

# CITY-LEVEL RESPONSES TO MIGRANT FAMILIES WITH RESTRICTED ACCESS TO WELFARE BENEFITS

A European pilot study

by Jonathan Price and Sarah Spencer

September 2014



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## INTRODUCTION

Migrants' entitlement to welfare benefits and public services has been the subject of tense and emotive public debate in some European countries in 2013 and 2014 – most notably in Germany and the UK. While a public and political concern of long standing it was re-launched into the public consciousness primarily by the lifting of transitional arrangements that had temporarily limited access to welfare benefits and the labour market in EU member states for Romanian and Bulgarian citizens. The debate has frequently been light on detail, centring more on moralised conceptualisations of entitlement and abuse. At its worst, the debate has been criticised as xenophobic and misleading, with essentialised constructions of 'the migrant', assumptions that systems are being abused, and calls for restrictions to be tightened. It has nevertheless raised questions on the appropriate basis of entitlements for newcomers relative to those of long standing residents with equivalent needs, at a time when European welfare states are in a gradual process of recalibration that has been intensified since the financial crisis began in 2008 and has seen austerity measures in some EU states, including Spain and the UK, resulting in considerable cuts to public spending on services (Hemerijck et al, 2013).

The challenges this brings to light raise questions long considered in the academic literature about who is (or should be) included in or excluded from the welfare state, the trade-off between migration enforcement on the one hand and universal access to welfare services and safeguarding<sup>1</sup> principles on the other, and the competing priorities in this respect of local, regional, national and European tiers of government.

In some EU States we have recently seen further legislative and policy initiatives to combat the perceived threat posed by migrants to national welfare states, resulting in complex, stratified systems that can leave migrants without the safety net the welfare state was designed to provide. The existence of migrant encampments in German cities and burgeoning shanty towns on the outskirts of Madrid are extreme examples of what happens when the safety net provided by the state is not an option to some migrant individuals and families. The less visible implications of statutory restrictions, however, are more difficult to entangle and are equally the subject of this pilot study.

Focusing on two contrasting European cities, the aim of the study has been to understand how entitlements and restrictions to welfare services for migrants – financial and temporary accommodation provisions of the welfare state, rather than on the broader function of the welfare state in areas such as pensions, healthcare or education (henceforth 'welfare benefits') – have been constructed in law and policy, and implemented in practice. We look at how migrants access or are unable to access services to which by law they are entitled, the implications when they are not entitled or able to access those services, and city-level responses to any problems these restrictions create. We do not limit the study to a focus on particular national groups or migrants with a common immigration status. Rather, we focus on those whose immigration or residence status limits, as a result of law, policy or practice, the welfare benefits that would otherwise be available to them based on their level of need. Within that group we examine the situation in particular of families where there is at least one adult aged 18 or over who is responsible for at least one dependent child under the age of 18. It is a broad group of people encompassing European Union (EU) citizens, third-country nationals, asylum seekers and migrants with irregular status, among others.

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1. We define 'safeguarding' here as the actions and processes that aim to manage and minimise risk to vulnerable adults and children.

Essentially, we are looking here at how migrants are formally and informally included or excluded from welfare state provision of accommodation and financial support, the implications for those who cannot access this safety net, and the role of statutory and non-governmental organisations in responding to the problems of those who are excluded in times of need. It is hoped that through transnational comparison of migrant incorporation into, or exclusion from, differing models of welfare state, light can be thrown on the implications of contrasting policy approaches. Evidence provided by policy experts and service providers from a range of organisations and institutions on the everyday problems of their service users and their communities provide data to analyse laws, policies and local practices in this area of work.

This is a pilot study designed to highlight key concerns and to establish whether the issues under consideration are worthy of further study both in the cities and countries considered here and further afield. A forthcoming study by the authors exploring similar issues in the UK will complement the analysis for future work in this area.

The research questions in this study are divided into four broad groups. Firstly, we focus on how law and policy frames entitlements and restrictions for different categories of migrant to welfare benefits. Secondly, we identify among them who the migrants are that are in need of such support. We focus then on how that support is implemented (or not) in practice, and finally whether systems adapt to address any gaps in the support framework.

### **Research questions**

1. Legal and policy frameworks
  - What are the entitlements of migrant families in Berlin and Madrid to welfare benefits and other forms of subsidiary statutory financial and accommodation support?
  - How is this support administered?
  - Are there any migrant families who are restricted from accessing this support because of their immigration status?
2. Migrant profiles and welfare needs
  - Who comprise the client group seeking accommodation and financial support and what broader welfare needs do they present?
3. Implementation
  - How are laws and policies governing the administration of welfare benefits implemented at a local level?
  - What are the experiences of families when they engage with local statutory service providers in relation to their service needs, what are the outcomes for them and the implications of these outcomes?
  - Has the financial crisis had any effect on the way in which laws and policies are implemented?
4. Adaptation
  - What solutions have been implemented by local and regional government, and non-governmental organisations to deal with the impact of exclusions from accommodation and financial support facing migrant families?
  - What strategies are employed by migrants and their advocates to negotiate around restrictions?
  - What implications do the findings suggest for future policy and practice at local, national and European levels?

## **METHODOLOGY**

Two cities were chosen for this study in two European countries. Germany and Spain have the largest non-national resident populations in Europe<sup>2</sup> with the capital cities of both hosting large migrant communities, whilst having different migration histories and policy approaches. By focusing on Berlin and Madrid we are able to consider the impact of the way in which different welfare states have been constructed (their 'welfare regime') and contrasting experiences of the European financial crisis.

Fieldwork took place over four weeks during 2013 with two separate week-long trips to each city, three months apart. For the first trips, we used published materials/websites to identify potential interviewees within welfare agencies and statutory service providers with responsibilities for delivering welfare services to the group of service users in question. Interviewees during the second trips were identified through 'snowballing': that is, where one existing contact leads to another person.

We spoke with 55 research participants in total: 28 in Berlin and 27 in Madrid, including social workers, lawyers, welfare rights advisers, voluntary sector advocates, senior regional and local government managers and integration specialists. In Berlin we interviewed ten officials working in federal, regional or local government and 18 working for non-governmental organisations (NGOs). Two of those working in government had primarily a service delivery role and eight had primarily a strategic or policy role. Fifteen of those working for NGOs had primarily a service delivery role and three had primarily a strategic or policy role. In Madrid, we interviewed seven officials working in regional or local government and 20 working for NGOs. Three of those working in government had primarily a service delivery role and four had primarily a strategic or policy role. Fourteen of those working for NGOs had primarily a service delivery role and six had primarily a strategic or policy role. Interviews were semi-structured, lasting between one and two hours; they were recorded and then transcribed. Interpreters were used where necessary.

