the grant system on the same terms as Spanish citizens.

This therefore includes access to the professional qualification programmes (PQPI) for undocumented migrant children. Giving undocumented children access to post-compulsory vocational training helps to bridge a social as well as scholastic gap. Allowing undocumented migrant children to integrate with their national peers into vocational training programmes helps aid their cognitive, social and professional development. Access to non-compulsory internships and vocational training helps give inspiration and nurture aspiration to the next generation of undocumented young migrants across Europe.

Financing Strategic Litigation

Strategic litigation is expensive and time-consuming work that requires expert legal representatives capable and accustomed to bringing cases at all levels. Migrants' rights organisations supporting individual families and their cases frequently struggle to find qualified, adequate legal representation for test cases, even where there is a strong case to bring. The time and bureaucracy of the process can be daunting for many undocumented families keen not to publicize their situation. Additionally, undocumented families and the NGOs that support them may not have the financial or social support of the local community to take such forceful and visible action against the State they live in.

The Strategic Legal Fund for Refugee Children and Young People in the UK

Recognising this financial gap between willing, but underpaid legal aid lawyers struggling with the persistent decreases to legal aid made by the UK government, and strong potential cases from migrant communities, the Strategic Legal Fund for refugee children and young people (SLF)⁷⁸ was born in October 2011.

Launched as a pilot project in October 2011, the SLF set out to test a new model for funding legal work. It seeks to do so through supporting work that goes beyond securing justice for an individual and instead results in wider changes to law, practice

and policy. The SLF funds pre-litigation research, including gathering evidence, reviewing the law and identifying cases on which to base a challenge, and interventions by third parties, such as NGOs in court cases to ensure that key strategic points are made to widen the focus beyond the specific issues involved in the case.

The national-level cases described above are strategic test cases in that they have either changed legislation, or changed judicial interpretation of legislation, to better grant undocumented families and children social rights. The SLF is devised to support such strategic legal action. It is a pilot model for supporting legal work in a time of austerity when governments are increasingly cutting publically-funded legal service provision. The funding model is innovative. The SLF operates with an Expert Panel comprising senior lawyers and policy experts. Members provide advice on what to fund and guidance on the development of the project, and this has been crucial to its success to date.

The 12 month pilot project was developed and funded by The Diana, Princess of Wales Memorial Fund ("the Fund") and focused on young refugees and asylum seekers. In November 2012, following a positive evaluation, the SLF became a project of Trust for London, with its remit extending to include all young migrants.

⁷⁸ Website available at: <http://www.migrationwork.org/strategic-legal-fund>

Several of the initiatives now funded will impact on undocumented children either directly or indirectly, for example funding pre-litigation research into access to accommodation and support for pregnant failed asylum seekers whose children might in turn become undocumented. The project started in October 2011 and will run until March 2014 with the mandate of distributing £400,000 to eligible legal service providers to undertake either third party interventions or pre-litigation research work that no longer qualifies for public funding. It is hoped that the success of this pilot model will result in further such funding models to bolster the crippling legal aid system in the UK.

Test Case Fund supporting strategic litigation from the Netherlands

In the Netherlands, Stichting Kinderpostzegels Nederland has financed the Test Case Fund for Defence for Children (DCI).

The Stichting Kinderpostzegels Nederland is an NGO for children's rights that fundraises and uses the proceeds to support projects focusing on protecting the rights of children. In providing funding, Stichting Kinderpostzegels Nederland strengthens partner organisations and aims to establish national and international links between various initiatives.

The fund established for Defence for Children enabled them to build a case, support their existing campaigns for undocumented children, and pursue strategic litigation at national and European levels. This specific fund financed DCI's collective complaint brought before the European Social Charter⁷⁹ concerning the access of children in an irregular migration situation to housing in the Netherlands.⁸⁰

⁷⁹ Defence for Children (DCI) v Netherlands Complaint No 47/2008, decision of 20 October 2009

⁸⁰ This case will be considered in more detail later in this chapter.

WHAT IS PUBLIC INTEREST LITIGATION?



Public Interest Litigation, or PIL, can be brought by anyone, not necessarily the aggrieved party. It is a petition brought by someone raising an alleged violation of constitutional rights.

The case is brought by the individual as representative of the collective or public interest.

European Level

Beyond national level, legal action at EU level can have a substantial and broad impact across Europe given the primacy of EU law over national law in selected areas.

The EU has developed various tools to monitor and guarantee the rights of individuals present on its territory. They can be grouped into two categories: (i) those relevant to the 27 Member States of the European Union and (ii) the instruments of the Council of Europe which is an international organisation with 47 member states.

The European Union

A. The Court of Justice of the European Union

Council of Europe

A. The European Court of Human Rights

B. The Commissioner of Human Rights

C. The European Social Charter

Each of these tools can be used to overcome barriers facing undocumented children's access of basic social rights. Although listed under the chapter 'legal strategies', engaging with these bodies does not necessarily involve bringing a case and having a judgment. Submissions in support of cases before the courts, and reports raising the specific issues undocumented migrant children face can also bring about change on the European level.

European Union

A. The Court of Justice of the European Union (ECJ)⁸¹

The Court of Justice is an oversight body that ensures uniform application and interpretation of EU law. It serves to firstly observe whether instruments of the European institutions are compatible with the treaties and secondly, to give rulings at the request of national courts.

Precedent case law protecting children in an irregular migration situation

Although cases brought to the ECJ concern one particular individual, they are a prime example of strategic litigation as the judgment stands as precedent for all subsequent cases on the same issue. The following is a recent example of ECJ case law that has positively impacted the rights of children living in an irregular situation across Europe.

⁸¹ Official website available at: <http://curia.europa.eu/>

RUIZ ZAMBRANO V OFFICE NATIONAL DE L'EMPLOI (ONEM)⁸²

In this case the Appellant, Mr. Ruiz Zambrano, a Colombian national, issued proceedings challenging the Belgian court's decision to refuse his applications for residence and unemployment benefit.

Legal Argument

Mr Zambrano argued that as a father of a Belgian national child, he should be entitled to reside and work in Belgium for the best interests of the child and their right to family life. This is irrespective of his immigration status.

Judgment

The Court ruled that Article 20 of the Treaty on the Functioning of the European Union (TFEU) prevents a member State from denying an undocumented parent of an EU national child the right to work and reside in the country of the child's citizenship.⁸³ Undocumented parents therefore have the right to work and live in Europe to support their EU national children.

This judgment establishes precedent across the EU. Since this judgment, courts in Ireland, Denmark, Austria and the UK have sought clarification on the decision showing how broad an impact this decision alone has had for the situation of children living in destitution in an irregular migration situation because of their parents' immigration status.

⁸² C-34/09, Ruiz Zambrano v Office National de l'Emploi (ONEM), [2011] E.C.R. I-0000, judgment of 8 March 2011. Full judgment available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/09>

⁸³ C-34/09, Ruiz Zambrano v Office National de l'Emploi (ONEM), [2011] E.C.R. I-0000, judgment of 8 March 2011, para 45

POSSIBLE AVENUES TO EXPLORE USING THE ECJ



USING THE TOOL

- **Family Reunification Directive** – ensuring the correct transposition of this Directive aimed at enabling third-country nationals in a regular situation to have their family lawfully join them.
- **Returns Directive** – develops common standards and procedures for returning migrants in an irregular migration situation
- **Trafficking Directive** – ensures prevention and combat of trafficking in persons, and protects its victims
- **Council of Europe Guidelines on Child-Friendly Justice** – intended to enhance children's access to and treatment in the justice system

The Council of Europe⁸⁴

The Council of Europe's primary aim is to foster and create a common democratic and legal area throughout Europe ensuring respect for human rights based on the European Convention on Human Rights (ECHR)⁸⁵ which came into force in 1953.

A. European Court of Human Rights (ECtHR)⁸⁶

Focusing specifically on the civil and political rights laid out in the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) rules on individual and states' applications of alleged ECHR violations. The court's judgments are binding on the states concerned and have frequently led to national legislative reform and changes to administration practice.

⁸⁴ Official website available at: <http://hub.coe.int/>

⁸⁵ Full text legislation available online at: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>

⁸⁶ Official website available at: http://www.echr.coe.int/echr/homepage_EN

The only two conditions to bringing a case before the European Court of Human Rights are that (i) all national remedies have been exhausted and (ii) that the application is lodged before the European Court of Human Rights within six months of the judgment of the highest national court having been handed down.

Precedent case law to protect children in an irregular migration situation

The following is an example⁸⁷ of a case brought before the European Court of Human Rights that has positively impacted the situation of children in an irregular migration situation in Europe. Given the breadth of scope of the ECHR, the jurisprudence developed similarly covers a broad range of civil and political rights for undocumented migrant children.

⁸⁷ *Gillow v UK* (9063/80), *Buckley v UK* (20348/92), *Connors v UK* (66746/01) - Article 3 and 8 can imply a positive obligation on States to avoid imposing "intolerable living conditions" that would breach these rights; *Osman v. Denmark*, no. 38058/09 on the readmission of an undocumented migrant girl to Denmark;

NIEDZWIECKI V. GERMANY, NO. 58453/00, ECTHR 2005⁸⁸

In this case the Appellant had been denied child benefits on the sole basis that he did not have valid residence status in Germany. The Appellant argued that this amounted to discrimination on the basis of nationality.

