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Access to social rights of non-removable TCNs in the European Union

Destitute in the limbo of toleration

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Abstract

Throughout the European Union, a group of migrants live in protracted destitution, without access to basic economic, social and cultural rights. This is the result of the legal limbo they live in. Although being in an irregular administrative situation in the Union, they cannot be sent back to their countries of origin due to legal or practical impediments. Therefore, they remain in the territory of the Member States under different toleration statuses. However, toleration does not mean regularisation, but a liminal or atypical status where non-removable migrants find themselves trapped, sometimes for decades. The aim of this thesis is to analyse on the one hand the kind of obstacles that throw third-country nationals (TCNs) into a situation of non-removability [the causes], and on the other, what the status granted to them when they are found to be unreturnable is [the consequences]. A study of the relevant European Union migration law will be conducted, as well as of the national responses to the issue. All this will be then contrasted with the obligations set by the human rights legal framework, to see whether the current legislation and practices concerning non-removability are compatible with the respect of human dignity.

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INTRODUCTION

According to European Union legislation, Member States should fight “illegal” migration by returning those irregularly staying in their territory. Therefore, only two possible options are contemplated: either a migrant is regular and has the right to be granted a residence permit; or irregular, and must thus be removed. Either s/he is “legal” and stays, or s/he is “illegal” and is returned. Either s/he is in, or s/he is out.

However, in practice there is a grey area that is neglected, since there are often a variety of impediments that prevent the removal of those irregularly staying from being carried out. These migrants are usually labelled “non-removable third country nationals”, who stay in a legal limbo where their human rights are likely to be violated. Despite being a subgroup within the collective or irregular migrants, their situation differs from the general group in the fact that their presence is known and tolerated by the authorities.

The reasons why non-removable TCNs cannot be returned can be legal/humanitarian (related to non-refoulement, protection of private and family life, medical and health conditions, humanitarian situation in the country of origin, best interests considerations), technical (difficulties in identification, lack of documents, lack of cooperation of the home country), or the result of policy decisions (concession of a discretionary permit on specific grounds chosen by the national authorities, e.g.)¹.

Quantitatively, this is a considerable phenomenon in the European Union. Although the lack of exact data on the issue, it is calculated that around 300.000 migrants per year cannot be removed for one of the above-mentioned reasons². However, if we look at the

¹ European Union Agency for Fundamental Rights, 'Fundamental rights of migrants in an irregular situation in the European Union: Comparative Report' [2011] pp29-34 <<http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>> accessed 10 March 2018

² Id.

EU legal framework, it is surprising to see that this matter is not being dealt with by the community legislation in a concrete, comprehensive and direct manner. It is considered as a marginal issue and there is only a brief mention to it in the Return Directive³. Consequently, the practice of the Member States is not harmonized and varies enormously from country to country.

I am interested in analyzing in depth how the EU law regulates the status of non-removable migrants, what rights are granted pending the postponed return and whether it provides with pathways to regular stay. At the same time, I will examine the regional and international human rights texts, to be able to answer my research question: does EU law actually protect the human rights of the migrants who cannot be removed?

In doing so, I will start with the basic concepts, by defining the term “non-removable” migrant and briefly presenting the different situations which can lead to a scenario of unreturnability [Chapter 1]. I will proceed to analyze the EU legal framework on the matter, through the study of the Return Directive. [Chapter 2]. I will then evaluate how Member States are dealing with the issue, and will focus on the particular experiences of Spain and Germany, which are clear paradigms of the two different models of toleration deployed across the Union (de facto and formal, respectively) [Chapter 3]. After this, the human rights concerns present on the approaches to non-removability deployed in the EU will be underlined, by analyzing some of the basic economic, social and cultural rights under human rights law and their applicability to the collective that this thesis is dealing with. A reflection on the aims that States are pursuing by restricting the human rights of irregular migrants will be also presented. [Chapter 4]. I will finish with the conclusions and some proposals for a more consistent and human rights-centered approach regarding non-removable migrants in the EU.

³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

I have chosen this topic because I believe unreturnable migrants are living a dramatic situation that is not being enough voiced, condemned to a protracted invisibility and exclusion derived from the lack of legal status and at the same time not being able to be sent back, therefore trapped in a limbo. There is little awareness on the issue, as it has been denounced by the European Commission: “it is often not possible for the general public to distinguish this particular group from general issues of migration and asylum seekers. Among the general public and in the media, the main issues debated often particularly concern irregular migrants, and it may require almost expert knowledge of the area to engage in discussion of the particular rights and situation of the specific group of those pending return. This was also evidenced by the fact that in several countries, even the respondents were not necessarily able to separate this group from other migration/asylum issues and legislation.”⁴

In a moment when migration is criminalized, and when the discourses that label people on the move as “illegal” are gaining strength, we tend to forget that irregular migrants are also human beings whose fundamental rights must be respected regardless of their administrative status. It is of utmost importance to tackle these situations of legal limbo as to guarantee a humane and dignified life for those that fall under this category, especially considering that the non-returnability is not often transitional and temporary, but in many cases can last for decades. The dimension of the problem can be summarized by the words of the former CoE Commissioner for Human Rights, Nils Muižnieks:

“In some countries, they call them “invisible persons”, in others – “ghosts”. Throughout Europe there are many migrants, primarily rejected asylum seekers, who live in a state of protracted legal and social limbo without any long-term prospects. The authorities refuse to regularize them or to grant them any kind of legal status, but often, they cannot go back

⁴ Ramboll and Eurasylum, 'Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries' [2013] -(HOME/2010/RFX/PR/1001) European Commission, p79 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_en.pdf> accessed 11 April 2018

to their countries of origin for various reasons, most often, fear of persecution. These desperate persons tend to live in substandard conditions, completely excluded from society, lacking residence permits and the means to meet basic needs such as shelter, food, health or education. In essence, they are deprived of any opportunity to live in dignity.”⁵

My methodology will be based mainly on legal analysis, through the study of the European Union migration law, as well as the regional and international human rights mechanisms of protection. I will consider hard and soft law, as well as case law emanating from the ECJ, the European Court of Human Rights and the European Committee of Social Rights. I will compare how this legal framework is applied in the practice of the Member States, taking into account national legislation and reports from different NGOs, and the information I get from some phone interviews that I will conduct.

I will draw on the existing data on the topic, which is mainly constituted by the report of ECRE: Point of no Return (2014)⁶, a report by the EU Fundamental Rights Agency (2011)⁷, a study by Ramboll-Eurasylum (2013)⁸, a study by the European Migration

⁵ Niels Muiznieks, 'Migrants in limbo in Europe have the right to live in dignity' (*Council of Europe Commissioner for Human Rights*, 15/11/2016) <<https://www.coe.int/en/web/commissioner/-/migrants-in-limbo-in-europe-have-the-right-to-live-in-dignity?desktop=true>> accessed 8 April 2018

⁶ ECRE, 'Point of no Return: the Futile Detention of Unreturnable Migrants' [January 2014] A face to the story <https://www.ecre.org/wp-content/uploads/2014/01/pointofnoreturn.eu_wp-content_uploads_2014_01_Point_of_no_return.pdf> accessed 10 April 2018

⁷ See supra note 1

⁸ See supra note 4

Network (2010)⁹, and the Study "REGINE – Regularisations in Europe" by ICMPD (2008)¹⁰.

What is innovative about my work is that I will use strictly a rights-based approach, by conducting an examination of the human rights that the EU and its Member States must comply with and how the situation is in practice in relation to non-removable migrants. As a human rights student, I believe that fundamental rights must never be blurred by political interests; in this case, related to the prevention of migration. If we affirm that we, as a Union, are committed to the human rights of everyone, we should be consistent and always comply with the international obligations we have entered. In the context of the issue that this thesis will deal with, any argument based on the pull-factor of giving a human solution to those migrants trapped in limbo should be therefore dismissed as inadmissible. Our Union should not direct its steps to the creation of a “fortress”, no matter what. That is why I will end this work by underlining the need of legislative change at EU level, to deal in a concrete, clear and comprehensive manner with the issue of non-removable migrants, as to ensure a harmonized approach to the matter across the Member States, where the protection of the human rights of migrants must be the primary consideration.

⁹ European Migration Network, 'The different national practices concerning granting of non-EU harmonised protection statuses' [2010] <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/non-eu-harmonised-protection-status/0_emn_synthesis_report_noneuharmonised_finalversion_january2011_en.pdf> accessed 11 April 2018

¹⁰ International Centre for Migration Policy Development, '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 ' [2009] -(JLS/B4/2007/05) - <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/pdf/general/regine_report_january_2009_en.pdf> accessed 11 April 2018

CHAPTER 1: DEFINITIONS AND CAUSES OF NON-REMOVABILITY

Who is a non-removable or non-returnable migrant?

Non-removable migrants are TCNs who, despite their irregular administrative status, cannot be sent back due to a series of obstacles or impediments that prevent their removal.

Differently from the rest of the migrants in an irregular situation, their presence in the Member States is known by the national authorities, who tolerate their stay. However, this toleration does not mean regularisation, but only a safeguard against deportation. Therefore, non-removable migrants find themselves trapped in a legal limbo as long as the obstacle preventing removal persists. They cannot be sent back, but they are not regularized either, so they are still considered as illegally staying TCNs. In many cases, the impediment lasts for a long time, and therefore the TCN can remain for decades in a state of liminality or a-legality, with the consequent implications for the respect of his/her human rights.

These situations of non-removability are a product of EU and domestic laws. Notwithstanding, EU law still does not regulate adequately, in a concrete and comprehensive manner, how to deal with this issue. Thus, it is mainly on the Member States to regulate on it. That is why, throughout the EU, one can see a huge difference in the approaches deployed by the different MS. There is a lack of harmonization due to the vagueness of the EU legislation on the matter.

The Return Directive¹¹ is one of the main causes of non-removability. While the postponement of removal contemplated in the text generates most of these situations of non-deportability, it fails to provide effective remedies to solve the deriving limbo situations. The only mechanism that the Directive considers is a possible discretionary grant of a residence permit for compassionate or humanitarian reasons given by the MS in case they want to.

¹¹ See supra note 3

If we have a look at article 9 of the Directive we can find some situations where MS shall or may stop the removal. Article 9.1 obliges MS to postpone deportation when doing so would violate the principle of non-refoulement and until a decision on an appeal of the return with suspensive effects is made. Article 9.2 states that MS “may” also postpone the removal taking into account the specific circumstances of each case: considering the TCN’s physical or mental state, as well as if there are technical/practical reasons preventing the return, such as lack of documentation or cooperation of the country of origin.

We should start by drawing the difference between the causes that generate non-removability. These can be threefold:

- 1) Legal or humanitarian non-removability (non-refoulement, protection of family life, protection of health)
- 2) Practical non-removability (for technical reasons, non-cooperation, lack of documentation)
- 3) Policy-based non-removability (for national policy choice, such as granting a residence permit to victims of domestic violence in Spain)

Analysis of the sources of non-removability

1) Legal (human rights-related) and humanitarian impediments:

1.1 **Non-refoulement:** concerning mainly rejected asylum seekers, who although not having been granted refugee status or subsidiary protection still cannot be sent back due to the risk of their human rights being violated if returned, mainly thanks to the protection granted by art. 3 ECHR¹².