Data were analysed thematically using NVIVO, software which facilitates analysis of qualitative evidence. Patterns and significant findings were analysed by attributing particular characteristics to interviewees – including city and sector – and cross-referencing these with the thematic codes.

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2. 2012 figures from the European Commission put these at 7.4 million in Germany and 5.5 million in Spain [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics#Main\\_tables](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics#Main_tables).



## **LITERATURE**

The academic literature, principally in the field of social policy, provides a useful theoretical framework that has informed the research questions and gives us tools to analyse the data collated during fieldwork.

One key consideration has been to take into account the differing models of welfare systems in operation in Germany and Spain. Esping-Anderson's seminal text (Esping-Andersen, 1990) on European welfare states helpfully identifies three welfare 'regimes': liberal, conservative-corporatist and social democratic. Conservative-corporatist regimes were developed under the influence of strong trade unions and are characterised by strong rights for workers and a subsidiary level of support for those on the margins of the labour market to complement support provided by the family. Their overarching aim is to maintain the standard of living of workers in periods of sickness/unemployment. Germany is often cited as the key example of a welfare state characterised by the conservative-corporatist regime. Scholars including Ferrera have subsequently identified a fourth regime to complement this typology: the 'Mediterranean model', comprising a conservative-corporatist social insurance approach, and a weak safety net in the form of under-funded social services assistance and a strong reliance on informal family support, churches and charities (Ferrera, 1996). The Spanish welfare state, developed principally in the decades after Franco's death can be characterised by the Mediterranean welfare regime.

The modelling of the Mediterranean welfare state on the conservative-corporatist welfare state means that there is a less marked conceptual difference between Germany and Spain's approach than with the liberal and social democratic regimes (for instance those in the UK and Sweden, respectively). The essential differences are in organisational capacity, and the scope and extent of family as the default site of support.

Sainsbury adds to this analysis by arguing that a missing element of welfare state scholarship is the extent and way in which welfare states incorporate migrants. A typology of 'incorporation regimes' needs to be understood alongside welfare state regimes creating an analytical framework that takes into consideration 'entry categories' (immigration status) and migration policy e.g. citizenship requirements, conditions to acquire work/residence permits, eligibility for specific services and employment rights. Studies that only focus on one migrant 'group' obscure the complexity of migrant incorporation into welfare states; rather it is multidimensional. Sainsbury then challenges the idea that immigration is a threat to the welfare state and indeed that stronger welfare states are more restrictive to migrants. In analysing incorporation with reference to different migrant 'groups' and immigration policy, there is divergence within welfare state regimes (Sainsbury, 2012). Hence, despite the common origin of the German and Spanish welfare models we might expect to find significant differences in their incorporation of migrants within them.

A second broad relevant debate centres around the argument that migrant incorporation into the welfare state has to be seen in the context of the evolving relationship between nation-states and supra-national institutions such as the EU and international human rights instruments. It has been argued that the shift towards the influence of these forces in constructing a 'post-national citizenship' will close the gap over time between those who are included and those who are excluded from the welfare state (Soysal, 1994). However, this analysis has been criticised as over-optimistic, overlooking the ongoing extent to which national laws still in practice prevail and migrants are excluded from key welfare provisions.



The notion of the liberal constraint is also a useful concept here (Hollifield, 2004). This is the idea that there is tension between the pressure on countries to become more economically open in terms of trade and to encourage greater levels of migration for economic reasons, and domestic political pressure – often driven by public opinion – to restrict migration and to have restrictive migration policies. This trend is notable in countries with an increasing proliferation of (restrictive) migration policies, including those relating to welfare provision, which is explained by political forces that view migration as something that must be limited or contained.

A third broad debate highly relevant to this study relates to the roles of individual 'street-level bureaucrats' such as officials and service providers, their relationship with the institutions they work for and the way in which they carry out their responsibilities, which may differ from those intended by national policymakers. The central idea here is that policy is created on the front-line and that discretion is intrinsic to public service provision. Because of management's limited control of front-line practice, a lack of resources and opaque policies, street-level bureaucrats are forced to find practical solutions on the front line, and this becomes policy. It has been argued that discretion can be favourable to the interests of service users or it can be counter to their interest, but nonetheless discretion may be necessary to meet variable and unpredictable needs that arise (Lipsky, 1983).

This argument has been critiqued on the basis that in the subsequent decades there has been increasing managerialism in social work which has curtailed discretion; that power has shifted away from street-level bureaucrats to managers; and that discretion is a thing of the past. Greater standardisation of policy and practice, less autonomy and greater scrutiny of work in the context of commissioned contracts has contributed to a harmonisation of policy and practice (Howe, 1991). Others have argued that discretion persists in spite of increasing rules, regulations and managerial scrutiny. The control of managers is not uncontested and it cannot be assumed that public service planning is without its flaws. Indeed, they argue that the increase in rules and regulations creates more space within them for interpretation and for street-level bureaucrats to act as individual moral agents, which can, counter-intuitively, lead to greater discretion (Evans and Harris, 2004).

It is widely accepted in the academic literature that informal networks such as communities of co-nationals play a significant role in providing a safety net to those experiencing periods of homelessness and destitution. However, additional considerations must be made to understand certain statutory responses when migrants are left without any safety net support. Moving beyond a simplistic binary of formal exclusion and informal incorporation through social and community networks, it has been argued that immigration legislation often has inner contradictions where formal exclusions on the basis of immigration status exist alongside modes of formal inclusion (Chauvin and Garcés-Mascreñas, 2012). Illegality can encompass a range of administrative categorisations that show a degree of formal recognition by the state (for instance granting access to health care or a birth certificate), often as a way of including those in some kind of probationary state. By recognising these people in this formal way, the state is arguably undermining its own sovereignty in the control of its borders. However such an approach may be necessary to solve some of the very practical problems that exclusion can create, including destitution.

## **LEGAL AND POLICY FRAMEWORKS**

In the following sections, we outline the legal and policy frameworks governing entitlements to, and restrictions from, welfare benefits in Berlin and Madrid. We focus on the financial and temporary accommodation provisions of the welfare state, rather than on their broader functions in areas such as pensions, health care or education. This is because in this study we are interested the systems that were established to ensure minimum standards of existence (shelter and subsistence) and avoid homelessness and destitution, and how different categories of migrants fit into these systems, or not.

### **Berlin, Germany**

Berlin, like Madrid, is a region as well as a city and has its own regional government, with a further tier within it of local authorities/municipalities.