The Court held that issuing child benefits falls within the scope of Article 8, respect for private and family life and so there was no "objective and reasonable justification for the Appellant to be treated differently." Therefore Germany's refusal to grant child benefits to the Appellant was in violation of Article 14, on the prohibition of discrimination.

⁸⁸ Judgement of 25 October 2005. Full judgement available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=7&portal=hbkm&action=html&highlight=Niedzwiecki&sessionid=98776026&skin=hudoc-en>



USING THE TOOL

The ECtHR is a powerful mechanism for ensuring the inclusion of undocumented to all fundamental human rights. The Convention rights do not make any distinction or exemption by migration status and so all its rights, in the broadest possible sense, are applicable to undocumented children.

B. The Commissioner for Human Rights⁸⁹

Within the Council, the Commissioner for Human Rights⁹⁰ is an independent institution mandated to promote awareness of and respect for human rights across the Council of Europe's 47 member states. The Commissioner does this by conducting country visits in order to develop a dialogue between national authorities and civil society based on the principles of human rights. Individuals and civil society are encouraged to submit reports to the Commissioner, raising issues of human rights abuses prior to country visits.

The Commissioner Engaging with Irregular Migration

Irregular migration is an issue the Commissioner actively works on in order to promote and improve the protection of migrant's human rights across Europe.⁹¹ In February 2010 the then Commissioner released an Issue Paper⁹² commissioned and published on the Criminalisation of Migration in Europe: Human Rights Implications.

⁸⁹ Official website available at: http://www.coe.int/t/commissioner/default_en.asp

⁹⁰ Further information available at: http://www.coe.int/t/commissioner/default_en.asp

⁹¹ Further information is available at: http://www.coe.int/t/commissioner/activities/themes/Migrants/rightsofmigrants_en.asp

⁹² Strasbourg, 4 february 2010, CommDH/IssuePaper(2010)1. Full text available at: <https://wcd.coe.int/ViewDoc.jsp?id=1579605>

In this Issue Paper, the Commissioner noted in its conclusions that there was "a steady advance of the discourse of 'illegality' in migration law and policy"⁹³ and expressed concern for:

- (i) measures which differentiate between citizens and foreigners, subjecting the latter to discriminatory and arbitrarily practices and
- (ii) the criminalisation of individuals, both citizens and foreigners who support foreigners.

The Council of Europe Commissioner for Human Rights has expressed powerful and clear concerns in position papers that focus specifically on the human rights of children in an irregular migration situation in Europe:

"Migrant children should enjoy social protection on the same footing as national children."⁹⁴

⁹³ Strasbourg, 4 february 2010, CommDH/IssuePaper(2010)1. Full text available at: <https://wcd.coe.int/ViewDoc.jsp?id=1579605>

⁹⁴ Positions on the rights of migrants in an irregular situation, Strasbourg, 24 June 2010, CommDH/PositionPaper(2010)5 available online here <https://wcd.coe.int/ViewDoc.jsp?id=1640817> and Positions on the rights of migrants in an irregular situation, Strasbourg, 24 June 2010, CommDH/PositionPaper(2010)5 available online here <https://wcd.coe.int/ViewDoc.jsp?id=1654377>

MOVING FORWARDS WITH THE COUNCIL OF EUROPE: COMMISSIONER FOR HUMAN RIGHTS



USING THE TOOL

- Framing the discourse on irregular migrant children, within the context of the Article 8 right to family life
- Raise awareness during national visits, of national legal protections for undocumented children that may fall far below international norms and standards intended for the protection of all children
- Bring to light before the Commissioner, any practical barriers facing undocumented children's access to education, healthcare and housing ahead of national visits
- Invite the Commissioner to engage in civil society national events and workshops on undocumented migrant children
- Working with the Commissioner to raise awareness that ECHR rights are applicable to all, regardless of immigration status.

C. The European Social Charter

The European Social Charter⁹⁵ concerns social and economic human rights, and supplements the ECHR, which focuses on civil and political rights.

The European Committee of Social Rights is the monitoring body of the Charter and it can make States change their national law and practice by (i) using national reports and (ii) deciding on collective complaints.

To date, four collective complaints⁹⁶ brought to the ESC concern children in an irregular migration situation and their access to basic social rights. Two cases concern access to housing for undocumented children and families, one concerns access to social assistance and one concerns access to medical treatment.

On 3rd March 2003 the International Federation of Human Rights League (FIDH) brought a collective complaint against France to challenge a French law which had been adopted in 2002.⁹⁷ The challenged French law distinguished irregular migrants, forcing them to pay for medical treatment, unlike their citizen counterparts. The committee found that there was a violation of Article 17 of the Social Charter, the right of children, as the new French law would provide medical treatment to children only conditionally, if they had been resident in France for a fixed period of time or if there was a direct threat to life. The committee found that the conditions attached to the new French law were limiting the full and intended remit of Article 17, thereby violating the rights of irregular migrant children.⁹⁸

On 4th February 2008 a second case was brought to the Committee of Ministers concerning the Netherlands' failure to provide housing to undocumented children and families. *(This case is discussed and analysed in further detail below).* In the case of DCI v Netherlands the committee accepted that the Netherlands was in violation of the European Social Charter's provision to provide adequate shelter for all children in its territory.

Building on the success of the ruling in the Netherlands, DCI have recently brought a complaint against Belgium with regard to access to social, economic, legal and medical assistance for undocumented children.⁹⁹ The complaint alleges that because the reception network in Belgium has reached saturation point, and as Belgian law ties the provision of assistance to undocumented children to the reception network, that the rights of children in an irregular migration situation to access meals, schooling, clothing, medical, social, legal and psychological support is violated. This case is still pending before the Committee.

The European Federation of National Organisations working with the Homeless (FEANTSA) have brought a case against the Netherlands¹⁰⁰ alleging that Dutch legislation, policy and practice regarding sheltering the homeless is not compatible with provisions of the Social Charter. Specifically, that access to emergency shelter is made conditional to a local connection, which discriminates against undocumented migrants, without taking due consideration of the specific vulnerabilities of undocumented children and families. This case is also still pending before the committee.

⁹⁵ Full text of the European Social Charter is available online at: <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/>

⁹⁶ International Federation of Human Rights Leagues (FIDH) v. France Complaint No. 14/2003, decision of 8 September 2004; Defence for Children International v Netherlands Complaint No. 47/2008, decision of 20 October 2009; and Defence for Children International v Belgium Complaint No. 69/2011 registered on 21 June 2011.

⁹⁷ The challenged French Law was section 57 of Part II – "Other Provisions" – of the 2002 Finance (Amendment) Act, No. 2002-1576 of 30 December 2002

⁹⁸ Full text ruling is available online at: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/cc14merits_en.pdf

⁹⁹ Defence for Children International (DCI) v Belgium Complaint No. 69/2011. Full text complaint available online at: http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC69CaseDoc1_en.pdf

¹⁰⁰ The European Federation of National Organisations working with the Homeless (FEANTSA) v The Netherlands Complaint No. 86/2012. Full text complaint available online at: http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC86CaseDoc1_en.pdf

DECONSTRUCTING A EUROPEAN SOCIAL CHARTER CASE: ACCESS TO HOUSING IN THE NETHERLANDS



Context



Under international law the right to housing is explicitly recognized as a basic human right.¹⁰¹ In Defence for Children International v Netherlands Complaint No. 47/2008, decision of 20 October 2009, DCI argued that Dutch legislation, policy and practice denied children unlawfully present in its territory access to adequate housing, and in doing so, breached the provisions enshrined in the European Social Charter.

The case arose from the alleged violation of the right to housing whereby families with children were being systematically evicted from reception centres after their request for residence permit was denied. Without access to social assistance, civil society observed that this caused widespread destitution amongst undocumented migrant communities in the Netherlands.

The Case



Having observed the destitution this caused, Defence for Children International brought a collective complaint to the European Committee of Social Rights for the Dutch government's violation of the European Social Charter, for failure to provide undocumented children with housing.

DCI lodged the collective complaint on 4 February 2008 arguing that Dutch national law¹⁰² violated Article 31, the right to housing in the Revised Charter. DCI further invoked Article E because irregular migrant children were being excluded both in law and in practice from the right to housing, in violation of Articles 11, 13, 16, 17 and 30 of the Charter.

¹⁰¹ Article 35 of the Universal Declaration of Human Rights states 'Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services'; Article 11, paragraph 1 of the International Convention on Economic, Social and Cultural Rights states 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions'; Article 43.1 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families states 'migrant workers shall enjoy equality of treatment with nations of the State of employment in relation to...[d] Access to housing, including social housing schemes, and protection against exploitation in respect of rents'; and Article 27.3 of the Convention on the Rights of the Child 'States parties...shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.'

¹⁰² Benefit Entitlement (Residence Status) Act (Koppelingswet) of 1 July 1998 incorporated in the Aliens Act 2000 of 23 November 2000 (Vreemdelingenwet) which entered into force in 2011

The Recommendations

In their recommendations¹⁰³ dated 7 July 2010 the committee concluded that Dutch national legislation was indeed in violation of the European Social Charter as States are bound by Charter to “provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction”, to prevent homelessness.

Impact of Recommendations

The final recommendations of the Committee of Ministers can have significant political impact, but there is little enforcement capacity to ensure practical effect.