¹² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950

The restrictive definitions and conditions required to get refugee status or subsidiary protection make it often very difficult for the person fleeing to access international protection.

According to the Geneva Convention on the Status of Refugees of 1951¹³, translated into EU law via the Qualification Directive of 2011¹⁴, a refugee is only the “third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it”. Therefore, there must be a well-founded fear of being individually persecuted, and it needs to be for one of the reasons stated in the definition (only race, religion, nationality, political opinion or membership of a particular social group).

On the other hand, in order to be eligible for subsidiary protection, the person must be a “third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”. According to Article 15, serious harm means:

¹³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

¹⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

- “(a) the death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

As UNHCR and ECRE point out¹⁵, concerning this latter section (c), in most scenarios of indiscriminate or generalized violence it is be very difficult to prove the “individual threat” required by the wording of the article. It seems a bit paradoxical that the definition requires the violence to be both “indiscriminate” and “individual” at the same time. Therefore, if States make a minimalist interpretation of it, many people could be excluded from subsidiary protection for this reason. Furthermore, in reality, this general violence does not always happen during international or internal armed conflicts, but also in cases of massive human rights violations that do not amount to armed conflict.

Therefore, once rejected international protection, these migrants fall as well into irregularity. They are not covered anymore by the protection against refoulement granted by the Geneva Convention to refugees and asylum seekers. However, fortunately, art. 3 of the ECHR acts as a bar against removal. According to it, no State Party to the Convention can send a person back to a place where there is reasonable risk that h/she will be submitted to torture or inhuman or degrading treatment or punishment. This is an absolute and non-derogable right under the Convention, that applies in all circumstances.

¹⁵ See UNHCR, 'Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence ' [2008] <http://www.refworld.org/pdfid/479df7472.pdf>> accessed 11 April 2018 and ECRE, 'The Impact of the EU Qualification Directive on International Protection ' [2008] ELENA (European Legal Network on Asylum) <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-The-Impact-of-the-EU-Qualification-Directive-on-International-Protection_October-2008.pdf> accessed 11 April 2018

In cases like *Saadi v Italy*¹⁶, the Court made this absolute character clear through its different statements:

“... expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country” [par. 125].

“... As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct ... the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3” [par. 127].

“... it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees” [par. 138].

But what happens after the Court has prevented the removal of the applicant? ECRE¹⁷ has proactively defended that all those migrants protected by the principle of non-refoulement that do not fit the conditions to obtain refugee status should be always given subsidiary protection. However, this is not what happens in the practice.

¹⁶ *Saadi v Italy* (GC) Application no. 37201/06, 28 February 2008

¹⁷ ECRE, 'The Impact of the EU Qualification Directive on International Protection ' [2008] ELENA (European Legal Network on Asylum), p29 <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-The-Impact-of-the-EU-Qualification-Directive-on-International-Protection_October-2008.pdf> accessed 11 April 2018

The status granted to them varies from MS to MS, ranging from mere de facto toleration, to formal toleration or regularisation in the best-case scenario. However, among all the groups that form the heterogeneous concept of non-removable migrants, we can affirm that those not sent back due to non-refoulement impediments are the ones who have it easier to eventually obtain a residence permit. We could say that they are on top of the hierarchy of desirability (or they are the least undesirable).

The situation is different if we talk about another group of non-removable migrants who are not sent back also on non-refoulement grounds but who have been excluded/revoked from refugee status or subsidiary protection. These are recognized refugees/beneficiaries of subsidiary protection who are withdrawn from their status, or asylum seekers who would qualify to be granted asylum/subsidiary protection but who are excluded because of having committed serious crimes or posing a threat for national security. This exclusion or revocation is done in conformity with article 1F of the Geneva Convention¹⁸ and arts. 12 and 14 of the Qualification Directive¹⁹.

This subgroup of migrants, despite complying with the rest of the requirements to get international protection, is deemed unworthy or undeserving of it due to their criminal actions prior or posterior to their arrival in the host country. Although the non-applicability or cessation of the non-refoulement clause under the Refugee Convention, they are still protected from removal by art. 3 of the ECHR²⁰, which, as we said, is absolute and applies regardless of the conduct of the applicant or the potential threat that h/she can pose to national security. That is why they are commonly labelled “undesirable but unreturnable” migrants. They fall as well into the legal limbo of irregular non-removability, being the possible consequences again the informal toleration, the formal toleration status or regularisation. However, contrary to the what we said about the other

¹⁸ See supra note 13

¹⁹ See supra note 14

²⁰ See supra note 12

non-removable migrants protected from refoulement due to humanitarian reasons, the “undesirable but unreturnable”, as their name itself indicates, are at the very bottom of the hierarchy of desirability and therefore find it very difficult to regularise their situation across the MS (being submitted to permanent imprisonment in many of them). However, I will not deepen on this subgroup in this work, since the relation between non-removability and criminality is out of the scope of my thesis.²¹

1.2 Protection of private and family life: Under exceptional circumstances, the European Court of Human Rights has found that deporting a migrant who is an irregular administrative situation could violate his/her right to private and family life enshrined in Art 8 ECHR²². In principle, the Court grants a wide margin of appreciation to States and recognized that they are sovereign to impose the conditions of entry/stay of TCNs “as a matter of well-established international law and subject to their treaty obligations to control the entry, residence and expulsion of aliens”²³. Article 8 ECHR is not an absolute right and may therefore be limited by the States, as long as the interference is proportionate, necessary in a democratic society to pursuit a legitimate aim (national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others), and it is in accordance with the law, as provided by Article 8.2 of the ECHR.

²¹ For an analysis of undesirable but unreturnable migrants in the EU *see* Refugee Law Initiative (School of Advanced Study, University of London) and Center for International Criminal Justice (VU University Amsterdam), 'Undesirable and Unreturnable? Policy Challenges around Excluded Asylum-Seekers and Migrants Suspected of Serious Criminality but who cannot be removed' [2016] <<https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf>> accessed 11 April 2018

²² See *supra* note 12, art. 8

²³ *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000, par. 38

However, in specific situations the Strasbourg tribunal has prevented removals based on art. 8 of the Convention. Some good examples of this are cases *Boultif v Switzerland*²⁴ and *Uner v the Netherlands*²⁵.

When determining the scope of protection of article 8, the Court uses some criteria to assess whether there has been a violation of the Convention:

“Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion”²⁶

Nevertheless, even if the ECtHR decides that the State Party cannot deport the applicant, it does not necessarily imply that h/she will be regularised. Although some authors suggest the idea of the potential of ECtHR’s decisions in the regularisation of the status of non-removable TCNs under art. 8²⁷ (basing their hopes in cases like *Rodrigues da Silva and Hoogkamer v the Netherlands*²⁸), the reality is that it ultimately lies on the discretion of the MS. For example, in countries like Germany the migrant would remain irregular

²⁴ *Boultif v Switzerland*, Application no. 54273/00, 2 August 2001

²⁵ *Üner v Netherlands*, Application No 46410/99, 18 October 2006

²⁶ *Nunez v. Norway*, Application no. 55597/09, 28 June 2011

²⁷ Daniel Thym, 'Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay?' [2008] *International and Comparative Law Quarterly* <<https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/respect-for-private-and-family-life-under-article-8-echr-in-immigration-cases-a-human-right-to-regularize-illegal-stay/0FC7513860C0FA7993C179EAC06B3D12>> accessed 11 April 2018

²⁸ *Rodrigues da Silva and Hoogkamer v the Netherlands*. Application No. 50435/99. 31 January 2006

but with a toleration status²⁹, therefore in one the limbo situations we are dealing with in this thesis. The wide margin of appreciation conferred to the States Parties in the control of migration makes the possibility of regularising status under art. 8 a not reliable option, as one can see through the inconsistency of the Strasbourg case law (for instance, in cases like *Omeregje v Norway*³⁰, the reasoning of the Tribunal lead to a very different conclusion).

1.3 Medical reasons: in very particular cases, the ECtHR has decided that sending a migrant back to a country where h/she will not be able to receive effective medical treatment when his/her health condition is very deficient can amount to a violation of art. 3 ECHR (extraterritorial effect). See for example *D v. the UK*³¹, concerning an HIV terminal patient.

However, not expulsing the migrant does not mean that h/she will be granted a residence permit, since there is no such an obligation for States Parties under the Convention. This is again a discretionary decision of the State. Therefore, we can find countries where this can be a ground for regularisation, while in others the person will remain in the legal limbo of non-removability (Austria, e.g., suspends the removal but does not automatically grant a permit)³².

2) Practical non-removability

In these scenarios, the migrant in an irregular situation cannot be sent back not due to legal or humanitarian obstacles, but for purely technical reasons. These include

²⁹ See German Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, art. 60a

³⁰ *Omeregje and Others v Norway*, Application no. 265/07, 31 July 2008

³¹ *D. v. the United Kingdom*, Application no. 30240/96, 2 May 1997

³² See supra note 1

difficulties with the identification of the migrant, lack of documentation and lack of cooperation of the country of origin with the return, among other impediments.

These obstacles constitute in the practice the biggest percentage of the total cases of non-removability³³. However, those who fall under these grounds enjoy a lower degree of protection under EU law compared to the ones not deported for legal reasons, since the EU Returns Directive does not oblige MS to formally postpone their removal (it just says they “may”)³⁴.

In most EU MS, when dealing with practical non-removability, a difference is made between those “cooperative” and those “non-cooperative”³⁵. Those defined as cooperative are migrants who cannot be sent back for practical reasons outside their control. Those labelled as “non-cooperative” are considered as such because of allegedly trying to impede the deportation by, for instance, hiding documents or not collaborating with the authorities.

The latter are the ones who have it more difficult within this subgroup to access regularisation. They are generally put in detention while trying to carry out the removal, until the legal maximum period is reached. After that, they are set free in a legal limbo status where they are de facto tolerated. They are labelled “exhausted returnees”, and in some countries they can even be subject to criminal sanctions, under the conditions set by the CJEU³⁶:

-they must have passed through all the stages of the return procedure (they must have complied with the maximum period of administrative detention)

³³ Communication COM (2014)199 of 28.3.2014 on EU Return Policy, p30

³⁴ See supra note 3, art. 9.2

³⁵ See supra note 4

³⁶ See CJEU rulings: C-61/11 PPU *El Dridi*, 28 April 2011 and C-329/11 *Achughbabian*, 6 December 2011

-They must have a non-cooperative attitude (they must have no legitimate ground for non-removal)

Therefore, in some MS they can be imprisoned after having exhausted the maximum term of administrative detention. That is why we can say they live between administrative detention, imprisonment and freedom-in-limbo.

3) Policy-based non-removability

These are reasons chosen by the particular MS to be a bar for removal. They are not required under international/EU law, but they are rather the discretionary decision of the State, who usually bases its choices on principles derived from national constitution. E.g.: concession of a temporary residence permit to victims of domestic violence in Spain.³⁷

³⁷ Ley Orgánica 4/2000 de 11 de Enero sobre Derechos y Libertades de los Extranjeros en España y su Integración Social (art. 31 bis) and Reglamento de la Ley Orgánica 4/2000, aprobado por Real Decreto 557/2011, de 20 de abril (arts. 131 to 134).