Broadly speaking, there are four tiers of accommodation and financial support available to migrants in Germany under national law, subject to restrictions that apply to certain migrant groups in certain situations. The statutory provisions available to migrants will depend on a range of factors, including their residence status, immigration status, employment history, reason for migration and their personal circumstances, such as their age or health status. The level of financial provision is highest under social security and lowest under asylum support. Law-making occurs at a federal level, interpreted at regional level by the *länder* (regional government, as in Berlin), and implemented at the local level by Jobcentres and local authority social services departments. Access to all forms of statutory support in the first instance requires obtaining a registered address in the civil registry maintained by the local authority (*Bezirke*) and an immigration status paper or residence permit by registering with the local immigration office. Some residence permits entitle certain categories of migrants to the same support as German nationals without any restrictions or qualifications. These include: refugees; migrants with a permanent residence permit; and family members of German nationals. Residence permits to which certain restrictions and qualifications are attached include those with a subsidiary humanitarian protection, other permits for humanitarian reasons and students.

A person must be 'normally resident' in Germany to be entitled to any of the statutory support detailed below, meaning that Germany is their primary place of residence. Winter shelters in Berlin, operational between the months of November and March and funded by the regional government, are open to anyone (including families) that is homeless irrespective of their immigration status. This is not the case in some German regions, where statutory restrictions to such support under Social Laws are applied to some categories of migrants.

Germany has a system of civil law where only decisions by the federal constitutional court are binding. Nonetheless, lower courts take into account the decisions of higher courts and are unlikely to take a different stance. Decisions made at the same court level are also persuasive. Social courts are active in Germany and decisions of statutory bodies on individual cases are frequently challenged in this way.

### *Unemployment benefits*

The 'top tier' of benefits is provided under the Social Law Book III (Sozialgesetzbuch III) which includes unemployment benefits at a percentage (60-67%) of the worker's most recent salary, for a period of 6-12 months depending on their employment history and requiring a minimum period of contributions. This is funded through employee and employer contributions.

There are no statutory restrictions to financial support under Sozialgesetzbuch III on the basis of immigration status.<sup>3</sup> Migrants who have contributed sufficiently through the formal labour market will be eligible for financial support. Additionally, if the amount of claimed unemployment benefits does not cover the legal margin of subsistence, support (including support towards accommodation) can be claimed under the subsidiary Sozialgesetzbuch II (also known as Hartz IV).

#### *Social security benefits under SGB II (Hartz IV)*

Subsidiary support is available to those whose unemployment benefits have ceased and is known as 'Hartz IV'. This support is means-tested and is tax-payer funded. Hartz IV is linked to the labour market and those receiving this support are required to undertake labour market activation activities (such as proving that they are looking for work) in order to reintegrate into the labour market. Hartz IV is provided at a flat-rate, based on the size of the family claiming support.

There are significant exclusions to Hartz IV on the basis of immigration status, detailed below.

#### *Social services financial support*

A third tier of support is provided under Section 23 Sozialgesetzbuch XII, and is known as 'social assistance' – this is for those who are 'normally resident' in Germany and do not fall under any other Act. It is provided to those who are entitled to work but due to age, illness or some other reason are not able to. This support is administered by local authority social services rather than the Jobcentre. The quantity of financial support provided under Section 23 Sozialgesetzbuch XII is the same as under the SGB II (Hartz IV). It is also means tested and taxpayer funded. Unlike Hartz IV, there are no activation requirements attached to Section 23 Sozialgesetzbuch XII as claimants are not expected to have the capacity to work.

There are significant exclusions to support under Section 23 Sozialgesetzbuch XII on the basis of immigration status, detailed below.

#### *Asylum support*

A fourth tier of support is provided for asylum seekers and those with '*Duldung*' residence titles (explained below) under the *Asylbewerberleistungsgesetz* (Asylum Seekers' Benefits Act).

On making an asylum application to the Federal Ministry of Immigration, asylum seekers are allocated to a particular state (Land) in Germany, according to a dispersal system designed to distribute the costs of supporting asylum seekers evenly across Germany's regions. Those that are allocated to Berlin stay for at least the first three months in a reception centre for asylum seekers. Thereafter, where practicable, asylum seekers can take up residence anywhere in Berlin and are provided with a fixed housing allowance that enables them to rent privately. When there is lack of availability of accommodation and/or where the allocated allowance does not meet market rates for accommodation, this may cause delays in the transition from reception centres. Outside Berlin, practice in this regard may differ and in some states, asylum seekers remain in reception centres for the duration of their asylum claim. Housing and financial support for asylum seekers is funded by the Berlin Senate (regional government).

In July 2012, Germany's constitutional court ruled that the level of financial support provided under

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3. Migrants with irregular status cannot lawfully make social security contributions because they do not have permission to work. It could arguably be said that they are indirectly excluded from financial support under Sozialgesetzbuch III because they do not have permission to work.

the Asylum Seekers' Benefits Act and the method of its calculation was unconstitutional and should be raised to almost equal to the levels of financial support provided under Hartz IV. Prior to this decision, levels of financial support for asylum seekers had not increased and had not been adjusted for inflation since 1993 and were, in 2012, around 40% less than the levels of social security provided under SGB II and SGB XII. The case has resulted in payments increasing to 90% of the levels provided under Hartz IV, the slightly lower amount accounting for the fact that utility bills for asylum seekers in reception centres are covered. Those living in private flats can make additional applications for furniture and utilities to be covered separately.

The assessment of eligibility for financial support under the Asylum Seekers' Benefits Act takes into account savings and assets such that those falling under this statute will have their financial support reduced by the amount they are assessed as having in savings.

### *Asylum support for those with Duldung residence title*

Asylum seekers whose claims are refused by the immigration authorities lose their legal status. They, along with other migrants with irregular status, may be granted a temporary status called *Duldung* or 'toleration' if they are temporarily unable to return to their country of origin, for example if they do not have the required documentation to travel or if there is no safe route of return.

*Duldung* residence titles may also be granted to migrants entering Germany without a necessary permit who do not seek asylum. Upon registering with the local immigration office, Germany's dispersal policy will be applied, meaning that migrants applying in Berlin may be required to move to a different state in order to access the financial and accommodation support to which *Duldung* residence title makes them eligible. Those whose asylum claims are refused and acquire a *Duldung* residence title are not required to relocate to another region in order to continue receiving support.

Whilst a person is tolerated or '*geduldet*', they remain eligible for financial support and accommodation under the Asylum Seekers' Benefits Act in spite of being unlawfully present in Germany. Accommodation and financial support for those with is administered by local authority social services departments. In order to spread financial responsibility equally between the twelve boroughs of Berlin for this group of service users, each family or individual is allocated to a local authority according to their birth month (the birth month of the principle adult in the case of families), even if they do not live in that borough.