In this instance, the Dutch government considered that its law, policy and practice were adequate, as the law provided exceptional provision for children in an irregular migration situation to access accommodation, and so did not recognise any additional obligations from the Committee of Ministers’ recommendations.

Advocacy Action to Bolster Support for Test Cases

Carla Van Os of Defence for Children International, Netherlands highlights the necessity for parallel advocacy activities to bolster any legal action taken:

“A political lobbying process is also needed besides the legal strategy.”¹⁰⁴

Parallel Advocacy Activities

In response to the Netherlands’ rejection of the Committee’s recommendations, DCI, along with a coalition of NGOs and local migrant’s rights organisations, built an ongoing advocacy campaign entitled ‘No Child on the Street’¹⁰⁵ to lobby the Dutch government to take on board the Committee’s recommendations. The campaign sought to bring wider public attention to the collective complaint and in doing so, apply media pressure on the government. The campaign booklet¹⁰⁶ explains in simple terms, why it is important to give adequate housing to undocumented children and their families, with real-life stories highlighting the impact on undocumented children’s lives.

The campaign uses dynamic, visual action to raise awareness. One such activity was a national campaign day when supporters occupied bus shelters across the country, asking passers-by to sign their petition. The campaign chose bus shelters as they are a known place of shelter for children living in an irregular situation. This very visual campaign activity helped humanise the cause and the desperate need for political action.

¹⁰³ Full text ruling available online at: <http://www.defenceforchildren.nl/images/20/1155.pdf>

¹⁰⁴ Carla Van Os of Defence for Children International (Netherlands) speaking at PICUM Workshop ‘Using Legal Strategies to Enforce Undocumented Migrants’ Human Rights’, 15 June 2012, Brussels, Belgium.

¹⁰⁵ Campaign website available online at: <http://www.geenkindopstraat.nl/?ac=CMS+Version%3A+gkos>

¹⁰⁶ Available online at: <http://www.defenceforchildren.nl/images/20/998.pdf>

Impact of Advocacy Campaign and Continued Litigation

The national advocacy campaign did catalyse some political action, however the campaign found it needed to continue its ongoing work as the full spirit of the recommendations were not being followed.

For example, in order to fulfil the Committee’s recommendation of the child’s right to shelter, the Dutch State first proposed to provide housing for undocumented children only, thereby separating single mothers and children, and breaking apart undocumented families. DCI brought several cases to the national courts, who ruled in support, and deemed the separation of the family unit is a violation of the fundamental right to family life.

DCI made further submissions to the Child Protection Council and Youth Care to inform the institutions about the danger of separating families and stating that a child’s right to family must take precedence over the needs of immigration control.

The ongoing advocacy campaign and the continued legal pressure encouraged an increasing number of Dutch courts to decide that the State did indeed have a positive obligation to house homeless undocumented children *with* their families.

The continued litigation has encouraged positive shifts in judicial mind-sets across the Netherlands. National courts are increasingly taking a human rights approach in considering immigration cases, regardless of residence status.¹⁰⁷

Ongoing Advocacy with the Committee of Social Rights

In addition to the Netherlands’ annual submission of their report to the Committee, DCI submitted a shadow report to the Committee¹⁰⁸ raising the difficulties observed by civil society for undocumented migrants’ access to housing, despite the Committee’s issued recommendations. The shadow report fuelled the Committee to issue dissatisfactory conclusions to the Dutch State in respect of their compliance to the European Social Charter.

These conclusions, and DCI’s ongoing advocacy activities, urged the Dutch government to publicly recognise that further action was needed to house undocumented families together. The government subsequently declared the building of family location centres.

Family Location Centres

Although a positive step in its recognition of the need to keep families together, the family location centres are still problematic in practice.

Several undocumented families are reported to be housed in these centres, designed to be temporary, for years on end. Moreover, the centres do not grant housing retrospectively, so families who had been evicted prior to the Committee’s recommendations and subsequent changes in national policy, are not readmitted into these centres nor offered alternative housing support.

¹⁰⁷ 6 April 2010 (BM0846) Administrative Court of Utrecht was the first subsequent decision well motivated by the ECSR decision; it involved the right to shelter for a mother and child. Other Administrative High Court (CRvB) decisions include: CRvB 19 April 2010 (BM0956) [shelter for vulnerable adult] CRvB 30 May 2011 (BQ6438) [shelter for mother and child] CRvB 9 September 2011 (BT1738) [social support for extremely vulnerable irregular migrant] CRvB 14 March 2012 (BV9270) [housing for mother and child]

¹⁰⁸ A copy of the report can be found online at: http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Netherlands4Add_en.pdf

In December 2011 UNICEF and DCI conducted visits to the centres¹⁰⁹ and concluded that they were not fit for children. For this reason DCI's campaign continues its work for undocumented families to have safe, adequate housing living together as a family unit.

Moving Forwards with the European Social Charter



Luis Jimena Quesada, President of the European Committee of Social Rights, urges civil society to submit more collective complaints to the committee consolidate the protection of undocumented children's rights:

"There should be a focus on launching more collective complaints in relation to other rights of undocumented children. Currently, there is only case law on access to healthcare and shelter for minors. There must be a mass consolidation of the protection of children to include all rights."¹¹⁰

¹⁰⁹ UNICEF and DCI have published a report on their findings from the visits to the family location centres, which can be found online (in Dutch) here: <http://www.ecpat.nl/images/20/1644.pdf>

¹¹⁰ Luis Jimena Quesada, President of the European Committee of Social Rights [ECSR] speaking at PICUM Workshop 'Using Legal Strategies to Enforce Undocumented Migrants' Human Rights', 15 June 2012, Brussels, Belgium.

AVENUES OF THE SOCIAL CHARTER TO EXPLORE IN RELATION TO UNDOCUMENTED CHILDREN



USING THE TOOL

- Exploring the applicability of the Social Charter's broad concept of 'human dignity'
- The right to all forms of education, without age limitation
- The right to birth registration
- The right to retain family life
- The implication of children in detention

International Level

International human rights law (IHRL) is established by treaty or by custom on the basis of which individuals and groups can claim entitlements to their rights from governments. IHRL provides different UN¹¹¹ mechanisms, the following of which are key tools to promote and improve the human rights protections of undocumented children and families:

- Human Rights Treaty Bodies and
- Special Procedures of the UN Human Rights Council

UN monitoring mechanisms are a means for migrants' rights organisations to educate and inform overseeing bodies mandated with the duty of examining and assessing human rights compliance. For marginalised undocumented families, the language of human rights treaties can be empowering, and for groups advocating for the reform of issues such as irregular migration, rights-monitoring can help legitimate their work.

The scope and reach of UN treaty bodies makes rights monitoring an effective means of promoting public and political awareness. The process civil society organisations go through to prepare shadow reports provides a good model for gathering evidence and documenting issues, as well as being a constructive means to bring organisations together for collective action. Finally, the issuance of recommendations by a UN body is crucial for international acceptance of the rights of undocumented children. Recommendations can also be powerful in encouraging political party representatives to seek a parliamentary debate or take issues further.

Human Rights Treaty Monitoring Bodies

Once a State has ratified or acceded a treaty, it has an obligation to take steps to ensure that everyone in the state can access and benefit from the rights laid out in the treaty. The State also bears the obligation to submit periodic reports to the relevant committees. The State report should identify how it is respecting rights and complying with its treaty obligations.

However State reports may fail to be comprehensive by either being misleading or through a failure to fully understand certain human rights issues. Specifically in such circumstances, civil society submissions of 'shadow reports' help treaty monitoring bodies identify gaps in information and help provide a fuller picture of national compliance in reality.

Some treaty monitoring bodies hold periodic Days of General Discussion (DGD). The purpose is to foster an in-depth discussion between government bodies, UN agencies, civil society practitioners, academics, national human rights institutions, professionals and individuals on the implications of specific treaty provisions as they relate to certain groups of people or themes. One can make written submissions to the body ahead of the DGD, and/or attend and contribute orally at the DGD.

Concerns raised at the DGD are considered by the bodies and frequently developed into official General Comments. General Comments, although not legally binding, can be powerful normative texts for civil society organisations to use in their advocacy. They offer more detailed authoritative interpretation of treaty texts, and explanations of the expectation of States, on thematic issues.