CHAPTER 2: CONSEQUENCES: HOW IS THE STATUS OF NON-REMOVABLE TCNs REGULATED UNDER EU LAW?

As we advanced, insofar the situation of non-removable migrants is not regularized, they stay in a liminal or atypical situation. Although still considered as illegally staying, they are tolerated (formally or de facto) by the national authorities, who do not enforce the removal. The aim of this section, therefore, is to analyse the concrete status in which unreturnable TCNs find themselves while they are in this situation of protracted non-removability, according to the standards set by the Returns Directive.

The EU Return Directive refers in a marginal way to the collective of our study in Recital 12, which reads: “the situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed”. However, in the same sentence, it states that “their basic conditions of subsistence should be defined according to national legislation.” As we can see, this is a politically sensitive topic, which is purposely left to the MS to regulate on. Moreover, this provision was intentionally moved from the text of the Directive to the Preamble (Recitals), therefore giving even more discretion to the MS on the topic. That is why, as a result, the policies put in place in the MS are not harmonized and vary enormously from country to country.

We will now deal with the specific provisions that are contained in the text of the Directive and are relevant in the definition of the status of non-removable TCNs.

Postponement of removal – legal limbo.

The removal can be either formally or informally postponed (leading to formal or de facto toleration). In both situations, in practice, the migrant will be in a liminal or a-legal position. S/he will still be considered irregular, but his/her stay will be tolerated. However, within this group, formal postponement brings more residence security to the non-removable TCN, as we shall see.

The Return Directive only contemplates formal toleration. This is the one that States are obliged to provide (“shall”) to those migrants who cannot be sent back due to non-

refoulement or due to having appealed a decision with suspensive effect (art. 9.1) and “may” provide in other situations contemplated in art. 9.2.

When removal is formally postponed according to art. 9, States are obliged to provide the person with a written confirmation that the return will temporarily not be enforced (see art. 14.2). This document, although not meaning any kind of regularisation, gives a minimum level of formality to their situation, avoiding at least arbitrary administrative detention. Moreover, apart from this written confirmation, some other safeguards apply in case of formal postponement, contemplated in art. 14.1. These are: family unity, education for minors, attention to vulnerability and emergency health care. The wording of the article leaves again a broad discretion to the MS, when stating that States “should” take into account, “as far as possible” that these principles are respected.

Moreover, as one can quickly realize, these rights are really minimal and leave the formally tolerated TCN still in a position of great precarity. Nothing is said about material reception conditions, such as housing, or essential rights to achieve integration, and make a dignified living, such as access to employment. The FRA has denounced in its reports that this list of rights is not comprehensive and does not include all the human rights obligations that States have towards irregular migrants under international law³⁸.

It is relevant to highlight that the reason why these fundamental rights are not contemplated in the text is not carelessness or oversight; but they were deliberately left aside for political interests. When the Return Directive was being discussed, the European Commission presented a proposal³⁹ (2005) in which it suggested the inclusion of similar

³⁸ See supra note 1

³⁹ European Commission “Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals” COM (2005)

rights for non-removable TCNs as the ones that are foreseen for asylum seekers under the Reception Conditions Directive, including material reception conditions and access to the labour market. However, due to the strong opposition of several MS in the Council Working Party on Migration (2006), this proposal was dismissed, and the list of safeguards was substantially narrowed. The arguments of the MS for sacrificing the human rights of non-returnable TCNs were based on the pull factor that enhancing their living conditions would have for other migrants. Different delegations claimed that assimilating the rights of non-removables to those of asylum seekers would be “upgrading”⁴⁰ the condition of irregular migrants and in some way “awarding” or “encouraging” illegality.

As we will see, if formal toleration under the Directive is not applied, MS deploy informal or de facto toleration. This happens mainly in cases where the Return Directive does not require the States to formally postpone the removal. If we have a look at article 9.2 we can see that under some circumstances States “may” (discretionarily) postpone the return: for instance, regarding the mental or physical state of the TCN or technical obstacles such as problems of identification.

In these situations, as it is not compulsory for the States to formally postpone the deportation, TCNs are usually just de facto tolerated. This means that the level of residence security is lower than in case of formal postponement, and that the safeguards of article 14 do not necessarily apply. This leaves the migrant in an even more uncertain and worse version of legal limbo.

Obligations of non-removable TCNs

They aim to prevent the risk of absconding. Some of these measures are deposit of a financial quantity, the submission of documents or the obligation to stay in certain place (art. 9.3). Obligations are contained in the text of the Directive, while the basic conditions

⁴⁰ European Council Document 13025/06, 16 October 2006

of subsistence for non-removable TCNs remain in the Recitals. ECRE notes with regret that most of the measures implying enforcement of return are drafted as ‘shall provisions’ or are worded as part of the text of the Directive, whereas most measures laying down safeguards for the rights of third country nationals during or prior to return procedures are drafted as ‘may provisions’ or contained in the Recitals, encouraging the wrong belief that migrants in an irregular situation are subjects without rights to whom the States can apply hard measures to ensure deportation⁴¹

Administrative detention

According to art. 14 of the Directive, detention of third country nationals in return procedures is a last resort, only possible “in order to prepare return and/or carry out the removal process, in particular, when there is a risk of absconding or the third-country national avoids or hampers the preparation of return or the removal process”. However, this risk of absconding is interpreted by many MS very widely and in cases of practical non-removability detention is often almost automatically applied. Even if the Commission issued a Return Handbook⁴² with guidance for MS on how to interpret the term, I believe – without underestimating the power of soft law – that including these guidelines in the wording of the article would provide a greater level of legal certainty and would enhance the protection against arbitrary deprivation of liberty.

⁴¹ ECRE, ‘Comments from the European Council on Refugees and Exiles on the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third country nationals’ [2005] <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Commission-proposal-to-recast-the-Reception-Conditions-Directive_-April-2009.pdf> accessed 20 April 2018

⁴² Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks. 27.9.2017. C(2017) 6505

According to art. 14, administrative detention can last for 6 months max, being extendable to 18 months in case of non-cooperation.

The provision contemplates as well that when it becomes clear that the return will be impossible to carry out, the person must be released. According to the CJEU, ‘a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods (the maximum periods for detention)’⁴³ Therefore, from the moment they are considered as non-removable, migrants cannot be detained any more.

Criminal sanctions

Criminal sanctions cannot be imposed only based on mere irregular entry or stay in the country. This would go against the purpose of the Return Directive, which is removal of undocumented TCNs from the territory of the Member States.

However, according to the CJEU, they can only be imposed “on third-country nationals to whom the return procedure established by the Return Directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return”⁴⁴. Therefore, they can only be executed against exhausted returnees, who have been released after having been administratively detained for the maximum legal period contemplated in the Directive and who do not cooperate with the authorities or hamper the removal.

Regularisation – end of limbo

There is not an obligation for MS to regularise the status of migrants who cannot be returned, not even when the Directive obliges them to formally postpone the removal.

⁴³ CJEU - C-357/09, PPU Said Shamilovich Kadzoev (Huchbarov), 30 November 2009

⁴⁴ See supra note 36

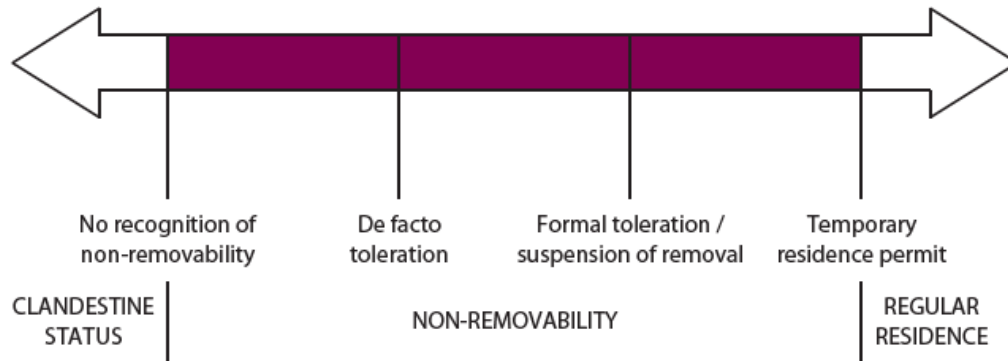
The only path to regularisation that the Directive contemplates is the possibility of the States granting a discretionary autonomous permit on humanitarian, compassionate or other reasons in case they choose to do it (art. 6.4). When dealing with the possibility of MS conducting case-by-case regularisations, the Commission's Handbook on Return proposes a list of factors that States should take into account:

- “– the cooperative/non-cooperative attitude of the returnee;
- the length of factual stay of the returnee in the Member State;
- integration efforts made by the returnee;
- personal conduct of the returnee;
- family links;
- humanitarian considerations;
- the likelihood of return in the foreseeable future;
- need to avoid rewarding irregularity;
- impact of regularisation measures on migration pattern of prospective (irregular) migrants;
- likelihood of secondary movements within Schengen area”⁴⁵.

⁴⁵ See supra note 42

CHAPTER 3: NATIONAL RESPONSES TO NON-REMOVABILITY

Figure 3: Degree of security of residence



Source: FRA, 2011

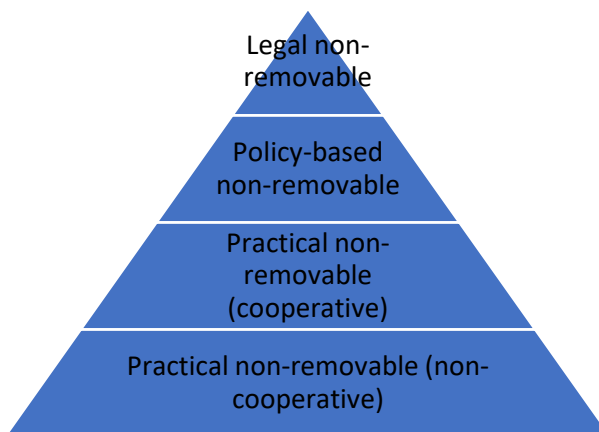
As we have seen, the wording of the Directive is very vague and leaves wide discretion for MS to choose what status to grant to non-removable TCNs. Therefore, the differences in status and rights granted depends a lot on the particular Member State, as the European Migration Network has carefully examined in its report on Concession of Non-Harmonized Protection Statuses in the EU MS⁴⁶.

As the FRA graphic shows, the range of possibilities goes from non-recognition of non-removability, where the migrant is in a clandestine situation and absconds from the authorities, to regularisation of residence, where the TCN's stay turns into legal stay. However, for the purpose of our research, we will focus our attention on the actual non-removability status, characterised by the acknowledgment and the toleration (either the facto or formal) of the irregular migrant by the national authorities of the MS. This limbo situation is the most common one in which unreturnable TCNs find themselves across the MS.

⁴⁶ See supra note 9

As we will now analyse, when making the decision on whether to grant a formal or de facto toleration status, and on what rights should be attached to each status, MS tend to follow a hierarchy of desirability of the non-removable TCNs.

Hierarchy of desirability in the MS and consequences regarding status and rights granted



The most desirable group (or the least unwanted) in the pyramid of non-removability is composed by those who cannot be sent back due to a legal obstacle. We can deduct this from the wording of art. 9.1. Those who are under non-refoulement protection or those whose removal is prevented due to the suspensive effect of their appeal are by default granted formal toleration. MS “shall” formally postpone the removal according to the Directive. Moreover, as previous studies on the topic prove, the rest of non-removable migrants for legal or humanitarian reasons (family life, medical status) are also in a quite a privileged position to access regularisation, the majority of MS providing channels for legalisation of their status⁴⁷.