Section 1a) of the Asylum Seekers' Benefits Act gives powers to social services departments to limit the amount of support available to those with *Duldung* residence titles, so that in spite of higher support rates following the Constitutional Court judgment in July 2012, those with *Duldung* residence titles may still have lower levels of support than those whose asylum claims are yet to be decided. Currently there are conflicting decisions by the lower and regional courts of social law as to the constitutionality of the sanction and a decision by the Federal Court of social law has not yet been delivered. This sanction is arguably imposed as an incentive for those with *Duldung* residence titles to facilitate their own return where this in part relies on their own action.<sup>4</sup>

Pregnant women who are excluded from statutory financial and accommodation support because of their immigration status may temporarily acquire a *Duldung* residence title and become eligible for support under the Asylum Seekers' Benefits Act. Pregnant women are eligible for three months

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4. For example where the issuing of a passport by an embassy requires that a person agrees to return to their country of origin voluntarily.

prior to and three months after the birth. A *Duldung* residence title may also be granted on a temporary basis to migrants with irregular status who are unable to return to their countries of origin.

Whilst fieldwork was being undertaken for this research, asylum seekers and those with *Duldung* residence titles in their first year were not allowed to work in Germany. Although there is a legal entitlement to acquire a work permit after the first year, requirements such as the '*Vorrangprüfung*', meaning that there has to be no person with a residence permit available for the job, create practical barriers to accessing such work permits. However, according to Section 32 *Beschäftigungsverordnung* this particular requirement is no longer applicable to those with *Duldung* residence titles who have spent more than four years in Germany, so these persons generally will receive a work permit.

#### *Those who are deemed to be imminently deportable (Grenzübertrittsbescheinigung)*

*Grenzübertrittsbescheinigung* is the immigration title given to those who are to be imminently deported. They are neither asylum seekers, nor *geduldet* (tolerated), nevertheless they still come within scope of the Asylum Seekers' Benefits Act, as defined under Section 1 *Asylbewerberleistungsgesetz*.

Migrants with irregular status may acquire *Duldung* or *Grenzübertrittsbescheinigung* residence titles by declaring themselves to the authorities, bringing them within scope of Asylum Seekers' Benefits Act support. As such, it could be argued that *de jure* rights to financial and accommodation support exist for all migrants in Germany with the final safety net provided under this statute. On the other hand, the potential implications of both immigration 'titles' – removal or deportation from Germany – is likely to act as a significant deterrent to seeking such financial and accommodation support in that way.

The level of support available to those with this immigration title can also be limited subject to Section 1a) Asylum Seekers' Benefits Act, in the same way as described above for those with *Duldung* residence titles.

#### *Additional support*

Migrant parents with dependent children may also be entitled to *Kindergeld* (Child Benefit) if the children are under 18 (although under certain conditions it is available for longer). *Kindergeld* amounts to €184 per month per child for the first two children, then €190 for the third child then €215 for all other dependent children in the family. However, holders of some types of humanitarian residence permits as well as asylum seekers and persons with *Duldung* residence titles are excluded from accessing *Kindergeld*.

#### *Exclusions from accommodation and financial support for migrants*

Exclusions to accommodation and financial support apply to certain categories of migrants under two statutes:

Under Section 5, Paragraph 1 Residence Act 2005 foreign nationals who claim financial support under Section 23 *Sozialgesetzbuch XII* or Hartz IV may lose their residence status, as they (with some exceptions) are expected to sustain themselves financially without dependence on the state. This means that technically they are not excluded from support under Section 23 *Sozialgesetzbuch XII* or from Hartz IV, however once information that this support has been requested or claimed is received by the immigration authorities, they may revoke a person's residence status thus jeopardising their legal stay in Germany or it may impact on a decision on an application to renew a residence

permit or establish more permanent status in Germany. This decision rests with the immigration authorities, who may withdraw the residence title immediately or state that it will not be renewable.

Migrant groups caught by these exclusions include: migrants with irregular status, migrant workers, students and anyone subject to immigration control residing in Germany who is not a refugee, someone with subsidiary humanitarian protection or a family member of a German national. The exclusion does not apply to asylum seekers (and those with *Duldung*/Grenzübertrittsbescheinigung residence titles), those with some form of humanitarian protection (including refugee status), family members of German nationals and permanent residents.

Section 7 *Sozialgesetzbuch II* excludes foreigners (non-Germans) from accessing Hartz IV when their residence in Germany is solely for the purpose of looking for work. This mainly affects EU citizens who are entitled to reside in Germany as jobseekers but are ostensibly not entitled to claim accommodation and financial support. The question of the constitutionality of this exclusion, its compatibility with the European Convention on Medical and Social Assistance and with EU law has resulted in conflicting court decisions during recent years. In December 2013, the Federal Court of Social law decided to bring an exemplary case to the European Court of Justice (ECJ) in order to get more definite guidelines and in May 2014, the ECJ ruled that this exclusion was indeed lawful.

### *Romanian and Bulgarian nationals*

Romanian and Bulgarian nationals required a work permit to work in Germany (but not if they were self-employed) until January 2014, yet faced no restrictions to legally residing there. As a result, those with no employment history were restricted from social security support under *Sozialgesetzbuch III*. They were also restricted from accessing Hartz IV and support under Section 23 *Sozialgesetzbuch XII* as EU citizens (see above for details); and from support under *Asylbewerberleistungsgesetz* as they could not be asylum seekers or granted *Duldung* residence titles (as they are non-deportable).

Whilst fieldwork was being undertaken for this research, restrictions were still in place for Romanian and Bulgarian nationals, and these represented a significant number of migrant families for whom no statutory safety net was available. These restrictions came to an end on 31st December 2013.

### *Migrants with irregular status*

There are no statutory duties or powers for government bodies to provide accommodation and financial support to migrants with irregular status with their dependent children in Germany. In order to be brought within the scope of statutory provisions, migrants with irregular status would need to acquire *Duldung* or Grenzübertrittsbescheinigung residence titles by declaring themselves to the immigration authorities. In such situations, they may become eligible for support under the Asylum Seekers' Benefits Act.

Migrants with irregular status do not have permission to formally rent accommodation because tenants are required to have a residence permit, to which migrants with irregular status are prohibited from access. However, some migrants with irregular status get around this restriction by renting in the name of a registered person, sometimes at a premium.

Without rights to statutory accommodation and financial support, migrants with irregular status must often resort to staying with family or friends, and rely on a limited number of non-governmental accommodation providers.