There are nine core international human rights treaties¹¹² which are monitored by Treaty Monitoring Bodies¹¹³, UN bodies of independent experts, to which States and NGOs can submit reports on a cyclical basis. The rights of undocumented migrants are protected within these treaties due to the principles of non-discrimination (c.f. Part I of the Guide's legal framework section) that is a core article in all of these treaties. States who have acceded the relevant treaties are obliged to comply with these international standards.¹¹⁴

¹¹¹ The UN published a handbook in 2008 entitled "Working with the United Nations Human Rights Programme: a Handbook for Civil Society" which details how NGOs can engage with the UN. The full text handbook is available online here: <http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx>

¹¹² The UN Office of the High Commissioner of Human Rights has published a guide on "The European Union and International Human Rights Law" which further explains the relationship between EU and International Law and highlights which member states have ratified which treaties. The full text publication is available online at: http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf

¹¹³ A full list of all treaty monitoring bodies can be found online here: <http://www2.ohchr.org/english/bodies/treaty/index.htm>

¹¹⁴ A full overview of the rights of undocumented migrants under international law is available in the following full text publication: Bicchieri, Luca and LeVoy, Michele "Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework" PICUM (March 2007) available online at: <http://picum.org/picum.org/uploads/publication/Undocumented%20Migrants%20Have%20Rights.pdf>

CORE INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

1. Convention on the Rights of the Child (CRC) 1989 and UN Committee on the Rights of the Child¹¹⁵
2. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 1990 and the UN Committee on Migrant Workers¹¹⁶
3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965 and the UN Committee on Racial Discrimination¹¹⁷
4. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979 and the UN Committee on the Elimination of All Forms of Discrimination Against Women¹¹⁸
5. International Covenant on Civil and Political Rights (ICCPR) 1966 and the Human Rights Committee¹¹⁹
6. International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 and the UN Committee on Economic, Social and Cultural Rights¹²⁰
7. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT) 1984 and the Committee Against Torture¹²¹
8. Convention on the Rights of Persons with Disabilities (CRPD) (2006) and the Committee on the Rights of Persons with Disabilities¹²²
9. International Convention for the Protection of All Persons from Enforced Disappearance (ICAED) 2010 and the UN Committee on Enforced Disappearances¹²³

¹¹⁵ <http://www2.ohchr.org/english/bodies/crc/index.htm>

¹¹⁶ <http://www2.ohchr.org/english/bodies/cmw/index.htm>

¹¹⁷ <http://www2.ohchr.org/english/bodies/cerd/>

¹¹⁸ <http://www.un.org/womenwatch/daw/cedaw/committee.htm>

¹¹⁹ <http://www2.ohchr.org/english/bodies/hrc/>

¹²⁰ <http://www2.ohchr.org/english/bodies/cescr/>

¹²¹ <http://www2.ohchr.org/english/bodies/cat/>

¹²² <http://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>

¹²³ <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>

Preparing a Shadow Report or Submission to a Treaty Monitoring Body

Any civil society organisation can submit a shadow report or make submissions offering their independent analysis of the situation.¹²⁴ These can be submitted as an individual, coalition or alliance.

When producing a shadow report, close scrutiny and critiquing of the government's report should be the first step. There should also be consideration of concluding observations from previous examinations as these will be used as a baseline from which the monitoring body will assess the state's progress.

Shadow reports are most influential when they clearly identify specific human rights violation and locate it within a treaty article. This should be supported with testimonies, interviews, surveys and official statistics and data where available. All treaty violations should be accompanied with specific recommendations for change, as well as a potential question that the body could challenge government on. Civil society can also engage at the treaty monitoring body's formal examinations of States reports by circulating lists of key concerns to members of the body.

Strategic follow up activity is key to ensure that the issued recommendations are heard widely by other civil society organisations, the public, policy makers, and members of the judiciary. Press releases and media campaigns publicising the recommendations are helpful in following up on the recommendations. These recommendations can then be relied upon in policy, advocacy and research activities.

All of these steps should also be borne in mind when making submissions to treaty monitoring bodies ahead of Days of General Discussion (DGDs).

The UN Committee on the Rights of the Child (CRC) Day of General Discussion (DGD) on Children in the Context of Migration

On 28 September 2012 the Committee on the Rights of the Child held a Day of General Discussion (DGD) on *'The rights of all children in the context of International Migration.'*

As with most other UN committees, the CRC committee accepted civil society submissions ahead of the DGD, offering practitioners the valuable opportunity to provide evidence-backed submissions, testimonies and expert insight into the situation in practice for children in the context of migration. Several of the civil society organisations made submissions addressing the situation of undocumented children, which gave space for discussion on irregular migration within the DGD's wider context of children in international migration.¹²⁵

Ms Marta Mauras, Vice-Chair of the Committee of the Rights of the Child, spoke at the Committee's Day of General Discussion re-affirming the principle of non-discrimination:

"The Convention applies to all children regardless of their migration status or any other status. All children are children first and foremost."¹²⁶

Two working sessions examined critical issues concerning the protection of children in the context of migration. A working session on the international framework on the rights of children in international migration included discussion on protection gaps and the individual and shared responsibilities of States Parties in countries of origin, transit and destination. During this session, examples of good practices that protect children in an irregular migration situation were shared, as well as the many legal protection gaps undocumented children fall through, as a result of increased security control measures aimed at repressing irregular migration. A second working session looked at national level measures to implement the rights of children in international migration situations in countries of origin, transit and destination.

¹²⁴ Shadow reports should comply with treaty monitoring bodies' guidelines, schedules and procedure. Full guidance specific to each treaty body is available online at: www.ohchr.org

¹²⁵ All submissions made to the DGD are available to view online at: <http://www2.ohchr.org/english/bodies/crc/WSDGD2012.htm>

¹²⁶ Ms Marta Mauras, Vice-Chair of the Committee on the Rights of the Child speaking at the Day of General Discussion, Geneva, 28 September 2012

The outcome of the DGD will be a report, to be released by the UN Committee on the Rights of the Child. Although not bearing the full weight and standing of a General Comment, the report will be a useful advocacy tool for migrants' rights and child rights' organisations.¹²⁷

“Children in Irregular Migration” Side Event to the CRC DGD

To encourage further discussion, and promote awareness of the barriers and discrimination children in an irregular migration situation endure, a side event to the Child Rights Committee Day of General Discussion was hosted by PICUM, UNICEF, Migrants' Rights International and Migrant Forum in Asia, focusing specifically on *'Children in Irregular Migration'*.¹²⁸

Keynote speaker Ms. Marta Murras, Vice-Chair of the Committee of the Rights of the Child, highlighted key difficulties faced by the Child Rights Committee when monitoring compliance to the CRC with regards to undocumented children. She noted the lack of specific national provisions granting access to rights; the criminalisation of irregular migration; and difficulties faced by undocumented children in maintaining family unity.

A prevalent issue that formed part of the debate on undocumented children was the importance and lack of data collection systems providing disaggregated data on human rights violations, as well as issues facing children in immigration detention.

The UN Committee on Migrant Workers Monitoring the Protection of the Rights of Migrant Workers in an Irregular Situation and Members of Their Families

On 19 September 2011 the UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW) held a Day of General Discussion (DGD) on the rights of migrant workers in an irregular situation.

Civil society and other interested parties were invited to make submissions ahead of the DGD as well as contribute on the day itself. The DGD included significant discussion on access to healthcare and education for children of undocumented migrant workers. Discussion highlighted that access to education for migrant children is their principal means of introduction to society, and how good practices such as the conferral of residence permit once the student reaches adulthood, and linking this to scholastic performance, can better protect undocumented children. The DGD also highlighted the need to separate immigration control practices from service provision, specifically focusing on the illegitimate use of educational systems to detect undocumented parents of migrant children.

The Committee on Migrant Workers is preparing a General Comment.¹²⁹ The General Comment was at its final draft stage, with the CMW inviting external stakeholders to provide comments for its finalization. Once published, it will be the first General Comment focusing exclusively on the rights of migrants in an irregular migration situation.

¹²⁷ Further updates on the outcome of the Day of General Discussion and the production of a report will be made available at the Office of the United Nations High Commissioner for Human Rights website, available at: <http://www2.ohchr.org/english/bodies/crc/discussion2012.htm>

¹²⁸ Further information on the side event can be found at: <http://picum.org/en/news/blog/37322/>

¹²⁹ Further updates on the general comment can be found at the Committee on Migrant Workers website available online at: <http://www2.ohchr.org/english/bodies/cmw/>

MAXIMISE YOUR ADVOCACY POTENTIAL BY ORGANISING SIDE EVENTS



- Know the participants – which key decision-makers are coming to the main event – how can you use this opportunity to focus their attention specifically on the problems faced by undocumented children?
- Find time or space in and around the main agenda for a parallel advocacy action – consider lunch time events, after-event drinks, or lobby spaces for exhibiting posters and playing videos that raise awareness of the problems facing undocumented children.
- Engage high profile speakers from the main event to chair your side event, in order to raise the profile of the specific cause of undocumented children and families.
- Widely publicise the side event well ahead of the day to ensure maximum participation.
- Use simple, visual tools to humanise your message. For example, play videos or share photos that highlight the problems undocumented children face, and where possible have undocumented families give live testimony.
- Keep the event short, clear and focused so participants can take away digestible key messages with them.
- Have a clear list of policy recommendations in hard copy for decision makers to take away with them and act on.
- Take photographs, catch quotes and fully document the side event so that you can blog, tweet, and report key discussion issues, share quotes and pictures from the side event.
- Use the side event as an opportunity to speak to targeted decision makers about how you could work together to take the issue further.
- Maximise the impact of your advocacy work by seizing all opportunities to raise public and political awareness to the problems facing undocumented children and families.

Special Procedures of the UN Human Rights Council

Special Procedures refer mainly to thematic mechanisms established to monitor certain human rights norms regardless of States' treaty ratifications. Special Procedures refer either to the following individuals: 'Special Rapporteurs', 'Special Representative to the Secretary General', 'Individual Experts' or to a collective working group of the UN.