⁴⁷ See the previous studies on the topic, supra notes 4,5,6 and 7

In between legal and practical non-removable, we find those who are unreturnable due to policy obstacles. This suspension of removal is not required by international or EU law, but discretionarily chosen by the MS.

After them, we have the practical non-removable. These are the ones that find it more difficult to access regularisation or formal toleration. Most of the times they are just de facto or informally tolerated, since they do not enjoy a right to have their removal formally postponed. Only if the State decides to do it, they “may” (but not “shall”) receive formal toleration.

Within this group, there are also degrees of desirability, being practical non-removable who are not considered responsible for the obstacle to their return (cooperative) upper on the pyramid.

Finally, at the bottom of the hierarchy, we find non-cooperative practical non-removable migrants, who are deemed to obstruct their deportation. These are the ones within the broad group of non-removable TCNs who have the least perspectives of having their postponement formalised or their stay regularised. Also, regarding deprivation of freedom, they are the ones who are often administratively detained for the maximum extended period (up to 18 months) and who can even be criminally sanctioned after having exhausted the return procedure (according to the CJEU cases *El Dridi* and *Achughbabian*⁴⁸). As a result, they live between administrative detention, criminal imprisonment and freedom-in-limbo⁴⁹.

⁴⁸ See supra note 36

⁴⁹ C Gosme, *Trapped between Administrative Detention, Imprisonment and Freedom-In-Limbo in Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (Springer 2016) p93

We will move on now to analyse the specific way in which 2 MS (Greece and Spain) are dealing with this issue, to see the different means deployed in different countries due to the lack of harmonisation resulting from the vagueness of the EU Directive.

We will focus on several points: type of toleration deployed, access to healthcare, access to work, access to housing and paths to regularisation

Non-removability in Spain

Kind of toleration: informal or de facto toleration.

The Return Directive was transposed into the “Ley Orgánica 4/2000, de 11 de enero, sobre Derechos y Libertades de los Extranjeros en España y su Integración Social”, amended by LO 8/2000, 14/2003 and 2/2009. Spain uses the model of de facto toleration, with no formal postponement being contemplated in the legislation.

To get an idea of the dimension of non-removability in the country, it is useful to compare the figures on how many migrants were administratively detained in the migration detention centres to prepare their removal and how many of them were eventually sent back. In 2017, out of 8.837 migrants who were detained, only 3.041 were effectively deported. This means that 65,5% (5.796) of the total number of detained migrants were set free⁵⁰, falling into the situation of freedom-in-limbo that characterizes non-removability.

⁵⁰ Europa Press, 'El 65,5% de los 8800 inmigrantes que pasaron por un CIE el año pasado no llegaron a ser expulsados' (*Europa Press Social, Migración*, 13/04/2018) <<http://www.europapress.es/epsocial/migracion/noticia-655-8800-inmigrantes-pasaron-cie-ano-pasado-no-llegaron-ser-expulsados-20180413172329.html>> accessed 20 April 2018

Administrative detention in Spain is limited to a maximum of 60 days, period after which the migrant will be released and cannot be re-detained (they are given a paper stating the number of days they spent in detention⁵¹).

After these 60 days in detention, and without the removal having been achieved, migrants have to be set free. When they are released, therefore, they find themselves in a state of legal limbo, where they cannot be sent back they are not regularised either, therefore, having a very limited access to basic social rights.

Access to employment

In the law: Right to access the labour market is not permitted under national law for non-removable migrants, since they are understood to be part of irregularly staying TCNs. No provision under Spanish law addresses their specific status, so they are only de facto tolerated but remain in irregularity. As long as they are not regularised, they cannot access employment.

In practice: The lack of access to the labour market throws migrants into destitution and forces them to engage in informal work, where they are often exploited.

In this context, the NGO SOS Racismo has denounced that migrants who are not regularized, and therefore, do not have access to work, have no option to survive but to involve in underground economy. They are helpless, and therefore accept situations of exploitation and labour precarity in order to subsist.⁵²

⁵¹ Real Decreto 162/2014, de 14 de marzo, por el que se aprueba el reglamento de funcionamiento y régimen interior de los centros de internamiento de extranjeros, art. 37.4

⁵² SOS Racismo, 'Informe Anual 2016, sobre el racismo en el Estado español' [2016] Tercera Prensa, p160 <<https://sosracismo.eu/wp-content/uploads/2016/09/2016-Informe-Anual-2016-definitivo.pdf>> accessed 21 May 2018

Access to healthcare

In the law: The current version of art. 3 ter Ley 16/2003 grants emergency healthcare as a minimum to all persons staying irregularly in Spanish territory, therefore including, although not mentioning, non-removable TCNs.

"Foreigners not registered or authorized as residents in Spain, will receive healthcare in the following ways:

a) Emergency due to serious illness or accident, whatever its cause, up to the situation of medical discharge.

b) Assistance to pregnancy, childbirth and postpartum.

In any case, foreigners under the age of eighteen will receive health care under the same conditions as Spaniards. "

This provision was amended by Royal Decree-Law 16/2012 on 20 April 2012 "on urgent measures to ensure sustainability of the national health system and to improve the quality and safety of its services"⁵³, which was adopted as part of the austerity measures and which excluded irregular migrants from healthcare and limited their access to healthcare to situations of emergency.

Before that, the right to healthcare in Spain was universal, and the migrants who were enrolled in the municipality (irrespective of their administrative status) could access it under the same conditions as Spanish citizens.

The Committee on Elimination of Racial Discrimination (CERD), in its concluding observations and recommendations to Spain, in May 2016, strongly criticized this legislative change, expressing its concern for the exclusion of undocumented migrants from healthcare and considering it a regressive measure with a high negative impact on

⁵³ Real Decreto-ley 16/2012, de 20 de abril, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones.

the right to health of this collective. Therefore, it recommended Spain to “reinstating universal health care so as to ensure the right to health without discrimination”⁵⁴

In the same line, the European Committee of Social Rights stated in November 2014 that “the economic crisis cannot serve as a pretext for a restriction or denial of access to healthcare that affects the very substance of the right of access to healthcare”, and expressed its concern about Spain’s “regressive legislative developments concerning access to health care by foreigners illegally present in the country.”⁵⁵

Although only emergency health care is granted at national level, the level of protection offered varies depending on the region, most Autonomous Communities providing health care beyond only emergencies, therefore trying to bypass the limitation established by the national law by implementing regulations regarding access to healthcare for undocumented migrants. They can do this thanks to the regional competencies they enjoy in the sphere of health.⁵⁶

For instance, the government of the Autonomous Community of Extremadura enacted a law to fight social exclusion, providing access to healthcare for undocumented migrants residing for more than 6 months in the region.⁵⁷

⁵⁴ Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twenty-first to twenty-third periodic reports of Spain. CERD /C/ ESP /CO/ 21-23, 13 May 2016

⁵⁵ European Committee of Social Rights. Conclusions XX-2 (ESPAGNE) on Articles 3, 11, 12, 13 and 14 of the 1961 Charter. November 2014, p14

⁵⁶ Paul Schoukens and Siemen Buttiens, 'Social protection of non-removable rejected asylum-seekers in the EU: A legal assessment' [2017] European Journal of Social Security p16

⁵⁷ Decree-law 1/2016, of May 10, on extraordinary measures against social exclusion <<https://www.boe.es/buscar/pdf/2016/BOE-A-2016-7692-consolidado.pdf>>, in Médecins du Monde, 'Access to healthcare in 16 European countries: 2017 legal report' [2017] European Network to Reduce Vulnerabilities in Health, p129 <https://mdmeuroblog.files.wordpress.com/2014/01/2017_final-legal-report-on-access-to-healthcare-in-16-european-countries.pdf> accessed 25 May 2018

In practice: the amendment of the law has left thousands of migrants without the right to access healthcare, as it has been documented by different NGOs in their reports, such as RedAcoge⁵⁸ or REDER⁵⁹.

We can get an idea of the number of people affected by it by attending to the words that the then president of the government pronounced at the Parliament after modifying the law, assuring that 873.000 health cards had been withdrawn to migrants who were previously benefiting from access to healthcare “without having the right to do so” because of being undocumented.⁶⁰

Moreover, as explained, the extent to which irregular migrants can access to healthcare differs across the country and depends on the particular region (autonomous community) where the migrant resides. The existence of these “parallel health systems” creates inequality, disparity and confusion.⁶¹

Fortunately, the recently appointed socialist government in Spain is preparing a new decree to go back to universality and entitle irregular migrants to have access to healthcare under the same conditions as Spanish nationals again. Hence, most probably,

⁵⁸ RedAcoge, 'Los efectos de la exclusión sanitaria en las personas inmigrantes más vulnerables' [2015] <http://redacoge.org/mm/file/2015/Jur%C3%ADdico/Informe%20Sanidad%20RED_ACOGE.pdf> accessed 30 May 2018

⁵⁹ REDER, 'Radiografía de la reforma sanitaria La Universalidad de la Exclusión' [2015] <<https://www.medicosdelmundo.org/actualidad-y-publicaciones/publicaciones/informe-reder-radiografia-de-la-reforma-sanitaria-la-0>> accessed 30 May 2018

⁶⁰ Cortes Generales, 'Presidencia del Excmo Sr D Jesús Posada Moreno Sesión plenaria núm 85' (*Diario de Sesiones del Congreso de los Diputados*, 20/02/2013) <http://www.congreso.es/public_oficiales/L10/CONG/DS/PL/DSCD-10-PL-91.PDF> accessed 31 May 2018

⁶¹ See supra note 18

undocumented migrants will be able to recover their right to access to healthcare in a few months.⁶²

Access to housing

In the law: Spanish legislation does not provide non-removable migrants with the right to housing. In a phone interview held with Jose Javier Sánchez Espinosa (Vice-Director of Social Inclusion at the Spanish Red Cross), he stated that the only moment when migrants whose removal has been de facto postponed are offered accommodation is when they are released from administrative detention, either because the maximum legal period has been reached without being able to carry out the deportation, or because it has become clear that removal will not be possible in the foreseeable future. After they are set free, they are given the possibility of being housed in a humanitarian reception centre (“Centro de Acogida Humanitaria a Inmigrantes”) run by the Red Cross (in cooperation with and funded by the Ministries of Employment and Interior), for a maximum of 3 months (extendable to 6 in case of vulnerability).

In practice: After this maximum period has elapsed, non-removable migrants have to leave the humanitarian reception centre, and therefore they find themselves on the street. As they are considered irregular although being de facto tolerated, they do not have access to the labour market, as it has been mentioned. The lack of the right to work plus the lack of the right to housing condemn them to destitution and homelessness, as it has been denounced by PICUM.⁶³

⁶² Emilio de Benito, 'Sánchez devolverá la sanidad a los inmigrantes irregulares' (El País, Sanidad, 16/06/2018) <https://politica.elpais.com/politica/2018/06/15/actualidad/1529059447_733412.html> accessed 16 June 2018

⁶³ PICUM, 'Housing and Homelessness of Undocumented Migrants in Europe: Developing Strategies and Good Practices to Ensure Access to Housing and Shelter' [2014] <http://picum.org/Documents/Publi/2014/Annual_Conference_2013_report_HOUSING_EN.pdf> accessed 31 May 2018

Pathways to regularisation

In the law: Spanish legislation does not contemplate explicitly any channel through which a TCN whose removal has been postponed can access legalisation of her administrative situation.