Broadly speaking, there are limited ways for migrants with irregular status to regularise their stay in Germany outside the asylum process. The *Härtefallkommission* (Hardship Commission) is run by the Berlin Senate (regional government) and has the power to suggest immigration decisions on exceptional cases, such as those with compelling reasons to remain in Germany on account of length of residence, for instance, or medical problems. The final decision however rests with the Regional Minister of the Interior in Berlin.

### *Administration of services*

Sozialgesetzbuch II and Hartz IV are administered by the Jobcentre. Section 23 *Sozialgesetzbuch XII* and *Asylbewerberleistungsgesetz* support for those with *Duldung* or *Grenzübertrittsbescheinigung* residence titles are administered by local government social services while *Asylbewerberleistungsgesetz* support for asylum seekers is administered by the Berlin senate (regional government).

Jobcentres and social services departments have internal appeals procedures but they can be lengthy processes, with decisions aimed to be reached within three months. Decisions can also be challenged in Courts of Social Law. Regional government can provide legal aid for individuals to access legal advice to support their claim, which lawyers can claim retrospectively, regardless of whether cases are successful.<sup>5</sup> Applications for financial support must have first been accepted by the Jobcentre or social services in order to be challenged. If applications are refused before submission, for example where a claimant has been told that because of their immigration status they are ineligible to apply, then the decision cannot be challenged in this formal way.

Data is regularly shared between government departments in Germany, including between social services, health services, the Jobcentre and the immigration authorities. This may impact migrants who are excluded from Hartz IV and *Sozialgesetzbuch XII* support by Under Section 5, Paragraph 1 Residence Act 2005, if they are seeking to establish a more permanent immigration status in Germany.

### *Public funds*

Public funds in Germany are generally defined as those funded through taxation. Support provided under Section 23 *Sozialgesetzbuch XII*, Hartz IV and *Asylbewerberleistungsgesetz* is therefore considered to be 'public funds', whereas social security benefits under *Sozialgesetzbuch III* are generally not considered as 'public funds' because they are funded through employer and employee contributions.

The federal government funds Hartz IV, regional state governments fund the Asylum Seekers' Benefits Act provisions, while local authorities fund support provided under Section 23 *Sozialgesetzbuch XI*. Support provided under these statutes that is provided by local authorities is covered by regional government according to projected costs.

In summary, some migrant families enjoy the protection provided by welfare benefits in Berlin, broadly speaking those with lawful status and those more likely to be resident permanently: family members of German nationals and those requiring protection from the state on asylum or humanitarian

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5. Access to legal aid and the amount granted differs between administrative proceedings and court proceedings. A consultation or a representation in an administrative proceeding administration will bring a small flat fee, regardless of the amount of work put in. In court cases in social law, legal aid will cover the normal fee. Granting of legal aid is however not guaranteed. A reform bill effective as of 1st January 2014 with the aim of cutting public spending, has significantly limited access to legal aid, especially for administrative cases.



grounds. Those who work or who have a history of formal work have privileged access to welfare benefits vis-à-vis those without a work history. With the exception of asylum seekers or those with a subsidiary title whose entitlements are outlined in the Asylum Seekers' Benefits Act, these protections are provided under the general statutes governing entitlements to welfare benefits (the Social Law Books). Exclusions from welfare benefits for certain migrant families apply to migrants without lawful status and for those migrants deemed to be residing in Germany solely for the purpose of looking for work, and no subsidiary safety net support is available to those who are caught by these exclusions (with the exception of Child Benefit for those who are eligible). Welfare benefit laws also give powers to statutory authorities to sanction some migrant families, either by using their welfare benefit claim to jeopardise their residence permits or by granting diminished benefits to those with *Duldung* or *Grenzübertrittsbescheinigung* residence titles.

## Madrid, Spain

The Spanish welfare state, broadly modelled on the conservative-corporatist welfare regime during the 1980s and 1990s, exhibits many similar characteristics to the German welfare system, with strong social security protection for workers and a subsidiary level of support provided by municipality social services departments. Support for asylum seekers, who number a fraction of those claiming refuge in Germany, is similarly coordinated by regional governments. Operating within a federal system of autonomous communities, these regional governments have welfare law-making powers, and as such welfare laws and policies vary from one region to the next. Immigration laws on the other hand, are made at a federal level.

On the whole, there are relatively few explicit statutory immigration restrictions on accessing welfare benefits in Spain. Article 14 of Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and their Social Integration states that foreigners residing lawfully in Spain will be entitled to the same access to welfare support as Spanish nationals. This is not the case however for migrants with irregular status, whose access to statutory welfare services, including accommodation and financial support, is restricted.

Article 14 (Prepared under the Organic Law 2 / 2009) states:

1. Foreign residents are entitled to access to benefits and social security services under the same conditions as Spanish citizens.
2. Foreign residents are entitled to services and benefits, both the basic and general, under the same conditions as Spanish citizens. Foreigners with disabilities and children under eighteen who are habitually resident in Spain are entitled to receive the treatment and care necessary to meet their physical or mental health needs.
3. All foreigners, irrespective of their status, are entitled to basic services and social benefits.

Registering with the local municipality is a precondition for accessing all statutory services. Migrants with irregular status must also register with the municipality, even though they are not entitled to the same level of welfare benefit provisions as those with regular status. In order to register with a municipality a person or family must demonstrate that they are living in that particular area, for example by showing a tenancy agreement. Additionally, all foreigners in Spain must obtain an identification number for foreigners – *Numero de Identificacion de Extranjeros* (NIE) – before being allowed to undertake formal employment and in order to receive social security payments.

The various forms of welfare benefits available to migrants are detailed below in three parts, divided

according to the level of government responsible for funding and administering support.

## **1. Federal level: welfare benefits regulated and funded by the federal government but administered by the Autonomous Communities**

### *Contributory welfare benefits (social security)*

Social security provisions are regulated under Royal Legislative Decree 1/1994 of 20 June, Social Security Act and correspond to Article 14.1 Organic Law 4/2000 in relation to migrants' rights of access. Social security is tied to an individual's participation in the formal labour market, whereby benefits accumulated through employee and employer contributions can be used by individuals in times of unemployment. All lawfully present migrants are entitled to access contributory benefits, however a minimum contribution period of one year applies. Social security provisions are available for a minimum of four months and a maximum of 24 months at 70% of the claimant's most recent salary for the first seven months and 50% of that salary thereafter. The total sum cannot exceed €1082 (where there are no dependent children) and €1242 (where there are dependent children) per person per month. However a minimum sum also applies: €497 euros (where there are no dependent children) and € 664 (where there are dependent children) per person per month.