Specific mandates of the special procedure mechanisms vary, but they all function to examine, monitor, advise and publicly report on the condition of human rights in States. Civil society can engage

with special procedures by submitting information of violations, past and present, affecting one individual or systemic amongst a particular group. Special procedures can receive information from an individual or an organisation. Some special procedures undertake official country visits on invitation by governments. These two functions make special procedures a useful mechanism to highlight key human rights abuses against undocumented children and families on the ground, and to assist rapporteurs to collect information and evidence of rights violations.

UN SPECIAL RAPPORTEURS

The mandates of the following current Special Rapporteurs concern the rights of undocumented children and their families. Footnoted links below provides further information on the specific function, mandate and activities of each Special Rapporteur:

- Human Rights of Migrants¹³⁰
- Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹³¹
- Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the right to non-discrimination in this context¹³²
- Extreme Poverty and Human Rights¹³³
- Trafficking in Persons, Especially in Women and Children¹³⁴
- The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health
- Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance¹³⁵
- Right to Education
- The Situation of Human Rights Defenders¹³⁶
- Violence against Women, its Causes and Consequences¹³⁷

¹³⁰ Official website available at: <http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx>

¹³¹ Official website available at: <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx>

¹³² Official website available at: <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>

¹³³ Official website available at: <http://www2.ohchr.org/english/issues/poverty/expert/index.htm>

¹³⁴ Official website available at: <http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx>

¹³⁵ Official website available at: <http://www.ohchr.org/EN/Issues/Racism/SRRacism/Pages/IndexSRRacism.aspx>

¹³⁶ Official website available at: <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/SRHRDefendersIndex.aspx>

¹³⁷ Official website available at: <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx>



TOOLS AND STRATEGIES

OVERVIEW OF LEGAL TOOLS AND STRATEGIES

- Actors from across disciplines should work together, maximising their political reach and impact to identify an issue, gather evidence, raise institutional awareness, build a case and conduct supporting advocacy work.
- Identify national provisions that fall below international standards.
- Legal action is one component of an advocacy strategy – political lobbying and campaigning should continue alongside any legal action.
- Case law must be developed, in all jurisdictions, to consolidate the protection of undocumented children to include all rights.

guide to taking legal action

PRELIMINARY STEPS

Assess the cost, risk and opportunities of legal action:

- Question what the possible impact could be on the immigration status of the claimant before, during and after the case.
 - Would anyone's personal security be at risk?
 - What financial costs are involved in the proposed litigation, and what are the costs for supportive advocacy action?
 - What impact could the litigation have on the international community?
 - What impact could the case have politically at national level?
- Clarify and clearly state the wider aims of the litigation. For example, raising awareness of the need to protect the rights of undocumented children and families or creating a legal precedent securing their rights.

WHAT TYPE OF ACTION TO BRING

Individual vs. Group action

- In circumstances where a systemic violation of rights, such as the denial of the right to birth registration, can be identified for an identifiable social group, such as undocumented children and families, then parties should consider whether a group action or public interest litigation would be better suited than an individual case.
- When the case is brought by an individual directly affected by a rights violation, involved civil society organisations should ensure that the claimant is one who most fully encapsulates the extent of the discrimination faced by undocumented children and families.
- In some countries civil society organisations can act as 'third party interveners' offering expert insight in support of ongoing litigation.

PRE-LITIGATION RESEARCH

Legal research:

- Conduct thorough legal research into national, regional and International law, to see whether previous successful judgments in favour of undocumented children and families, or their access to rights, can support your legal arguments.
- Consider what other national and international laws, policies and practice are pertinent to your case, and whether citing them could bolster your case.

Collecting evidence in support of the case:

- Where available and reliable, use national statistics to support allegations of systemic violations, and highlight the impact repressive policies against irregular migration have on children and families.
- Gather strong evidence from all available sources, including other undocumented families and front-line professionals who are in direct contact with undocumented families, to support the testimony of the claimant(s).

CHOICE OF JURISDICTION

Choosing the right court:

- Cases can be brought in a variety of different courts and jurisdictions. Seek legal advice on whether the case is best pursued through criminal or civil courts, assessing which remedies the claimant would most benefit from.
- Once national remedies are exhausted, parties can consider going to regional (European) or International courts for higher judgment.

RIGHT OF APPEAL

Don't quit at the first hurdle:

- If a court of first instance does not grant judgment in your favour, do not be defeated, there is always a right to appeal to a higher court, or to take the case further to regional or international courts.
- Take full notes of the proceedings in order to best draft grounds for appeal if your case is unsuccessful.

PARALLEL ACTIVITIES

Mobilising support for the cause:

- Legal action must be supported with community-level campaigning, and a national communications strategy. Parallel advocacy activities, campaigns and communication strategies raise awareness of the problems undocumented children and families face can help garner public and political support for their rights.
- Maximise support for the case by joining forces with other civil society organisations working with undocumented children and families, and conduct your advocacy work together.

OUTCOMES

Possible downfalls:

- Legal action can be a lengthy process, leaving the involved party in limbo for an extended period of time, with no certainty and often no interim remedy.
- Enforcement of a positive judgment can be difficult, sometimes making the legal victory only symbolic and changing little for undocumented families in practice.

Possible benefits:

- Positive judgments can set powerful legal precedents for subsequent legal challenges and legislative reform protecting the rights of undocumented children.
- Bringing legal action can help raise awareness for the rights of undocumented children and families.
- Positive judgments can help positively shape public and political mind-set on undocumented children and families.
- Positive judgments raise judicial awareness of the rights of undocumented children and families, and their international legal protections.
- Litigation can be an empowering process for otherwise disengaged undocumented families. Engagement with a country's legal system is a key step for migrants' social integration and social inclusion.

chapter 5

Regularisation as a Migration Policy Tool. Regularising Irregularity.

Regularisation is the process by which undocumented migrants can either temporarily or permanently gain regular immigration status. Regularisation can be a useful mechanism for States to account for, and integrate undocumented migrant populations, as well as being a corrective instrument for defects in migration legislation.

Regularisation is a long-term means of surmounting barriers to accessing legal rights, and a way of replacing discrimination with social integration. The benefits of regularisation are empowerment and increased access to rights for undocumented migrants, and increased human and regulated economic development for local society.

Regularisation programmes tend to have strict criteria and so, only regularise a specific sub-group of undocumented migrants at any one time, however the very implementation of a regularisation scheme is a positive policy step for the inclusion of irregular migrants, and can trigger subsequent regularisation initiatives.

“Regularisation programmes in a way, have become part of the ‘toolbox’ of contemporary migration management, precisely because states have refined objectives and mechanisms of migration management.”¹³⁸

Over forty formal regularisation programmes have been implemented in the EU and US over the last twenty-five years¹³⁹, illustrating that it is not a one-off policy instrument, but a well-used and necessary mechanism in modern-day migration management.

Why Regularise?

Four main reasons can be given for States to implement regularisation programmes.¹⁴⁰ Firstly as a means to yield information on the flows, causes, effects and reality of irregular migration, and exert some control over it. In this way, regularisation programmes can be an information-gathering process allowing States to build a picture of irregular migrant populations, in order to better structure migration management or security policies.

¹³⁸ Kraller, Albert, “Regularisations: A misguided option or part and parcel of a comprehensive policy response to irregular migration?” IMISCOE Working Paper (2009) page 21

¹³⁹ Kraller, Albert “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, 2009)

¹⁴⁰ Mármora, Lelio. “International Migration Policies and Programmes” International Organization for Migration (Geneva, 1999)

Secondly, regularisation programmes may be implemented to improve the social and economic condition of undocumented migrants. Several regularisation programmes have been established in various EU member states in response to pressures from broad coalitions of civil society organisations fighting against the destitution and discrimination of undocumented migrants.

Regularisation can thirdly, be used as a means to gain labour market transparency.

Finally, regularisation programmes have also been implemented for national economic or foreign policy aims, such as to avoid sanctions, compliance for aid and investment, and accession. For example, Portugal agreed to regularise part of its undocumented migrant population as a pre-requisite for accession to the EU.¹⁴¹

Types of Regularisation Programmes

There are several types of regularisation programmes, with differing aims, degrees of flexibility and temporal effect. There are three thematic categories of regularisation: formal regularisations, regularisation by way of entitlement and information regulations.

Formal regularisations occur when States seek to specifically transform an individual’s migration status, be it through policy or legislation. Regularisations that occur through marriage to a national or by way of EU accession are examples of regularisations by way of entitlement. Informal regularisations (sometimes referred to as normalisation) occur when individuals acquire status after delayed or queried immigration applications. For example when an individual with a tourist visa overstays, but is subsequently granted a work permit.

This chapter will focus on formal regularisation programmes undertaken by the State. Each of the above categories however, can be implemented differently, having different effects on flexibility, application and duration of the programme.

One-off regularisation programmes aim to regularise a finite number of migrants in a finite period of time, whereas permanent regularisation programmes are on-going and have no set quotas. Regularisation can also be implemented for a clearly defined specific vulnerable group or individual, by discretion. Similarly, migrants can be regularised on a case-by-case basis, for reasons of humanitarian protection, medical needs or family life.

Permanent regularisation programmes are arguably most beneficial for the sustainable protection of undocumented migrants’ access to rights in a State, although the length-of-stay criteria tend to be prolonged and don’t help to resolve any immediate discrimination, destitution or vulnerability undocumented migrants face. As a result, this type of regularisation programme is rarely seen as a viable solution to the problems faced in irregular migration.