Therefore, unreturnable migrants can only regularize their status through the same means as the rest of the general group of irregular migrants.

During history, several exceptional plans of massive regularisation of irregular migrants have been put into place. They were based mainly on regularisation through work. The last one was conducted in 2005 by the government of José Luís Rodríguez Zapatero, with around 800.000 beneficiaries.

However, Spanish legislation contemplates also some permanent mechanisms of regularisation of irregular migrants. These are based on the migrant's "rooting" in the country. There are 3 kinds of residence permit that can be grant due to rooting:

-“Employment rooting” (“arraigo laboral”), where migrants need to provide evidence that they have been living in Spain for a minimum of two years, have had an irregular employment relationship for more than 6 months (this is proven by denouncing the employer), and does not have a criminal record in any country where they have resided for the previous 5 years.

-Having social roots (“arraigo social”) in Spain also provides a chance of obtaining a temporary residence and work permit, if the migrant can give evidence that she has been residing in Spain for more than 3 years, has no criminal record for the previous 5 years, has family ties with other foreigners in Spain or can get a report from the municipality or the Autonomous Community where she resides giving proof of her social inclusion; and last, if she can present a signed job contract for at least a year (full-time) at the moment of applying for the permit.

- Last, a migrant in an irregular situation who is the parent and legal guardian of a Spanish national under 18 years old may also apply for a temporary residence and work permit under “family rooting” scheme (“arraigo familiar”).⁶⁴

In practice:

The requirements are difficult to comply with. Regarding the employment rooting, the main obstacle is that migrants are afraid of denouncing their employer to prove that they had an irregular employment relationship.

As for the social rooting, the one-year full-time contract requirement makes it almost unachievable, especially considering the current situation of crisis and the high unemployment rate existent in the country, as it has been denounced by JRS Europe.⁶⁵

Last, the third path to regularisation (family rooting) requires being the parent of a Spanish national, which is a very specific circumstance, so it is not that frequently applied in reality.

The new President of the Government, Pedro Sánchez, has in several occasions expressed his willingness to conduct a new plan of massive regularisation to give residence permits to the undocumented migrants staying in Spain⁶⁶. However, these are only comments that he has made during media interviews, and there is still no real policy proposal about it.

⁶⁴ See PICUM, 'Undocumented Migrants and the Europe 2020 Strategy: Making social inclusion a reality for all in Spain' [2017] p18 <http://picum.org/wp-content/uploads/2017/11/UndocumentedMigrantsandEurope2020StrategyinSpain_EN.pdf> accessed 27 May and Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, art. 124

⁶⁵ Jesuit Refugee Service Europe, 'Living in Limbo: Forced Migrant Destitution in Europe' [2010] p112 <<http://lastradainternational.org/lisidocs/JRS%20Europe%20Living%20in%20Limbo.pdf>> accessed 28 May 2018

⁶⁶ Europa Press, 'Pedro Sánchez daría permiso de residencia a todos los inmigrantes irregulares que residen ahora en España' (*Europa Press Social, Sociedad*, 24/06/2016)

Non-removability in Germany

Kind of toleration: formal toleration

A *Duldung* (tolerated stay) is a document which formally certifies postponement of removal. The legal basis for the *Duldung* can be found on Article 60a the Residence Act⁶⁷.

Art. 60a.4 establishes that “The foreigner is to be issued with a certificate confirming the suspension of deportation”. This certificate is not a residence permit, since the migrant is still under the obligation to leave the country when the impediment to removal is over: “suspension of deportation shall not affect the foreigner’s obligation to leave the Federal territory.” (60a.3) When the circumstances justifying suspension of removal cease to apply, the *Duldung* will be immediately revoked and the person will be deported.

Deportation of a foreigner shall be suspended for as long as removal is impossible in fact (practical impediments) or in law (human rights/humanitarian impediments) and no residence permit is granted. (art. 60a.2) Toleration can be granted as well for “reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany” (60a.1) A migrant may also be granted a temporary suspension of deportation if his or her continued presence in the federal territory is necessary on urgent humanitarian or personal grounds, or due to substantial public interests (60a.2)

Regarding the number of non-removable TCNs present in Germany, it has been calculated that around 86,000 migrants have *Duldung* status, of whom around 53,000 have been in Germany for longer than ten years⁶⁸.

<<http://www.europapress.es/sociedad/noticia-pedro-sanchez-daria-permiso-residencia-todos-inmigrantes-irregulares-residen-ahora-espana-20160624125328.html>> accessed 29 May 2018

⁶⁷ Aufenthaltsgesetz, AufenthG (Residence Act)

⁶⁸ Pro Asyl, Caritas und Diakonie, 'Für eine neue Bleiberechtsregelung', p6 [2011], in ECRE, 'Point of no Return: the Futile Detention of Unreturnable Migrants' [January 2014] A face to the story

Access to employment

In the law: Migrants with a Duldung are not allowed to work during their first three months of their residence in Germany Art. (waiting period)⁶⁹. The Foreigners' Registration Authority (Ausländerbehörde) can issue an employment prohibition even after the first three months of residency if it considers that the migrant is responsible for the impossibility of return. In all other cases, employment is allowed only with permission of the Foreigners' Registration Authority and it is subordinated, meaning that the non-removable TCN will only have access to the job in case where there are not any other interested candidates who have priority (German nationals, EU citizens or regular residents TCNs). After 15 months, the priority test will be withdrawn, but the Federal Authority will still have to review the working conditions of the specific job and approve it before the migrant can accept the offer.

After 4 years, the restriction is lifted and holders of a Duldung get full access to the labour market (no priority test and no need for permission of the Foreigner's Registration Authority).

In practice: Due to the temporary nature of the toleration status, many employers refrain from employing third-country nationals holding a Duldung.⁷⁰

Access to healthcare

In the law: Non-removable migrants enjoy a higher minimum than just emergency health care. Their rights are equivalent to those of asylum seekers, since the Asylbewerberleistungsgesetz (Asylum Seekers' Benefit Act), includes those foreigners

<https://www.ecre.org/wp-content/uploads/2014/01/pointofnoretturn.eu_wp-content/uploads_2014_01_Point_of_no_return.pdf>

⁶⁹ Verordnung über die Beschäftigung von Ausländerinnen und Ausländern - Beschäftigungsverordnung – BeschV (Employment Regulation), art. 32

⁷⁰ See supra note 9

who “have a tolerance according to § 60a of the Residence Act” within the list of beneficiaries (art. 1)

The legal basis for the right to healthcare of non-removable migrants can be found on art. 4) of the mentioned Act:

“(1) Treatment of acute diseases and conditions of pain, the necessary medical and dental treatment, including the supply of medicines and bandages, as well as other services necessary for the recovery, improvement or alleviation of diseases or disease outcomes, shall be granted. Prevention and early detection of diseases and vaccinations are provided in accordance with §§ 47, 52 paragraph 1 sentence 1 of the Twelfth Book of the Social Code and the medically required preventive medical check-ups. A supply of dentures is only possible, as far as in individual cases for medical reasons is not postponed. (2) Maternal and maternity wives shall be provided with medical and nursing assistance and support, midwife assistance, medicines, dressings and remedies. (3). The competent authority shall ensure the supply of the services referred to in paragraphs 1 and 2. It also ensures that beneficiaries are offered early completion of their vaccine protection”.

However, the law contemplates the possibility for holders of a Duldung to get access to full healthcare coverage, under the same conditions as German citizens. In order to get this, the non-removable TCN must have been living in Germany for at least 15 months and must have a cooperative attitude (s/he must not hamper his/her removal)⁷¹

In practice: Access to health for non-removable migrants is very limited. The interpretation of the terms “acute diseases” and “pain” is problematic, since its

⁷¹ Asylbewerberleistungsgesetz (Asylum Seekers' Benefit Act), art. 2.1

appreciation is very subjective.⁷² Therefore, many people actually suffering from serious health problems may be left outside the protective scope of the provision.

Access to housing

In the law: Non-removable migrants holding a Duldung are in principle not free to reside wherever they want in the German Territory. According to art. 61.1 of the Residence Act, “the stay of a foreigner who is enforceably required to leave the Federal territory shall be restricted in geographic terms to the territory of the Land concerned” This legal requirement is called “*Residenzpflicht*” and obliges them to stay in a concrete administrative district.

As to the possibility to access accommodation, non-removable tolerated migrants are entitled to basic welfare, including clothes, housing, food, etc., as well as allowances in cash, according to art. 3.1 of the Asylum Seekers’ Benefits Act.

Duldung holders are normally placed in shared accommodation centres run by the municipal authorities, as happens with asylum seekers⁷³.

In practice: In Germany, non-removable migrants are in general obliged to stay in assigned accommodation centres within a certain area, and only in exceptional circumstances are they allowed to stay in private houses.⁷⁴ The Jesuit Refugee Service denounces the same, stating that “holders of tolerations do not have the right to move out of the shared accommodation centre. It is based on the discretion of the relevant authority to decide whether in exceptional circumstances a holder of a toleration can reside in

⁷² Heide Castañeda, 'Paradoxes of Providing Aid: NGOs, Medicine, and Undocumented Migration in Berlin, Germany' [2007] The University of Arizona

⁷³ Federal Office for Migration and Refugees, 'Approaches to rejected asylum seekers in Germany: Focus-Study by the German National Contact Point for the European Migration Network (EMN)' [2016] <https://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Studien/wp69-emn-umgang-abgelehnten-asylbewerbern.pdf?__blob=publicationFile> accessed 1 June 2018

⁷⁴ See supra note 1, p67

private accommodation: the general public interest is balanced against the private interest of the holder of a toleration”⁷⁵

Pathways to regularisation

There are several ways through which a tolerated non-removable migrant can regularize her status. A Duldung can turn into a residence permits on humanitarian grounds, for the purpose of employment of qualified foreigners or on the basis of integration in Germany⁷⁶.

Art. 25 of the Residence Act contemplates the possibility of regularisation for humanitarian reasons. Section 4 states that “a foreigner who is enforceably required to leave the Federal territory may be granted a residence permit if his or her departure is impossible in fact or in law and the obstacle to deportation is not likely to be removed in the foreseeable future.” The requirements are that the deportation has been suspended for 18 months and that the foreigner is cooperative with the deportation, that is to say, that she is not responsible for the non-removal (by for instance, giving false information, hiding her identity or nationality or in general putting obstacles for the deportation).