Migrants are entitled to renew their residence permit every year if they can prove they have a regular income and permanent residence can be obtained after five years of living in the country. Income for the purpose of renewing residence permits can be in the form of social security, however if this is their only income, it could affect the renewal process, thereby jeopardising their immigration status.

### *Non-contributory welfare benefits*

A relevant non-contributory benefit funded by the federal government and administered by the Autonomous Community is *Prestaciones Familiares de la Seguridad Social*, financial support for dependent children under the age of 18 whose parents/guardians earn below a particular threshold, which varies depending on how many children they have.<sup>6</sup> This benefit is slightly more generous for disabled children. All migrants with lawful status and EU citizens are eligible for this non-contributory benefit. No minimum residence period applies.

Non-contributory financial support is also available from social services departments to elderly and disabled people, under Organic Law 39/2006. Federal law states that a minimum period of residence of 5 year for disabled people and 10 year for elderly is required to be eligible for these non-contributory benefits, applying therefore in all of the Autonomous Communities of Spain. However, disabled children who are habitually resident in Spain are entitled to receive all treatment and care services necessary to meet their physical or mental health needs. Both Autonomous Communities and municipalities are responsible for administering and providing social care services for the elderly and disabled.

## **2. Welfare benefits regulated and funded by the Autonomous Communities but delivered by municipalities**

### *Renta Mínima de Inserción (RMI)*

Minimum Insertion Income or *Renta Mínima de Inserción* (RMI) is a form of financial assistance which provides a safety net to those who are outside the social security system and is regulated in Madrid under Law 15/2001 of the Autonomous Community of Madrid which corresponds to Article 14.2

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6. For more details, see: [http://www.segsocial.es/Internet\\_1/Trabajadores/PrestacionesPension10935/Prestacionesfamilia10967/Prestacioneconomica27924/index.htm](http://www.segsocial.es/Internet_1/Trabajadores/PrestacionesPension10935/Prestacionesfamilia10967/Prestacioneconomica27924/index.htm).

Organic Law 4/2000 in relation to migrants' rights of access. RMI is means-tested and aims to provide relief whilst individuals seek re-entry into the labour market. It is funded by the autonomous communities, who design and implement their own eligibility criteria. Applications for RMI however are administered by municipality social services, who assess the eligibility of individuals and families and make final recommendations to the regional government on the applications of individuals and families. Funding for RMI comes from general taxation and is secured by autonomous communities in negotiations with the federal government on the basis of regional need. A finite sum is available under RMI, which is agreed annually by the autonomous communities, and once this is spent there will be no support available until the next round of funding begins.

In Madrid, significantly, RMI applicants must show that they have lived for at least one year in the autonomous community with lawful status in order to qualify. This applies to Spanish nationals in the same way as to foreign nationals, meaning that all those migrating to Madrid from outside the borders of the autonomous community are excluded from RMI for one year. For those who lose their residence status at any point, for example because they have lost their job, the calculation of length of lawful residence begins only when they regain their lawful residence status.

RMI rates are based on household claimants and in 2013 consist of €375.55 a month for the first person, an additional €112.67 for the second person in a household and €75.11 for the third and subsequent members of a household, with a maximum per household of €532.51. This will adversely affect families who live in the same household because they are required to share a single application.

Some other eligibility requirements for RMI are as follows:

1. Recipient families must be 'genuine families' and municipalities have the power to investigate instances of fraud.
2. RMI is usually allocated to parents or single adults in the 25-65 age range. Younger families are expected to seek help from family or informal support networks.
3. As a means-tested benefit, the existing income of families is taken into account in the assessment of eligibility. A threshold is agreed in the annual budgets of autonomous communities.
4. Recipient families must be involved in activation activities such as job seeking, voluntary work and registration in Jobcentres.

Migrants with irregular status are not entitled to RMI in Madrid, however some regions, including The Basque Country, extend eligibility to their RMI scheme to migrants with irregular status.

Receipt of RMI can also count towards the income required in the assessment for extensions of residence permits, however, if this is their only income, it could affect the renewal process, thereby jeopardising their immigration status.

### *Home-care support for children and their families*

Under the Order of the Autonomous Community of Madrid 22/2008, financial packages are available to children and families in order to promote the upbringing of children in a secure family environment and prevent situations of risk. In general this support is provided where caregivers are less able to care for their children due a lack of support networks such as family and friends. Support can also be given in the form of childcare provisions, personal care, meal preparation and home adjustments.

This benefit is means-tested and two years of previous legal residence in the Autonomous Community is required in order to be eligible. It is funded and regulated by the Autonomous Community but delivered by the municipalities.

### **3. Welfare benefits regulated by and delivered by municipalities**

#### *Financial benefits for emergencies and support for temporary social needs*

Under an agreement of the Municipality of Madrid in 2013 a number of forms of financial, subsistence and accommodation support are available to migrants who are registered with the municipality. An assessment by social workers is required to determine needs that can relate to temporary accommodation, food, free school meals and other educational expenses (e.g. books), activities for avoiding social exclusion and other exceptional needs. These benefits are means-tested and available to all migrants registered in the municipality, regardless of their immigration status and length of residence in the municipality.

Emergency winter shelters in Madrid, open between November and March, are open to anyone regardless of immigration status.

#### *Exclusions to accommodation and financial support for migrants*

Migrants lawfully residing in Spain have the same access to social security and social assistance as Spanish nationals, pursuant to Article 14 of Law 4/2000 Rights and Freedoms of Aliens in Spain and their Social Integration. However, minimum residence periods imposed by Autonomous Communities before individuals and families are eligible for non-contributory benefits act as statutory exclusions to these forms of accommodation and financial support. Those who are excluded as a result of being resident for less than a year or because they have irregular status in Spain are expected to rely on informal support networks or 'basic social services' provided by municipality social services departments, as a final safety net. The law governing 'basic social services' does not provide clarity on what constitutes 'basic'. It is therefore left to each autonomous community to interpret this law in deciding what support will be available to this group of service users, with some regions being more flexible than others. It may, for instance as seen above, include discretionary payments to help with rent arrears, food, clothes or other essential items.

Access to social assistance depends in the first instance on successful registration with the municipality, which is a statutory requirement. Stipulations for registration vary from one autonomous community to the next but as a minimum, individuals must provide some proof that they live in the area such as a tenancy agreement. Also, all migrants (lawful and unlawful) have to renew their registration every two years, and if they don't their registration will be withdrawn.

When Romania and Bulgaria joined the EU in 2007, temporary restrictions were imposed on their access to the labour market which were lifted in 2009. In response to the economic crisis however, the restrictions were re-established in 2011 but only for Romanian nationals. These restrictions ceased on 31st December 2013 when the EU's maximum transition period of seven years for accession countries came to an end.