Programmes focused on regularising adult migrants in families by offering access to regularised employment, also positively impact the material and economic experience of their dependent children.

Ongoing regularisation schemes would in theory, allow governments to address gaps in policy or systemic failures in migration control legislation. In this way on-going regularisation programmes can be a crucial equalising supplement to existing migration systems. Deficiencies in migration systems require active migrants’ rights organisations to continuously assess the real impacts of migration policy on undocumented families and identify and draw systematic failings to policy makers’ attention.

This chapter will outline a few key regularisation programmes in Europe for undocumented children, and analyse the different catalysts behind them. The first group are participatory actions, led and initiated by undocumented children themselves. Other strategies are State-led initiatives seeking to correct an acknowledged deficiency in existing migration systems. The chapter will compare the results and effects of the different regularisation programmes and analyse the advocacy efforts that led to their implementation, in the hope of inspiring further effective regularisation programming in Europe.

¹⁴¹ Kraller, Albert “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)

Solidarity in Collaborative Action for the Regularisation of Children

Collectively experiencing the instability and adversity of living in irregularity, undocumented children and families are increasingly coming together and collaborating to secure their regularisation.

Participatory action helps undocumented children combat isolation and find solidarity amongst peers. Sharing experiences and struggles, such collaboration can be a productive outlet for vulnerable children and families, which is both empowering and proactive. The use of shared experiences can be a powerful tool to inform, inspire and influence decision makers. Positioning undocumented children as crucial and visible actors in campaigns helps to

humanise and give a face to undocumented migration instead of what can otherwise be neglected as 'just another issue on the political agenda.'

Children in an irregular situation in the Netherlands have come together to form the "We Stay"¹⁴² regularisation campaign. This participatory action operates as a project of the Dutch branch of the NGO, Defence for Children International (DCI).¹⁴³

¹⁴² Website for "We Stay" Campaign available at: <http://www.defenceforchildren.nl/p/74/2152/mo89-mc21>

¹⁴³ Website for DCI available at: <http://www.defenceforchildren.nl/p/43/465/mo89-mc97/defence-for-children-international>

PARTICIPATORY ACTION FOR REGULARISATION IN THE NETHERLANDS



The Context



Defence for Children International, The Netherlands (DCI), works to promote children's rights by raising awareness and reporting on violations in the Netherlands.

Through their work with migrant families, DCI became aware of the growing number of undocumented children and young people who remain in irregular situations, despite protracted stays in the Netherlands.

The "We Stay" campaign, a participatory action for children in an irregular migration situation, seeks regularisation for undocumented children who lived in the Netherlands for a long period of time.

The Organisation and its Ideology



The primary objective of DCI's "We Stay" campaign, which was founded in 2006, is to regularise migrant children who have been continuously present in the Netherlands for five years or longer.

The campaign demands legislative change on the basis of undocumented children's integration into Dutch society, their ECHR¹⁴⁴ Article 8 right to private life and their UNCRC¹⁴⁵ Article 8 right to identity.

Initial Legal Action



Using knowledge and experiences from their front-line work with migrant families, DCI collated the stories and experiences of over 2,100 migrant children to bring a test case. This case for the regularisation of children who had been in the Netherlands for five years or longer was brought against the Dutch state in 2006.

The claim raised three fundamental points. First, that the state of the Netherlands has violated the UNCRC by deporting children who have built firm and lasting ties to the Netherlands. Further that this deportation will fracture the family unit and only cause further disruption to vulnerable children's development.

Secondly that once denied a residence permit it becomes immediately more difficult for children to access fundamental services such as healthcare, housing and education. Finally, that these children are at risk of detention due to their continued irregular migration status, and the detention of children violates the right to freedom, education and recreation.

However DCI's case was not successful and the judge ruled that there was no need to create a special rule for long stay regularisation under Immigration Law. DCI lodged an appeal against this decision.

The "We Stay" campaign was born out of the case's negative judgment and is an initiative by which DCI's legal arguments for regularisation can continue to be voiced.

Positive Outcome - The General Pardon of 2007



The media storm garnered with the DCI case pushed the government to take action on regularisation. In reaction, in 2007 the Dutch government issued a General Pardon to all asylum seekers who had applied for asylum before 2001 and who were still present in the Netherlands. Family members of successfully regularised migrants under this scheme would then be able to apply for a residence permit within the family reunification network. At the end of January 2008, 25,000 foreign nationals received a written notice of eligibility for residence permits.

Campaign Action



The "We Stay" campaign launched itself through media - devising a user-friendly website with fortnightly e-newsletters, by running informative TV programmes on the issue of irregular children, through publishing regular reports and gaining exposure in newspapers and using all forms of social media to inform and reach as broad and diverse an audience as possible.

¹⁴⁴ European Convention on Human Rights available online here: <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/The+Convention+and+additional+protocols/The+European+Convention+on+Human+Rights/>

¹⁴⁵ United Nations Convention on the Rights of the Child available online here: <http://www2.ohchr.org/english/law/crc.htm>

The second action the campaign took was to publicly target MPs and other policy makers, having laid the foundation of their cause through widespread media coverage.

The targeted efforts of the campaign were successful in getting a 'rooting motion'¹⁴⁶ regularisation passed through the Lower House (a parliamentary chamber) in 2010.

Political Impasse



However, in December 2010 the Dutch Minister of Immigration and Asylum, Minister Gerd Leers, announced that he didn't intend to support the regularisation motion passed in the Lower House earlier in 2010.

DCI argues that this lack of support is discriminatory and that the Minister's decision fails to adequately consider and acknowledge the cultural and social ties children inevitably build when in the Netherlands for a substantial period of time, and fails to protect the rights of children who are victims of lengthy administrative procedures.

In response to Minister Leers' refusal, the "We Stay" campaign launched an online petition (available online here http://petities.nl/petitie/oproep-tot-tenuitvoerlegging-van-de-motie-spekman-en-anker_) demanding the rooting motion be executed. This petition and the work behind it, remains ongoing.

Outcome of Campaign



After Minister Leers' opposition in December 2010, the rooting motion remained unexecuted. However, the campaign continues to fight for the regularisation of undocumented children after long-stay in the Netherlands despite a dissenting judgment and Ministerial opposition.

During the Dutch elections of 2012 members of "We Stay" campaigned further for the regularisation of these children. As part of the campaign, supporters could make a personal poster on the website www.stemvoorkinderen.nl to show solidarity with undocumented children. More than 500 people uploaded, or signed a poster. By timing the campaign to coincide with the national elections, the new government were forced to listen to the campaign's pleas.

As a result, the new sitting government of 2012 voted for a Children's Pardon. The pardon is intended to regularise children who have lived in the Netherlands continuously for more than five years before turning 18, and who had previously claimed asylum unsuccessfully. The exact criteria for the Pardon are due to be released around Christmas time of 2012.

In addition to the Children's Pardon, the government will be amending legislation to incorporate some of the wording and the spirit of the 'rooting motion' such that Dutch law recognises the value of children strongly "rooted" in Dutch society. Again, the exact criteria and wording of the legislative reform has not yet been released, but the government have indicated that they will be issuing a new Act in early 2013 to regularise children who have living in the Netherlands for a long period of time, and still do not have a residence permit.

¹⁴⁶ The Dutch term for the proposed bill can be translated as 'rooting motion.' It refers to the ties or 'rooting' a migrant has cultivated in the Netherlands.

Analysis of Activities



- A comprehensive media strategy allowed the campaign to quickly and effectively give the issue of children in an irregular situation, broad media exposure. By utilising all forms of media, the campaign reached out to a diverse audience.
- The campaign extends the ground work laid by the test case of 2006. The on-going campaign and its extensive media activity continue to keep the legal arguments alive and circulating, while the appeal is pursued through the courts.
- Targeted political action towards MPs and policy makers ran simultaneously with the legal appeal in court, giving complementary public and political attention to the campaign.
- The campaign's online petition is a flexible and remote tool useful to immediately and effectively respond to political developments.

'I Have a Right to My Own Rights'

Under the guidance of Defence for Children International, another participatory action for regularisation has been born. The dynamic group 'Foute kinderen bestaan niet', ('There are no wrong children'), focuses its work on a specific group of undocumented children seeking, firstly, their recognition as individuals and secondly, regularisation in the Netherlands based on length of stay.

The group is composed of children whose fathers are alleged war criminals, as per the definition in Article 1F of the Refugee Convention.¹⁴⁷ When Foute Kinderen Bestaan Niet started its work Dutch law forbade all children whose fathers had been accused (but not necessarily convicted) of war crimes from ever applying for a residence permit. This law did not consider the child's length of stay in the Netherlands, ties to the Netherlands or any real association with the father. Under Dutch law, the child bore the burden of their father's criminal status, for the duration of their life.

The committee 'Foute kinderen bestaan niet' is a forum through which these children can fight for their recognition as individuals entitled to rights. This includes their right to apply for and obtain a residence permit, regardless of their parent's criminal status. The Committee argues that consideration of the child's residence should be based on consideration of the child's present circumstances and integration in the Netherlands, solely.

The committee acts under the guidance of NGOs Defence for Children International Netherlands and Justice and Peace,¹⁴⁸ who offer support and guidance to the children in their campaign.