Another path to regularisation is the concession of a residence permit for the purpose of employment of qualified foreigners. Art. 18.a of the Residence Act establishes that “a foreigner whose deportation has been suspended may be granted a residence permit for the purpose of taking up employment commensurate with his or her vocational qualification if the Federal Employment Agency has granted approval (...)”. The migrants need to meet a long list of requirements, like having completed a vocational qualification or having been working for a period of time as a skilled worker in Germany,

⁷⁵ See supra note 63, p32

⁷⁶ Federal Office for Migration and Refugees, 'Opportunities to change the residence title and the purpose of stay in Germany: Focus-Study by the German National Contact Point for the European Migration Network (EMN)' [2016] <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/wp_67_changes_in_immigration_status_und_purpose_of_stay_en.pdf> accessed 31 May 2018

having a place to live at their disposal, commanding German language, not having a criminal record and having been cooperative throughout the removal procedure, among others.

The third set of regularisation opportunities is based on integration in the country.

On the one hand, art. 25 (b) of the Residence Act contemplates the granting of a residence permit to those migrants who are holders of a Duldung and who have been lastingly integrated in the country. In order to prove that sustainable integration, the non-removable TCN needs to give evidence that s/he:

- “1. has resided in the federal territory for at least eight years or, in the event that he or she is living with a minor, unmarried child as a family unit, for at least six years without interruption by virtue of his or her deportation having been suspended, on the basis of permission to remain pending the asylum decision or by holding a temporary residence or permanent settlement permit,
2. is committed to the free democratic basic order of the Federal Republic of Germany and possesses a basic knowledge of the legal and social system and the way of life which prevails in the federal territory,
3. ensures his or her subsistence primarily by means of pursuing an economic activity or it is to be expected, when considering his or her previous educational, training, income and family situation, that he or she will be able to ensure his or her subsistence within the meaning of Section 2 (3), whereby the drawing of housing benefits shall not be detrimental thereto,
4. possesses sufficient oral command of the German language pursuant to Level A2 of the Common European Framework of Reference for Languages and
5. can furnish proof that his or her school-age children are actually attending school.”

Last, a specific regularisation pathway is defined in art. 25 (a) for well-integrated non-removable young people and adolescents. The requirements are the following:

- “1. he or she has been resident in the federal territory for four years without interruption, either by virtue of holding a temporary residence or permanent settlement permit, by virtue of his or her deportation having been suspended or by holding permission to remain pending the asylum decision,
2. he or she has successfully attended a school in the federal territory for, as a rule, four years or has acquired a recognised vocational or school-leaving qualification,
3. the application for the temporary residence permit is filed prior to his or her reaching the age of 21,
4. it appears, on the basis of the child’s education and way of life to date, that he or she will be able to integrate into the way of life which prevails in the Federal Republic of Germany and
5. there is no concrete evidence to suggest that the foreigner is not committed to the free democratic basic order of the Federal Republic of Germany.”

CHAPTER 4: HUMAN RIGHTS CONCERNS: RIGHT TO DIGNITY OF EVERY PERSON

As stated in the report prepared by Ramboll and EurAsylum for the European Commission, “since the majority of the study countries do not have specific legal provisions, standard procedures or even terminology for dealing with non-returnable third country nationals, issues and obstacles occur in most countries and in several of them, third-country nationals pending return or removal can be said to be *de jure* and/or *de facto* in a legal vacuum”⁷⁷

This situation is mainly due to the fact that the safeguards contained in the Directive for postponed removal are not enough to ensure that the dignity of unreturnable TCNs is respected. They are vague and do not include essential rights closely linked to human dignity such as the right to work or to material reception conditions.

As a landmark for human rights protection, despite its non-binding character, the Universal Declaration of Human Rights (UDHR) grants the civil and political rights and economic, social and cultural rights contained in it to everyone, with no distinction of any kind; therefore, regardless of administrative status.

In the same line, the Parliamentary Assembly of the Council of Europe affirmed that “as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.”⁷⁸

⁷⁷ See supra note 4, p77

⁷⁸ Parliamentary Assembly of the Council of Europe (PACE CoE), 'The human rights of irregular migrants' [2006] Recommendation no 1755, PACE Doc. 10924, par. 5

The Committee of Ministers of the Council of Europe, in a similar fashion, has recommended the States parties to:

“[...] recognise, at national level, an individual universal and enforceable right to the satisfaction of basic material needs (as a minimum: food, clothing, shelter and basic medical care) for persons in situations of extreme hardship.”, emphasizing that “the exercise of this right should be open to all citizens and foreigners, whatever the latter’s position under national rules on the status of foreigners, and in the manner determined by national authorities.”⁷⁹

Specifically, in relation to economic, social and cultural rights, the Committee on Economic, Social and Cultural Rights, in its General Comment No. 20 on non-discrimination in economic, social and cultural rights states that the Covenant rights apply to everyone, regardless of their legal status and documentation. Therefore, it grants equal protection to regular and irregular migrants.⁸⁰

The extent to which irregular migrants are entitled to access basic human rights is however not clear-cut, especially concerning economic, social and cultural rights. We should therefore analyse now how these are concretely articulated in international and regional human rights law to see their applicability to migrants in an irregular administrative situation. The focus will be on the health, work and housing, which pose

⁷⁹ Committee of Ministers of the Council of Europe (Recommendation No. R (2000) 3 of the Committee of Ministers to Member States on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship (Adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers’ Deputies))

⁸⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20

the main problems to non-removable irregular migrants because of their difficulties to access to them and the importance of these rights to live a dignified life.

Analysis of selected economic, social and cultural rights under human rights law and their applicability to migrants in an irregular situation

Right to health

The right to health is a fundamental right that is necessary for ensuring human dignity⁸¹.

Art. 25 of the Universal Declaration of Human Rights⁸² states that “everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”. It applies to everyone, without discrimination⁸³ based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*”.

Moreover, it is enshrined in multiple international and regional human rights instruments, as we will subsequently analyse.

International Covenant on Economic, Social and Cultural Rights

Art. 12.1 of the ICESCR⁸⁴ reads that State Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Same as with the other rights under this convention, States must respect, protect and fulfil the right to health. Furthermore, the CESCR, in its General Comment No 14 (2000)⁸⁵, confirmed that undocumented migrants are also entitled to this right: “States are

⁸² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

⁸⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

⁸⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4

under the obligation to respect the right to health by inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers *and illegal immigrants*, to preventive, curative and palliative health services”

European Social Charter

At the regional level, the European Social Charter (ESC)⁸⁶ of the Council of Europe contains health rights in Articles 11 and 13. Notwithstanding, the extent to which they apply to irregular migrants is questionable, since initially only nationals of the States Parties to the European Social Charter and legal resident immigrants are entitled to the rights contained therein (personal scope of the Charter).

According to the Appendix to the ESC, “without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”⁸⁷

However, the European Committee on Social rights has softened this limitation through its decisions. In *International Federation of Human Rights League (FIDH) v. France* it concluded that any “legislation or practice, which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter”⁸⁸. The reasoning of this quasi-judicial body was that the restriction in the Appendix affects a wide variety of social rights and impacts on them in

⁸⁶ Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163

⁸⁷ *Id.*, Appendix

⁸⁸ European Committee of Social Rights. *International Federation of Human Rights Leagues (FIDH) v. France*. Complaint No. 14/2003. Par. 32

different ways.⁸⁹ Therefore, each situation must be examined on a case-by-case basis⁹⁰. In this specific case, the right at stake (the right to healthcare) was understood to be especially fundamental, since it is intimately linked to the right to life and human dignity, core of European human rights law. Moreover, the restriction negatively affected children since it denied them access to healthcare unless they had been residing in France continuously for a period of time or were in an emergency or life-threatening condition⁹¹. As a result, the Committee included irregular migrants within the protective scope of the Charter, despite the initial limitation set by the Appendix.

As we can see, the rationale under these decisions is that everyone should enjoy basic social rights regardless of her/his administrative situation, since they are essential to safeguard the right to human dignity and must be granted to every person without discrimination⁹².

⁸⁹ Id., par. 30

⁹⁰ Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, par.70

⁹¹ See supra note 42, par. 12

⁹² Also at Council of Europe level, and going far beyond the protection offered by the European Social Charter, a recent and very timely soft law instrument deals with irregular migrants' access to rights without discrimination. See Maria Daniella Marouda, On safeguarding irregularly present migrants from discrimination: ECRI's innovative new General Policy Recommendation no 16. in , *Liber Amicorum Stelios Perrakis* (ISIDERIS Publications 2017), on the proposal of the creation of a firewall between migration control and provision of services to prevent public and private actors from denying access to human rights to irregularly staying TCNs. This, in the sphere of health, would mean for instance to “ensure that health service providers do not require documentation relating to immigration or migratory status for registration which irregularly present migrants cannot procure” (par. 22)

European Convention on Human Rights

According to Article 1 of the Council of Europe’s ECHR,⁹³ States Parties ‘shall secure to everyone within their jurisdiction the rights and freedoms’ set forth by the Convention, therefore including irregular migrants under its protective scope.

Although the European Convention of Human Rights covers civil and political rights and does not contain in principle economic, social and cultural rights apart from the right to education (Art. 2, Prot. No. 1) and the right to property (Art. 1, Prot. No. 1), the Court has indirectly protected some social rights which can be relevant to migrants in an irregular situation, like the right to health.

Right to health is indirectly covered under articles 2 (right to life) and 3 (right to be free from torture, inhuman or degrading treatment or punishment) of the Convention. The Strasbourg court has stated in many decisions that States have an obligation to provide health care to the whole population, and in case they fail to do so, responsibility will arise under the ECHR⁹⁴. For instance, in *Cyprus v Turkey*, it considered that that “an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally. It notes in this connection that Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction”⁹⁵

⁹³ See supra note 12

⁹⁴ Yannis Ktistakis, 'Protecting Migrants Under the European Convention on Human Rights and the European Social Charter: A Handbook for Legal Practitioners' [2013] Council of Europe Publishing <<https://rm.coe.int/168007ff59> > accessed 10 May 2018

⁹⁵ *Cyprus v. Turkey* (GC). Application no. 25781/94, 10 May 2001

Regarding art. 3, in *Pretty v. UK*⁹⁶ the Court 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”.

Charter of Fundamental Rights of the European Union

The most important human rights text at European Union level also contains a provision on the right to health. Article 35 of the Charter of Fundamental Rights of the European Union⁹⁷ establishes that “everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

The right to access to healthcare is also intimately related to art. 1 of the Charter, which recognizes the right to dignity of every human being.

According to article 51, the rights contained in the Charter bind European Union institutions and Member States only when applying European Union law. This means that when Member States are dealing with non-removability by implementing the Return Directive, they must respect the rights included in the Charter.

Although being recognized as a fundamental right in many international and European human rights texts, the extent to which irregular migrants can access health care is not clear and, as a result, the national practices are very different across the Member States. This has been denounced by FRA, who held that: “the limited enforceability of legally binding international law provisions on the right to health, the vague language used (such as adequate care) combined with the need to implement international and European

⁹⁶ *Pretty v. United Kingdom*. Application no. 2346/02, 29 April 2002

⁹⁷ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02

standards in countries with very different healthcare systems, has led to a divergent understanding and application of the existing legal framework across the EU and resulted in different healthcare services offered to migrants in an irregular situation”⁹⁸

Nevertheless, even if access to healthcare for irregular migrants is granted, it is obvious that this alone is not enough to protect their human rights and dignity. Due the interdependency of human rights, if other important social rights are not ensured too, the right to health will be ineffective.