In order to become eligible for non-contributory benefits, migrants must regularise their immigration status in Spain. This can be achieved by securing a job contract<sup>7</sup> or making a claim to *La Figura del Arraigo Social*, a Ministry of Interior mechanism for granting status on the basis of strong family,

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7. This requires an application to the Ministry of Employment and a fee paid by the prospective employer.

community or labour ties to Spain. If a person's application to *La Figura del Arraigo Social* is successful they will automatically become eligible for non-contributory benefits and will not require a minimum period of residence. Migrants from Latin America can apply for Spanish nationality after a period of two years legal residence; for nationals of other countries, this period increases to ten years.

### *Asylum support*

Asylum seekers with pending application with the Spanish Ministry of Immigration are eligible for accommodation and financial support from the Autonomous Communities for the duration of their claim. This is provided in reception centres. Once an asylum claim is rejected, accommodation and financial support ceases.

In summary, some migrant families enjoy the protection provided by welfare benefits in Madrid, broadly speaking those with lawful immigration status and those with longer periods of residence in the region of Madrid. Those who have a history of formal work have privileged access to welfare benefits vis-à-vis those without a work history. With the exception of asylum seekers for whom a separate support system is in operation, these protections are provided under the general regional statutes governing entitlements to welfare benefits. Exclusions from welfare benefits for certain migrant families apply to migrants without lawful status and for those with less than one year's residence in Madrid. Subsidiary safety net support is available to those who are caught by these exclusions in the form of basic social services, which can include discretionary financial payments but cannot constitute ongoing support.

## ANALYSIS OF LEGAL AND POLICY FRAMEWORKS

Most laws governing welfare benefits in Spain are made at a regional level; in Germany they are made at a federal level, making it easier insofar as legal frameworks are concerned to generalise from Berlin to the rest of Germany than it is from Madrid to the rest of Spain. Below, however, we offer an analysis of the legal and policy frameworks at a regional level.

There are, broadly speaking, four discernable tiers of welfare benefits or other statutory financial and accommodation support available to migrants in both systems, two of which – non-contributory benefits and asylum support – have emerged as particularly contested and are therefore the main subject of analysis below. The top tier of social security is the key characteristic of the conservative-corporatist and Mediterranean welfare models, offering strong protection to former workers in the initial period of unemployment. The second tiers of financial support were introduced into the welfare systems later – in Spain during the 1990s and in Germany in 2005. These are called *Renta Mínima de Inserción* (RMI) and Hartz IV, respectively. These non-contributory and means-tested, minimum income schemes with activation requirements and sanctions for non-compliance are a key characteristic of the liberal welfare system and point to a recalibration of the German and Spanish welfare states towards slimmer social protection.

This non-contributory financial support in Germany is administered by Jobcentres which assess entitlement and provide the services. In Spain RMI is funded by regional governments but the assessments are completed by municipalities which make recommendations to the regional governments as to whether this should be provided or not.

Figures from 2011 show that there were 4,615,057 Hartz IV claimants in Germany compared with just 554,089 RMI claimants in Spain. Adjusted for their respective populations, there are almost five times as many non-contributory financial support recipients in Germany than in Spain. Comparing the coverage of this tier of welfare benefit support highlights a significant divergence between these two systems and shows the larger extent to which the state is providing protection to the unemployed in Germany, in spite of its significantly lower unemployment rate of 5.2% compared with 26.7% in Spain.<sup>8</sup> The contrasting figures suggest that the Spanish welfare state is comparatively weaker than its German counterpart and that there is an expectation that the family and organisations in the voluntary and faith sectors play a relatively more significant role in providing accommodation and financial support vis-à-vis the state. This confirms the key characteristic of the Mediterranean welfare model as identified in the academic literature by Ferrera and others.

### *Legislative inclusion and exclusion*

With some exceptions and on certain conditions, migrants who are residing lawfully in either country have rights to access welfare benefits. In both countries, these migrant groups include those with some form of humanitarian protection (including refugee status), family members of German/Spanish nationals, permanent residents and those with residence permits for the purpose of work. Asylum support, the fourth tier of financial and accommodation support available to migrants, in both countries is administered separately to 'mainstream' welfare benefits and is provided to those with pending asylum claims. EU citizens and their family members, deriving their entitlements to welfare benefits from EU directive 2004/EC/38 are also included in the welfare systems of member states, with some notable exceptions that are discussed below. On the other hand, those

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8. Eurostat, figures from October 2013.

residing unlawfully in Madrid (and some other parts of Spain) and in Germany are not entitled to contributory benefits (because they do not have the right to work) or to non-contributory benefits.

As mentioned above, Article 14 of Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and their Social Integration states that foreigners residing lawfully in Spain will be entitled to the same access to welfare support as Spanish nationals. However, regional laws, including those in Madrid, that require a minimum lawful residence period to access non-contributory and contributory benefits, have the effect that those having migrated to Madrid from outside the border of the region have a lesser degree of protection than those with longer periods of residence in the region of Madrid. This is therefore in keeping with the principle of non-discrimination between migrants and Spanish nationals deriving from federal immigration law, but in practice, migrants are disadvantaged when it comes to eligibility for welfare benefits because they are less likely to have lived lawfully in Madrid for the requisite period of time. For those whose residence permits have expired or been revoked, the calculation of a years' lawful residence only begins when they regain their residence permit. This further disadvantages those who are in and out of 'legality'.

Nevertheless, those who are unlawfully resident may be able to rely on subsidiary financial support and accommodation provided by social services departments in both Madrid and Berlin. In Madrid we saw that those unlawfully resident have the right to register with the municipality and to access basic social services which may include discretionary financial support and accommodation, but this cannot constitute ongoing support. In Berlin, those who are unlawfully resident may be entitled to financial support and accommodation from social services departments if they are given the immigration title of *Duldung* or *Grenzübertrittsbescheinigung*. Those who are unlawfully resident and do not have any immigration title are not entitled to any statutory accommodation or financial support, even if they have dependent children.

In Germany we saw that there are two explicit exclusions to non-contributory benefits and to social services support affecting certain migrants: Under Section 5, Paragraph 1 Residence Act 2005<sup>9</sup> (*Aufenthaltsgesetz*), however, foreign nationals who claim Hartz IV or financial support under *Sozialgesetzbuch XII* may lose their residence status, as they are expected to sustain themselves financially without dependence on the state.