¹⁴⁷ Full text of the legislation is available at: <http://www.unhcr.org/3b66c2aa10.html>

¹⁴⁸ Website of Justice and Peace is available at: <http://www.justitiaetpax.nl/>

Five young girls of Afghan origin have taken the lead in one of the first initiatives of the campaign, the creation of an informative booklet entitled 'I have a right to my own rights' (<http://www.defenceforchildren.nl/p/43/494/mo89-mc96>). The booklet raises the issue of children in this inescapable irregularity, children who are denied individual recognition and so live in the shadow of their father's criminal statuses, and remain caught in immigration limbo, regardless of any positive, personal achievements they make for themselves in the Netherlands.

Following the distribution of the booklet, the five girls were invited to tell their personal stories on popular Dutch TV show 'Pauw en Witteman.' The campaign gained wide media coverage and a hearing was held in Parliament's Commission of Justice, which the girls were invited to speak at. The hearing looked at the legislative framework and the situation in practice for these undocumented children, taking live evidence from the girls themselves. As a result of the hearing, Parliament proposed legislative change.

Dutch law now facilitates permanent regularisation by stating that migrant children of alleged war criminals who have been living in the Netherlands for ten years or more are eligible to apply for a residence permit.

The 'Foute kinderen bestaan niet' committee has not disbanded, and it continues to act and campaign as they argue that a five-year period, not ten years is sufficient for vulnerable children to apply for a residence permit.

These two campaigns are unique in that they are participatory actions, led by empowered undocumented children. Other initiatives have taken place in recent years to regularize undocumented migrants, as the following examples demonstrate.

REGULARISATION IN POLAND

Context



Poland is not a newcomer to regularisation programmes. The 2012 programme is the third this decade for undocumented migrants.

The 2003 and 2007 one-off programmes are estimated to have regularised only 4,500 migrants, however. Critics argue that the low statistics can be indebted to the restrictive criteria and excessive and un-obtainable evidence requirements such as proof of access to housing and future contracts of employment.

Having observed the low yields of their earlier programmes, the Polish government was keen to improve its regularisation process, and organised a preliminary public consultation to understand the previous shortcomings, and gather civil society's input before drafting a proposed Bill.

The Polish Authority for Foreigners¹⁴⁹ estimates between 70,000 and 80,000 undocumented migrants live in Poland. Research on numbers remains vague and hard to substantiate, but the authorities believe that implementing an effective regularisation programme would improve the social and economic situation of a substantial group of vulnerable migrants.

Eurostat¹⁵⁰ figures indicate that Poland has one of the lowest percentages of migrant populations in comparison to other EU countries, with only 0.1% of the Polish population registered as migrants. Authorities hope that the regularisation will boost this figure and increase the number of regulated migrant workers contributing to the national economy.

Resulting Law



The implemented law¹⁵¹ is a one-off regularisation programme that was open for applications from 1st January 2012 to 2nd July 2012.

The two main criteria are (i) continuous residence in Poland since at least 20 December 2007 and (ii) lack of regular status on the date of the Act's enforcement, 1st January 2012.

Unlike its predecessors, this regularisation programme does not impose stringent requirements such as proof of adequate means for maintenance and housing, and proof of offers of prospective employment.

¹⁴⁹ Website for the Polish Ministry of Interior is available at: http://msw.gov.pl/portal/pl/716/9428/Kto_mogl_skorzystac_z_abolicji.html

¹⁵⁰ Website for Eurostat available at: <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>

¹⁵¹ The full text of the Amnesty legislation is available online in Polish at: <http://www.udsc.gov.pl/files/prawo/ustawy/D20111133.pdf>

The regularisation will grant successful applicants a residence permit for a fixed period of two years, during which time migrants would be permitted to work. Successful applicants would be eligible to apply for visa extension after the initial two year period. It is hoped that data will be collated to document how economic development is affected by this regularisation.

Supporting Informative Campaigns to Ensure Awareness of the Amnesty



In order to facilitate accessibility, the regularisation programme constructed a website¹⁵² with templates of the application form in English, Polish, Russian and Vietnamese as well as providing simplified instructions to help migrants with their application.

In the hope of increasing the reach of the regularisation programme, the Polish Office for Foreigners ran a broad media campaign to inform migrants of the regularisation, its requirements and offer assistance with applications. Three television advertisements were aired to promote the law and encourage applications.

The website developed supporting posters and leaflets in all four languages which were widely distributed in schools, on bus billboards, in markets and other visible public spaces.

An additional campaign, run by migrants in cooperation with the Polish Regional Offices, entitled "Be Legal" was aimed at informing undocumented migrants of their rights and entitlements under the new law through community outreach work. The "Be Legal" campaign additionally ran a manned helpline to assist undocumented migrants accessing the regularisation.

Analysis of Applicants



As of November 2012, the Polish Office for Foreigners had registered 9,521 applications as received for regularisation (figures from www.abolicja.gov.pl and all as of November 2012).

A geographic analysis of the application pool reveals that the largest number of applications (7,386) were submitted in the region of Mazowieckie, with the second greatest number of applications (392) received in Lodz, both heavily industrialised areas in Poland.

A demographic analysis of applicants reveals five main nationalities applying for regularisation. With 2,189 applicants from Vietnam, this population by far outnumbers other nationalities. Other sizeable groups of applicants were received from the Ukraine (2,013 applicants), Pakistan (1,420 applicants), Bangladesh (762) and Armenia (713). Official data indicates the remainder of applicants were citizens of India, Egypt, Russia and Belarus.

No public statistics are available yet to disaggregate numbers of adults with accompanying children, who have applied for regularisation under the new law, although civil society organisations have assisted many families to apply under for regularisation under the scheme. It is hoped that the broad application criteria and the supplementary information campaigns will facilitate the successful regularisation of numerous undocumented families in Poland.

¹⁵² The website www.abolicja.gov.pl was created for the duration of the regularisation period but is no longer online.

Whereas the previous examples have focused on regularisations for, either children, or irregular migrants more generally, in 2006 France implemented a regularisation programme aimed specifically at families and children.

REGULARISING FAMILIES AND CHILDREN IN FRANCE



Context



As explained in greater detail in Chapter 3, deportations of school-going children in France became a very real fear in 2006 when former Interior Minister, Nicholas Sarkozy, ordered the French police to raid and detain undocumented children and their families at school gates.

In reality the arrest and detention of families had increased since 2004. A first wave of mobilisations stopped the arrests in Autumn 2005, leading Minister Sarkozy to publish a circular in October 2005 which temporarily suspended the evictions of families until the end of the school year.¹⁵³

As a result, RESF, a support and solidarity network for undocumented migrants, mobilised support for the protection of children, youths and their families from deportation by urging their regularisation.

Intended Aims of Regularisation Programme



The regularisation programme was intended to be a temporary remedy for those undocumented families whose deportation had been temporarily suspended until the end of the 2006 school year in June, by the October 2005 Circular.

However the target group was intended to be highly restrictive and limited only to families with firm ties to France, in keeping with the government's migration control policy.

Regularisation Criteria



Without civil society consultation, a Circular¹⁵⁴ was issued detailing the strict requirements of the regularisation programme. Firstly, families had to apply to a voluntary return programme. If the government did not authorise funding for the voluntary return, then they were eligible to apply for the regularisation programme, provided the below six criteria were met:

1. Eligibility criteria was limited to families with children enrolled in French school and living in France since birth or early childhood (before age 13).
2. A condition of at least one parent having two years presence in France, and that at least one child in the family had been enrolled in French school since September 2005 or earlier.
3. The family's integration into France would be assessed on the basis of absence of ties to the country in which the family formerly had citizenship.
4. Proof of the parent's contribution to the child's support and education.
5. Integration into French society on the basis of French language assessments, children's scholastic performance.
6. No threats to public order.

The language of the circular remained vague, allowing for broad discretion in accepting/rejecting applications.

The regularisation programme accepted applications in a small closed window between 13 June and 13 August 2006, again in the hope of limiting the scope of the programme to only those families affected by the 2005 Circular.

The circular itself does not specify duration of the residence permit, saying only that the residence permit is to be granted on a 'temporary' basis. However official websites¹⁵⁵ indicate that residence permits granted for 'private and family life' tend not to be granted for more than one year, although the length of the permit is discretionary, and so, varies from case to case.

Civil Society Supportive Action



The NGOs La Cimade¹⁵⁶ and RESF¹⁵⁷ were imperative in facilitating undocumented migrant families' access to the regularisation programme.

Both organisations supported and assisted families with their preparation of application forms. RESF further organised the submission of collective applications to expedite the application process.

Civil society played a key role in monitoring and oversight of the implementation of the regularisation programme, with La Cimade publishing a monitoring report after the September 2006 end of the regularisation programme.

As well as assisting and supporting the regularisation process, both NGOs targeted HALDE (Haute Autorité de Lutte contre les Discriminations et pour l'Égalité) in July 2006 demanding their presence and oversight during the regularisation process.

In response to civil society pressure, the HALDE supportively wrote to the Minister of Interior on 4 September 2006 reminding the government of the importance of the concepts of equal treatment and anti-discrimination, during the administration of the regularisation programme.

After the closure of the regularisation programme, civil society continued its action, as a response to the low numbers of successfully regularised families as well as providing crucial support and assistance during the legal appeal procedures.