This inherent relationship has been underlined by the CESCR in General Comment no. 14, where it affirmed that: “the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.”⁹⁹

Therefore, right to access healthcare would be pointless if irregular migrants are not granted at the same time other basic rights like the right to access employment and adequate housing. This has also been emphasized somehow by the CJEU in relation to non-removable TCNs, in *Abdida* case, in which the Luxembourg Court stated that the right to the provision of health care would be ‘rendered meaningless if there were not also

⁹⁸ European Union Agency for Fundamental Rights, 'Migrants in an irregular situation: access to healthcare in 10 European Union Member States' [2011] pp.12-13 <<http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-access-healthcare-10-european-union-member-states>> accessed 11 May 2018

⁹⁹ See supra note 55

a concomitant requirement to make provision for the basic needs' of the person concerned.¹⁰⁰

Right to work

The right to work is an essential human right necessary to earn one's living and in this way be able to fulfil other fundamental rights. It is enshrined in art. Article 23 of the UDHR, which guarantees everyone "the right to work, to free employment, to just and favourable conditions of work and to protection against unemployment.". According to section 2 of the provision, it applies to everyone, without discrimination.

Although the Declaration has no legal force, the right to work is widely recognized in different legally binding human rights text, both at international and regional level.

International Covenant on Economic, Social and Cultural Rights

Art. 6.1 ICESCR reads as follows: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

This right does not mean that everyone is to be guaranteed an employment, but that every person is to be granted the opportunity to access the labour market.

However, art. 2.3 ICESCR contains a limiting clause (which applies to the rights under the Covenant), by stating that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." Therefore, in principle and according to the wording of this provision, developed countries should not limit the rights of non-nationals under the Covenant.

¹⁰⁰ CJEU-C-562/13, Abdida, judgment of 18 December 2014

Nonetheless, Hathaway finds it difficult to argue that according to the wording of art 2.3, developed States “do have a duty to allow non-citizens to work”, since “neither state practice nor the pattern of inquiry before supervisory bodies is in line with such a construction”¹⁰¹

Not granting the right to work may eventually be a synonym of not granting subsistence rights, putting the right to life at risk as a consequence. As the CESCR noted in General Comment no 18, “the right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community”. The income from work enables the realization of survival rights, such as food, housing and health, and aids in achieving other socio-economic rights such as education and culture¹⁰².

As stated by the Soviet Union during the drafting of the ICESCR, “virtually all the other rights” in the Covenant “would be illusory without a real guarantee of the right to work”¹⁰³

European Social Charter

At Council of Europe level, it is contestable whether the right to work under the European Social Charter applies to undocumented migrants. As it has been discussed in the previous sections, the Charter in principle limits its personal scope to legally resident migrants.

¹⁰¹ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) p771

¹⁰² Saul Ben and others, *The International Covenant on Economic, Social and Cultural Rights: commentary, cases and materials* (Oxford University Press 2014) p273

¹⁰³ Id., p272. UNGA Third Committee, A/C.3/SR.709 (13 December 1956), 142 (USSR)

However, as we saw, when deciding on very specific cases, the Committee has departed from this limitation and has included also irregular migrants under its protective sphere. This has been the case when dealing with the rights to healthcare and housing.

However, the Committee made clear that this bypass of the Appendix happens only under very exceptional circumstances:

“However, although the restriction of personal scope contained in the Appendix does not prevent the application of the Charter's provisions to unlawfully present foreign migrants (...) in certain cases and under certain circumstances, the Committee wishes to underline that an application of this kind is entirely exceptional. It would in particular be justified solely in the event that excluding unlawfully present foreigners from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights (such as the right to life, to the preservation of human dignity, to psychological and physical integrity and to health) and would consequently place the foreigners in question in an unacceptable situation, regarding the enjoyment of these rights, as compared with the situation of nationals and of lawfully resident foreigners.”¹⁰⁴

Therefore, the limitation, in general, continues to apply:

“Since it is exceptional to apply the rights enshrined in the Charter to persons not literally included in the Charter's scope under paragraph 1 of the Appendix, the Committee considers that this category of foreigners (...) is not covered by all the provisions of the Charter, but solely by those provisions whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons

¹⁰⁴ Defence for Children International (DCI) v. Belgium, Complaint No. 69/2011, decision on the merits of 23 October 2012, par. 35

concerned by the provision in question from serious threats to the enjoyment of those rights.”¹⁰⁵

Even though excluding irregular migrants from the right to work has clearly serious consequences for the fulfilment of their most fundamental human rights and the preservation of their dignity, the case law of the Committee has only addressed the bypassing of the Appendix’s limitation in relation to the right to healthcare and housing and has so far been mute on whether the right to work should cover also undocumented migrants. Their protection under the European Social Charter remains therefore weak and unclear.

Charter of Fundamental Rights of the European Union

Art. 15 of the EU Charter contains the right to work. However, the provision explicitly mentions it in relation to EU citizens and third country national who have the right to work in the EU.

Notwithstanding, the right to work of non-removable irregular TCNs could be grounded on article 1 of the Charter, which grants the right to dignity to everyone. As we have seen, access to work is a prerequisite to realize other human rights which are necessary for survival and for a dignified life.

However, as examined in Chapter 2, the Return Directive does not contain a right for non-removable irregular migrants to access employment. They are nevertheless allowed to open up their labour markets for this group due to the exception in Article 3(3) of the Employers’ Sanctions Directive:¹⁰⁶

“Article 3 Prohibition of illegal employment

¹⁰⁵ Id., par. 36

¹⁰⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

1. Member States shall prohibit the employment of illegally staying third-country nationals.
2. Infringements of this prohibition shall be subject to the sanctions and measures laid down in this Directive.
3. A Member State may decide not to apply the prohibition referred to in paragraph 1 to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law.”

Hence, the extent to which non-removable migrants can access the labour market is to be decided discretionarily by each Member State. As a result, the policies in this regard vary widely across the European Union. There are three types of Member States. The first group does not guarantee access to work at all. The second group grants access to the labour market based on the concession of a formal toleration status. Finally, in the third group of Member States, unreturnable TCNs have the right to access employment thanks to a temporary residence permit granted by the MS.¹⁰⁷

Right to housing

As a starting point, the right to housing is enshrined in the UDHR, which in its art. 25 establishes that “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 and necessary social services, and the right to security in the

¹⁰⁷ European Migration Network, ‘Synthesis Report for the EMN Focussed Study 2016. The Return of Rejected Asylum Seekers: Challenges and Good Practices’ [2016] <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_synthesis_report_rejected_asylum_seekers_2016.pdf> accessed 1 June 2018

event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.

This basic social right is also included in other international and regional human rights instruments. However, its applicability to irregular migrants is not straightforward in every case, as we shall see.

International Covenant on Economic, Social and Cultural Rights

The right to housing is protected at universal level by art. 11 of the Covenant, which guarantees “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 Committee on Economic, Social and Cultural Rights has underlined that the right to housing “should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity”. However, “it should be seen as the right to live somewhere in security, peace and dignity”¹⁰⁸.

The wording of the article entitles “everyone” to the enjoyment of the right, therefore including also migrants in an irregular situation. This has furthermore been explicitly stated by the Committee, who in General Comment No. 4 stressed that “the right to adequate housing applies to everyone” without discrimination and it is indispensable to ensure that the human dignity of every person is respected¹⁰⁹. It furthermore stressed that

¹⁰⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23, par. 7

¹⁰⁹ *Id.*, par. 6 and 7

“disadvantaged groups must be accorded full and sustainable access to adequate housing resource”, and that “both housing law and policy should take fully into account the special housing needs of these groups”¹¹⁰.

Using the same reasoning, the Special Rapporteur on adequate housing has expressed that “the provision of housing should not be denied to undocumented migrants. They must be afforded a minimum level of housing assistance that ensures conditions consistent with human dignity”¹¹¹.

Therefore, “States should, at a minimum, provide migrants in irregular situations at risk of homelessness with a level of housing which ensures their dignity and allocate resources to shelters which provide assistance to migrants in irregular situations.”¹¹²

European Social Charter

The right to housing is specifically contained in art. 31 of the European Social Charter, and also protected by other provisions such as arts. 13, 15, 16, 17, 19 and 23. As we have already seen with other rights contained in the Charter, they are in principle only granted to legally resident TCNs, excluding irregularly staying migrants. However, again, the Committee has clarified that undocumented migrants cannot be excluded from the enjoyment of fundamental rights that are essential for human dignity.

¹¹⁰ Id., par. 8 (e)

¹¹¹ General Assembly, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/65/261, 9 August 2010, on the specific legal entitlements and protections granted to migrants with respect to the right to housing in international treaties and other international legal instruments. Par. 9

¹¹² Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/14/30, 16 April 2010, on the enjoyment of rights to health and adequate housing by migrants, par. 88

For instance, in *Defence for Children International (DCI) v Belgium*, concerning the right to housing, the Committee stressed that “when human dignity is at stake, the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity”¹¹³

A similar argumentation was deployed by the Committee in *CEC v the Netherlands*, where it held that “shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-term accommodation in a more permanent housing be offered to them”, underlining again that “the right to shelter is closely connected to the human dignity of every person regardless of their residence status”¹¹⁴. As a result, it found a violation of art. 31.2 of the Charter.

European Convention on Human Rights

Although there is not a right to housing as such under the Convention, the European Court of Human Rights has in several occasions indirectly protected this social right and built minimum housing obligations for States Parties by linking it to one of the civil/political rights contained in the text.

The most relevant provisions of the Convention for access to housing are art. 3 (prohibition of torture, inhuman and degrading treatment or punishment) and art. 8 (protection of private and family life, home and correspondence).

¹¹³ See supra note 63, par. 28

¹¹⁴ See supra note 44, par.144

Regarding art. 3 ECHR, The Committee on Social Rights, in *CEC v the Netherlands*, made reference to the ECtHR's decision in *M.S.S v. Belgium and Greece*, stating that in that case: "it was further recalled that Article 3 could not be interpreted as obliging the States Parties to provide everyone within their jurisdiction with a home"¹¹⁵. However, "the Court has furthermore not excluded "the possibility that the responsibility of the State may be engaged in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity"¹¹⁶. Hence, in that specific case, the Strasbourg tribunal found a violation of art. 3, taking into account the combination of factors that made the applicant live in unacceptable living conditions, which together reached the threshold required for something to be considered as inhuman and degrading treatment.

Concerning art. 8, we should consider the ECtHR's judgments in *Chapman v the UK* and *Yordanova v Bulgaria*. Although in the first case, the Court stressed that "Article 8 does not in terms recognise a right to be provided with a home"¹¹⁷, in *Yordanova and others v. Bulgaria*, the ECtHR affirmed that "an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases"¹¹⁸.

¹¹⁵ See supra note 50, par.27

¹¹⁶ Id., par. 29

¹¹⁷ *Chapman v UK* (GC), App. No. 27238/95, 18 January 2001

¹¹⁸ *Yordanova and others v Bulgaria*, App. No. 25446/06, 24 April 2012

Departing from the acknowledgement that the protection of the right to housing under the Convention is only indirect and not clear-cut; and being cautious about the fact that it has only been applied in very particular and exceptional circumstances, we could say it has a potential in the protection of the group of our study, non-removable TCNs, who, as it has been analysed, find themselves in situations of hardship and destitution across the Member States of the Council of Europe.

