

Migrants with Irregular Status: Evolving International & European Human Rights Frameworks

***Colm O’Cinneide,
Professor of Law, UCL***

***Former Member and Vice-President, ECSR
(No views expressed here to be imputed to the
Committee!)***

The Starting Point: Universal Applicability of Human Rights Standards

- Universal applicability is the default mode of UN human rights treaty instruments – ICCPR, ICESCR, CRC etc. See e.g. Article 2 ICCPR: state parties ‘undertake[s] to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant...’
- See also e.g. Article 1 ECHR – state parties ‘shall secure to everyone the rights and freedoms’ protected by the Convention; also the provisions of the EU Charter of Fundamental Rights.
- But migration status may affect the scope of state obligations, by e.g. providing an objective justification for ‘proportionate’ restrictions on the enjoyment of rights, or limiting the responsibilities of state parties.

The Uncertain Scope of Application of Human Rights Standards Within the ‘Grey Zone’ of Irregular Migrant Status

- See e.g. the UK case of *R (Guvैया) v NSS*: [2004] EWHC 2371 (Admin): no ‘treatment’ existed for the purposes of Arts. 3 and 8 ECHR where no welfare support was given to a failed asylum seeker who refused to return home.
- Note also that ‘stronger’ human rights regimes may not cover key issues relating to the treatment of irregular migrants: see e.g. ECHR, *Hunde v. The Netherlands*, Application No. 17931/16, Decision of 5 July 2016.
- In general, a ‘grey zone’ exists when it comes to the applicability of certain rights standards to irregular migrants - especially when it comes to socio-economic and non-discrimination requirements.

Tensions Within the ‘Grey Zone’

- UN human rights treaty bodies have consistently reinforced that irregular migrants are protected by the aforementioned treaties. See e.g. Committee on the Elimination of Racial Discrimination (CERD), 23 February-12 March 2004, General Recommendation No. 30 on discrimination against non-citizens, 64th session.
- See also now the 2016 New York Declaration for Refugees and Migrants’, and the UN Global Compact initiative. Also, in Europe, Article 4 of the Council of Europe’s Istanbul Convention on violence against women
- But states slow to comply with pre-existing commitments – or to accept new obligations in this regard (e.g. by refusing to ratify ICRMW).
- This tension plays out within framework of national, ECHR and EU law – and in other contexts, such as the European Social Charter framework.

The European Social Charter

- The European Social Charter is the socio-economic equivalent of the ECHR, and has been ratified by 33 member states of the Council of Europe. The Charter contains a comprehensive list of social rights: state parties agree to be bound by a minimum amount of such obligations in the Charter's unique 'a la carte' system.
- Compliance with the ESC is monitored by the European Committee on Social Rights (ECSR) – independent experts, 15 in total, elected by Committee of Ministers. States report periodically on their compliance, with the ECSR making conclusions of conformity/non-conformity. Also, 17 states have signed up to the unique 'collective complaints procedure' – whereby civil society compliants of Charter breaches are adjudicated by the ECSR.
- Unlike the ECHR, ECSR findings are not judicial determinations, i.e. they are expert-authoritative but not binding.
- ESC standards as they relate to irregular migrants have been controversial – and influential.

An Action Shot...



The Scope of ESC Rights

- Part I of the Charter: '[e]veryone shall...'
- But see the Appendix to the Charter: 'Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 [of Part II] 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, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.'
- Very opaque wording, amplified by secondary status of the Appendix test.
- Spirit and purpose of the Charter also a relevant concern.

Solution: Core SE Entitlements Covered, Rest Excluded.

- See *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 8 September 2004; *Defence for Children International (DCI) v. The Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009 - Art 17/31, inadequate shelter for irregularly present migrant children. Also *FEANTSA v. The Netherlands*, Complaint No. 86/2012; *Conference of European Churches (CEC) v. The Netherlands*, Complaint No. 90/2013, *DCI v. Belgium*, Complaint No. 69/2011, decision on the merits of 23 October 2012 – violation of Art 7§10, 11, 17 (health care, shelter, social protection).
- ‘Social minimum’ of provision consistent with human dignity required – but not full equality of status.
- Controversial, especially with the Dutch government – but widely accepted.

Future Direction of Travel?

- Will the legal minimum of rights protection that irregular migrants and their families should enjoy acquire greater definition?
- How will the gap that exists in this regard between this ill-defined minimum and 'best practice' be resolved?
- What can different actors – state/civil society, national/supranational, Council of Europe/EU, Europe/UN, local/central, 'protection'-orientated /'control'-orientated etc. bring to the table in this regard?
- For a decent overview, see e.g. FRA (2011a), Fundamental Rights of Migrants in an Irregular Situation in the European Union, Luxembourg: Publications Office of the European Union – and the excellent Delvino paper prepared for this event.