¹⁵⁵ Such as <http://vosdroits.service-public.fr/F17146.xhtml>

¹⁵⁶ Website of La Cimade available online at: <http://www.cimade.org/>

¹⁵⁷ Website of RESF available online at: <http://www.educationsansfrontieres.org/>

¹⁵³ Further information on the French school raids and set deportation targets can be found in Chapter 3.

¹⁵⁴ Circular N°NOR/INT/K/06/00058/C available online at: <http://www.auber-sans-la-peur.org/pdf/circulsarko.pdf>

Analysis of Applicants



The government anticipated only a small number of applications, but in total 33,538 applications were received, reflecting the sizeable population of undocumented families living in France. Of the many applications, official statistics say 6,924 regularisations were successfully granted.

Applications were generally made from dense population areas, such as Paris, Île-de-France, Lyon, and Marseille).

Belgian Regularisation

In Belgium in 2009 the government launched a regularisation programme which at the outset was not intended to provide for a 'mass regularisation'¹⁵⁸ but a formalised method of regularising the many migrants who had been residing in Belgium for at least five years. The programme, established through a Ministerial Circular of 19 July 2009,¹⁵⁹ was open to applications between 15 September and 15 December 2009. Applicants had to additionally demonstrate integration into Belgian society, which could be fulfilled through demonstration of language skills, attendance of literacy courses or through having children attending Belgian schools.

Unlike other regularisation programmes discussed above, this scheme introduced a new permanent regularisation criteria for migrants who had been working in Belgium for at least two and a half years, and could produce an employment contract and a regional labour card. This permanent criterion is for migrants whose asylum applications had been pending for more than three years, with special consideration for families with children attending school.

Between 2009 and 2011, 11,016 regularisation applications were granted, out of a total of 27,668 applications. Although data has not been disaggregated to show how many children were impacted by this programme, the figures from 2011 show that the 2,910 applications granted for 'durable local ties' regularised 3,745 people, which gives some indication of the impact on undocumented children and families in Belgium.¹⁶⁰

Legal Support for Regularisation

Many civil society organizations, including migrant community organizations, find it important to properly understand regularisation programmes in order to ensure a proper implementation. Red Acoge¹⁶¹, a network set up in 1991 to uphold and promote the rights of migrant people living in Spain, runs a project to de-mystify the current Spanish regularisation process ("arraigo social") for undocumented families and support them during the application process.

Red Acoge have in-house lawyers offering legal advice and support to undocumented families seeking to regularise themselves (and subsequently their children). In addition to legal advice, the project also helps families gather relevant documentation and evidence and build their case for regularisation. Under the Royal Decree 557/2011 of 20th April 2011¹⁶², undocumented adults/parents who have lived in Spain continuously for three years, who have an employment contract, guaranteeing them minimum wage earnings, are eligible for regularisation. Once the parents have successfully been regularised, their children are also eligible to apply for regularisation. If the regularisation application is rejected however, Red Acoge supports undocumented families through the appeal process.

Language difficulties and fears of administration pose added difficulties for undocumented families trying to navigate complex regularisation programmes. In response to these specific difficulties, Red Acoge's project offers holistic legal support for undocumented families undergoing the regularisation process. Parents are informed of their rights and eligibility, and given ongoing advice throughout the application process both for themselves, and their children, ensuring that the entire family can successfully avail of the regularisation programme.

Regularisation as an Effective Migration Policy Tool

Reflecting the numerous routes into irregularity, regularisation programmes must be equally malleable and diverse in form to respond to diverse irregular populations. These examples demonstrate the rise of regularisation as a migration policy tool, rather than an ad hoc response to civil society advocacy. Yet all the programmes analysed are distinct in intent, implementation and results, highlighting the need for distinct policy responses in each member state.

A striking similarity drawn from all the above programmes is the need for ongoing programme monitoring and structured and comprehensive data analysis of the outcomes of the programmes. Monitoring ensures the effective administration of regularisation programmes, avoiding lengthy and expensive legal appeals. Systematic data analysis of regularisation programmes also gives States an opportunity to obtain key data on undocumented migrant populations, as well as learn from any weaknesses in the programme.

¹⁵⁸ As quoted in De Standaard newspaper

¹⁵⁹ Full text of the circular is available online at: https://docs.google.com/viewer?a=v&q=cache:fiQRXbA1KEcJ:www.theux.be/ma-commune/services-communiaux/population-etat-civil/population_theux/art_9_3et9bis090326.pdf+Instruction+relative+%C3%A0+l%E2%80%99application+de+l%E2%80%99ancien+article+9,3+et+de+l%E2%80%99article+9bis+de+la+loi+sur+les+%C3%A9trangers.&hl=fr&gl=be&pid=bl&srcid=ADGEEsgePmRkVDrSmYNoXyOqTqHeXPtQY_Vs1b5Q7NHsT8kfxH2k-SR16r6hjfBiz1wRPRTS20qKMcQwY-ynKoSoyqRoBPq0dPYpSV8PrLrw2wbcMly7AbglDH7w1mIR5fduCMN-tYzp&sig=AHIEtbQOVCS1uKeCFRBXbqhuK1F1FYqsB2A

¹⁶⁰ Centre for Equal Opportunities and Opposition to Racism "Annual Report on Migration" (2011) page 121

¹⁶¹ Website for Red Acoge is available online at: <http://www.redacoge.org/>

¹⁶² Full text legislation is available online at: <http://www.boe.es/boe/dias/2011/04/30/pdfs/BOE-A-2011-7703.pdf>



TOOLS AND STRATEGIES

OVERVIEW OF TOOL - ELEMENTS OF GOOD PRACTICE FOR REGULARISATION

Preliminary Research

- Comprehensive analysis of results of previous regularisation programmes
- Consultation with civil society practitioners and professionals of the regularisation needs of irregular migrants
- Clear definition and statement of target group of regularisation programme and any social, economic and human development aims intended to be achieved

Implementation and Monitoring

- Creation of a regularisation programme that directly answers the needs of irregular migrants and national society.
- Collaboration between NGOs and government official bodies during each stage of the regularisation programme
- Ongoing consultation process with professionals and civil society to ensure the effective and proper implementation of the regularisation programme

Postimplementation and Data Analysis

- Information campaigns to reach the broad target group of the regularisation programme explaining their rights under the programme and offering support during the application process
- Systematic collation of data to analyse the nature and size of undocumented migrant populations, and to assess the effectiveness and reach of the programme

PART

3

NEXT STEPS FOR CHANGE



going forwards: policy protection for children in an irregular migration situation

Key Conclusions and Policy Recommendations

1. A child is first and foremost and only a child

The international child protection framework is for *all* children, without distinction, discrimination or exception. States are legally obligated to protect the rights of all children, regardless of their own, or their parents' migration status. State policies and programmes aimed at protecting children from poverty and social exclusion must include undocumented children and make them a specific target group for social protection policies.

2. Policy-making should be based on structured evidence and collated data

States should implement data collection systems that collect and analyse data on migration flows that are disaggregated for undocumented children and families. All policy should be based on such evidence. This data should not be used for immigration control purposes.

3. States should reform law and policy to ensure access to civil, economic, social and cultural rights and basic services for undocumented children and families

Undocumented children and families face numerous practical and administrative barriers to accessing and enjoying their basic rights. Legislation, policies and practice should ensure that no child is excluded from access to basic rights, without exception. The interdependence of rights requires a cross-sectoral approach in law, policy and practice that ensures undocumented children and families' access to all rights. States should proactively remove existing barriers to undocumented children's access to rights.

4. There must be a separation between service provision and immigration enforcement that is implemented in law and in practice

Public officials and service providers should not be required to report undocumented migrants to immigration authorities. Service providers should eliminate information sharing with immigration authorities; immigration enforcement action should not be conducted in or near service provision. Detection procedures of the immigration authorities should not be conducted in such a way as to disproportionately discourage undocumented migrant families from accessing essential services.

5. Policies on preventing irregular migration should always consider the impact on children

States must consider the impact of law and policies on undocumented children who accompany their parents or other caregivers. Policies that restrict the living and working conditions, and access to health and housing of undocumented adults, have a significant and damaging impact on undocumented children.

6. State activity combatting xenophobia, racism and discrimination should be strengthened in line with promoting the integration of undocumented families

Measures should be taken to ensure the discrimination and criminalisation of irregular migration is replaced with improved social knowledge that corrects negative perceptions of irregular migrants and promotes their access to rights.

7. States should ensure national legislation complies with international standards of protection for undocumented children and families

National law and policy should acknowledge undocumented children as rights-holders and protect their access to rights in compliance with international legal standards and norms.

8. Promote and protect family unity and the right to family life

States should ensure that families are never separated. All decisions concerning the separation of families should have careful consideration for the best interests of the child and every child's fundamental right to private and family life.

9. States should promote access to regular and safe channels of migration and secure residence status

Irregular migration means living in an unstable and insecure situation which can hinder a child's social, cognitive and physical development. States should make permanent regularisation programmes that facilitate long-term residency accessible to undocumented children and families.

10. Children should not be detained and deported solely because of their immigration status

Detention is not in the best interests of the child and should not be justified to preserve family unity. There is no justification for the deprivation of a child's liberty. The immigration detention of children should be prohibited. States should seek suitable alternative mechanisms that fulfil the best interests of the child, and protect children's rights to liberty and family life.