European Union Charter of Fundamental Rights

According to FRA, “whether the obligation to fulfil the right to adequate housing enshrined in international human rights law also includes the duty to provide adequate shelter to destitute migrants living in an irregular situation is controversial. However, a strong case can be made that such a duty exists at least for those persons whose removal cannot be carried out through no fault of their own, particularly where they are not granted access to the labour market”¹¹⁹

Although the EU Charter does not contain a right to housing as such, a duty of the Member States to provide accommodation to non-removable migrants may well arise from art. 1 of the text. The right to dignity again plays a crucial role here. As it has been exposed, unreturnable migrants remain in most cases in legal limbo and destitution, being unable to access fundamental human rights. This puts them in an extremely vulnerable situation. Under these conditions, denying them access to housing, especially where they are at the same time denied access to the labour market (as the FRA points out) would go clearly against their human dignity, deepening in their exclusion and marginalization. Therefore, one could fairly affirm the existence of a right to housing for non-removable TCNs deriving from art. 1 of the Charter.

¹¹⁹ See supra note 1, p69

Rationale under the sacrifice of non-removable migrants' human rights: exclusion as a means of deterrence

There is a general reluctance of the MS to tackle the issue of non-removability at EU level. They tend to prefer the option of legislating (or not) about it at national level.

As we have seen, most of them make use of the room left by the Returns Directive and regulate (or de facto deploy) toleration statuses, through which they condemn TCNs to live in a protracted and insecure liminal situation, still being part of the group of irregular migrants although not being sent back.

EU countries know about the existent gap regarding TCNs who cannot be deported, and about the consequences that this has for the human rights of this collective. However, still most of them decide to leave this gap open.

As we have repeated throughout this thesis, this decision has nothing to do with carelessness, but it is clearly intentional and seeks a purpose.

On March 21, 2014, experts coming from the different MS gathered together as the Contact Group Return Directive for a brainstorming on best practices regarding non-removable returnees, and discussed about the possibility of establishing EU harmonized criteria about the conditions for regularisation of unreturnable TCNS. However, there was an almost general opposition by the MS representatives on the setting of common standards at EU level. The reasons they provided were the following:

“1. Successful return should be the primary objective and all efforts should be focused on increasing return rates. Discussing rights of irregular migrants (as well as pathways to regularization) would send a wrong policy signal and might even encourage irregular migration. Granting rights to non-removables should therefore be a "non-topic" and managed at national level only.

2. The wish of Member States not to be subject of additional obligations resulting from a rights-based approach for "non-removables".

3. Concern not to be caught in a "soft-law" trap (Best practices leading to Guidelines and potentially leading to proposals for hard law...).
4. Concern about the European Court of Justice interpreting extensively the existing *acquis* and following migrants-rights based interpretations”¹²⁰

This only shows again the unwillingness of the MS to provide a dignified and secure status to non-removable migrants. This follows the tendency we presented on CHAPTER 2, when we mentioned that MS delegations rejected the Commission’s initial proposal of the Return Directive, which contemplated the right to access material reception conditions and employment for unreturnable TCNs. In a similar way then, EU countries found this as “upgrading” or “encouraging” irregular migration, having a pull effect.

As Emanuela Paoletti affirms, non-deportable status is a glaring example of radical exclusion. The stripping from such individuals of basic rights and access to essential services can be in itself considered not only a human rights infringement but a deliberate act of exclusion from society.¹²¹

The paradox of the law constitutes irregularity as a structural, permanent and chronic fact, condemning non-removable migrants to live in a constant state of exception. This legal limbo they are thrown into crystallizes the role of the States as producers of “illegality”,

¹²⁰ Fabian Lutz, 'Non-removable Returnees under Union Law: Status Quo and Possible Developments' [2018] 20 *European Journal of Migration and Law* p49

¹²¹ Emanuela Paoletti, 'Deportation, non-deportability and ideas of membership' [2010] 65 *Refugee Studies Centre* pp18-19 <http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5880> accessed 3 June 2018

through the ambiguity in the elaboration and application of the law and the administrative proceedings to control migration.¹²²

By doing this, it seems States are using the liminal toleration status of non-deportability as a punishment or sanction against irregular migrants who cannot be removed. This is, of course, an indirect punishment, but we could somehow relate it to the EU's tendency of criminalizing migration and putting into place practices to prevent it.

If we have a look at the theory of the purposes of the punishment under criminal law¹²³, we can understand that the EU's (and its Member States') approach towards irregular migrants pursues the goal of deterrence, both at a specific and a general level.

The wrongdoing committed by the TCN would be violating migration rules and staying in the country irregularly. The direct consequence-sanction is deportation of the alien from the territory of the MS. This sends a clear message to the migrant herself and to all other prospective migrants (specific and general deterrence): "Do not come, if you do, you will be removed".

However, in our case, the direct punishment of removal fails due to a series of impediments we have previously analysed, and the migrant remains therefore in the MS. As a substitute punishment to continue pursuing deterrence, another kind of indirect sanction is imposed: exclusion. Formal or de facto toleration statuses exclude the migrant from having a regular administrative status and as a result hinder her access to fundamental rights. The message sent to the migrant herself (specific deterrence) is now:

¹²² Adriana Jarrín Morán, 'La construcción de la persona inmigrante en el limbo jurídico: ni expulsables ni regularizables en España' [2012] 21 *Cadernos do campo* pp312-314

¹²³ Mike C. Materni, 'Criminal Punishment and the Pursuit of Justice ' [2013] *British Journal of American Legal Studies* <<https://hls.harvard.edu/content/uploads/2011/09/michele-materni-criminal-punishment.pdf>> accessed 22 June 2018

“This is not the place for you. Leave”, and the one sent to all other prospective migrants (general deterrence) is: “Do not come, if you do, and cannot be sent back, you will live in legal limbo and destitution”.

The main objective of these policies is thus creating an environment that is not too secure or comfortable for irregular TCNs who cannot be removed, therefore avoiding (the alleged) “pull factor” that attractive reception conditions in the EU MS have for migration.

However, the argument of the “pull factor” or “deterrence” fails for several reasons and must therefore be dismissed as unacceptable to justify the low conditions and legal insecurity given to unreturnable migrants.

The first reason has to do with this limbo status constituting a form of punishment. Non-removable migrants should not be punished for the sole fact of having migrated without meeting the legal requirements for that. We should remember moreover, that most of them cannot be sent back to their countries of origin due to impediments that escape their control, therefore being bound to stay in the territory of the MS. Therefore, once the sanction of removal proves to be ineffective in the long run, unreturnable TCNs should be given a legal and dignified solution, and not be punished.

The second reason has to do with the effectiveness of the goal pursued. Member States claim to not regularise migrants and leave them in toleration positions to reach preventive or deterrent objectives. However, as we have seen, a considerable number of irregular migrants come to the EU every year and many of them fall under the category of non-removability. Hence, the effect sought by this strategy is not being achieved. Migrants will still come; that is a reality. As Maria Daniella Marouda points out, “these measures are predicated on the belief (myth) that not only can irregular migration be controlled but that it can also be *perfectly* controlled”, although the reality shows that “migration cannot

be ‘turned on and off like a tap’¹²⁴. Then, it is on us to decide whether we give them dignified living conditions in conformance with the international human rights obligations we have entered, or whether we condemned them to legal limbo and destitution.

Third and most importantly, and connected to this last point, migration policies must be always in line with the requirements prescribed by the international human rights framework. There is no possible preventive goal that can justify the violation of the dignity and basic human rights of unreturnable migrants. That is why, the Union and its Member States should not promote a fortress model based on securitization, but a migration system that is over all rights-based. The famous Italian legal philosopher Luigi Ferrajoli has denounced this situation, maintaining that citizenship in our wealthy countries constitutes the ultimate class privilege, the ultimate factor of exclusion and discrimination, the ultimate source of personal inequality as opposed to the proclaimed universality and equality of fundamental rights¹²⁵

For the aforementioned arguments, the existence of an alleged pull factor cannot justify the lowering of the conditions granted to non-removable TCNS to ones that are undignified or non-human rights compliant.

¹²⁴ See supra note 90, p424

¹²⁵ Luigi Ferrajoli, *Derechos y garantías: La ley del más débil* (Trotta 2004) p31

CONCLUSION

Non-removable or unreturnable TCNs are migrants who, although having been issued a deportation order because of their irregular stay in a Member State on the EU, cannot be sent back due to a number of legal or practical impediments.

Even when it becomes obvious that return will not be possible in the foreseeable future, EU law does not require Member States to grant them a residence permit. Therefore, as long as the obstacle to removal persists and their administrative situation is not regularized, non-removable migrants find themselves in a legal limbo, where their presence is acknowledged and tolerated by the authorities (and therefore, the deportation order is not enforced), but at the same time they continue to be considered as illegally staying TCNs.

This tolerated status can be formal (when the authorities grant some kind of documentation to the postponed returnee) or de facto. Although formal toleration brings a bit more protection than the de facto postponement of removal, both of them mean in practice a low level of residence security.

The piece of legislation dealing with the situation of non-removable migrants at EU level, the Return Directive, does not comprehensively and clearly regulate the rights that must be granted to the people who fall under this category, leaving to the national authorities' discretion the faculty of legislating on their basic living conditions. The few safeguards contemplated by the Directive for postponement of removal are worded in a very open manner, as principles that shall be "taken into account" "as far as possible". Furthermore, they do not reflect all the rights to which irregular migrants are entitled under international human rights law, and are clearly not enough to guarantee the human dignity of unreturnable TCNs.

An analysis of the different national responses to non-removability proves the lack of harmonization on the matter across the Member States of the EU. Their access to

fundamental rights and to regularisation varies enormously from country to country. Therefore, their social protection remains a lottery at will of the particular Member State.

These different interpretations and national approaches are a result of the vagueness and insufficiency of the EU Return Directive when dealing with this issue. As it has been evidenced through the development of this thesis, these gaps are not accidental but are purely intentional, pursuing the goal of deterrence. The aim behind this is avoiding the pull factor by excluding non-removable migrants from regularisation and offering them unattractive and substandard living conditions.

Nevertheless, migrants in an irregular situation are not human beings without rights. As it has been exposed, a minimum level of economic, social and cultural rights must be granted to them in accordance with international and European human rights law, mainly based on the right to dignity of every person. This is particularly relevant in relation to non-removable irregular TCNs, who are trapped in a situation where they are in most cases not allowed to be regularised and at the same time, bound to stay in the European Union due to the impossibility of the removal. In this context, it seems obvious that a solution must be given to those with a protracted postponement of return, so as to be able to live with dignity during the time they are staying in the EU (which can often last for decades).

To tackle this issue, a reform of the Return Directive should be conducted. The revised version should regulate in a clear and comprehensive manner the status of non-removable migrants, ensuring a stricter level of protection by wording the provisions dealing with basic standards of subsistence and safeguards pending return as “shall provisions” that must be always respected without leaving room for discretion, and including other rights that are essential for human dignity and are missing in the current text, such as the right to work and to material reception conditions. It should also contain some paths to regularisation, to give unreturnable migrants the possibility of getting a residence permit after some time has passed and under some criteria. This way, the practice of the different

Member States will be harmonized, and the human rights of this collective will be respected and protected throughout the European Union.

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