The second exclusion is under Section 7 *Sozialgesetzbuch II* which excludes foreigners (non-Germans) from accessing Hartz IV when they are residing in Germany solely for the purpose of looking for work. This mainly affects EU citizens who are entitled to reside in Germany as jobseekers but are not entitled to claim accommodation and financial support. The question of the constitutionality of this exclusion, its compatibility with the European Convention on Medical and Social Assistance and with EU law resulted in conflicting court decisions during recent years. The Federal Court of Social Law meanwhile arguably avoided a decision on the matter. In the 2009 case of *Vatsouras/Koupatantze v. ARGE Nürnberg*, the ECJ (04.06.2009, C-22/08 and C-23/08 (*Vatsouras/Koupatantze*)) issued a first decision on one of the questions, ruling that it is reconcilable with EU constitutional law to exclude other EU nationals seeking employment from social welfare, but left the main question of the legal nature of the German SGB II (Hartz IV) and legality of the exclusion open. However, in May 2014 the European Court of Justice ruled that the exclusion was indeed lawful.

To summarise, both welfare systems formally exclude certain categories of migrants. This is most

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9. "claims social welfare for himself/herself, his or her dependents or other persons belonging to his or her household."



evident in the restrictions applying to non-contributory benefits. These restrictions apply to different groups of migrants in different circumstances, illustrating the importance of Sainsbury's insistence that an analysis of migrant incorporation into different welfare states requires a consideration of the impact on migrants with different immigration statuses and of immigration law and policy (Sainsbury, 2012). Those who can be left without any protection provided by welfare benefits in Madrid comprise those who are unlawfully resident and those with less than a year's lawful residence in the Madrid region, including Spanish and other EU citizens (except for basic social services provided by municipalities); and in Germany, those who are unlawfully resident without any immigration title and EU citizen jobseekers.

It is interesting to note here the exclusions relating specifically to EU citizens in Germany. It distorts what could arguably be an assumption of the hierarchy of rights, where citizens with the greatest entitlements are followed by EU citizens, third country nationals with residence permits and with migrant with irregular status at the bottom. In Germany, however, EU citizen jobseekers are particularly disadvantaged, and sit alongside those who are unlawfully resident with no immigration title in having no entitlement to welfare benefits. This political decision could be argued to highlight the favoured balance of migration enforcement over the welfare rights of certain migrants.

### *The impact of dependent children*

The legal and policy frameworks governing entitlements and restrictions to welfare benefits in Madrid and Berlin do not suggest a particularly privileged position of families with dependent children over and above single adults. Emerging findings from a parallel study being undertaken by the authors in the UK point to a stark difference, where a comparatively more child-centred legal and policy framework results in a stronger social services safety net for families, despite blanket restrictions to most migrants accessing 'mainstream' welfare benefits.

It is notable here however that in Germany, *Kindergeld* is a non-contributory benefit available to those with residence permits, including EU citizen jobseekers, as the immigration restrictions under Section 7 *Sozialgesetzbuch II* do not apply to this benefit. Similarly, *Prestaciones Familiares de la Seguridad Social*, in Madrid is available to legally resident families with dependent children under the age of 18. Research participants in Berlin reported that some families, particularly EU citizens, rely on *Kindergeld* to pay for rent and consumables, but they struggle to cover all necessities with this payment.

In spite of these 'child benefits', there are dependent children that fall through the gaps in both legal frameworks. Although it could be argued that in Germany a *de jure* right to statutory financial and accommodation support exists under the Asylum Seekers' Benefits Act where migrants acquire *Duldung* or *Grenzübertrittsbescheinigung* residence titles, in practice the potential implications of these immigration titles appear to act as a significant deterrent in seeking such support.

### *The relative powers of law-making institutions*

On the role of international legal instruments and supra-national institutions such as the EU vis-à-vis domestic law-making powers, the evidence points to a mixed picture. EU law outlines the entitlements of EU citizens to welfare benefits in other members states, although in practice these may be limited by laws and policy set at federal or regional levels. European legal instruments such as the European Convention on Human Rights (ECHR) impose positive obligations on states to prevent rights breaches of civil rights (which can impact on destitution through its provisions on degrading treatment and the right to family life), but this has not been incorporated into domestic

law in Germany or Spain (in contrast with the UK) so that its provisions while binding cannot be enforced except through the European Court of Human Rights in Strasbourg. The Council of Europe's Social Charter does guarantee minimum rights to subsistence and shelter from homelessness but neither Germany nor Spain is signatory to its collective complaints mechanism, weakening its impact (though scope for advocacy through the Charter's reporting mechanism remains one significant area of advocacy to explore).

In Spain, the key welfare law making power is the region, and we have seen that in Madrid this has the effect of excluding migrants from outside the region from non-contributory welfare benefits – including Spanish citizens – in spite of the federal government's commitment to equal access to welfare services in their immigration legislation.

In Berlin, welfare laws are made at a federal government level. An active resistance in this area to EU legislation is evident in the federal government's refusal to give Hartz IV access to EU jobseekers. Further, the high profile test case around levels of support for asylum seekers was decided in the federal constitutional court, pointing to a domestic legal focus.

Comparison with the UK here is illustrative. The ECHR was incorporated into domestic UK law in 1998 in the Human Rights Act and can thus be enforced in its domestic courts. The courts have interpreted its standards as placing a duty on the state to ensure minimum standards of accommodation and financial support for all within the jurisdiction including migrants with irregular status who have dependent children – in order to prevent breaches of Articles 3, 6 and 8 ECHR. Additionally, whilst lawfully present third-country nationals who are not permanently resident have 'no recourse to public funds' in the UK, excluding them from almost all welfare benefits, EU citizens have a comparatively privileged position in order to meet the requirements of EU law. International legal instruments in this particular regard thus appear to have greater impact in the UK than in Germany or Spain.

### *Exceptions to the exclusions*

Two forms of statutory financial and accommodation support that are notable for not applying any exclusions based on immigration status in both cities are services for those fleeing situations of domestic violence and winter shelters. Refuges operate a 'safety first, questions later' policy enabling victims of domestic violence immediately to flee dangerous or potentially life-threatening situations and secure refuge space funded by regional governments. Winter shelters are operational in both cities during the colder months of November to March and are open to anyone irrespective of immigration status.

On the balance of migration enforcement in the form of welfare exclusions and safeguarding considerations, it is illustrative that fleeing abusive situations and sleeping in cold temperatures on the streets is considered to swing the balance, the welfare needs of people in these circumstances effectively being considered more important than the state's prerogative to enforce migration laws and policies.

### *Legal and policy frameworks: concluding observations*

The rights and entitlements set out in European legal instruments to welfare benefits or minimum standards of subsistence are directly challenged by restrictive laws and policies set at federal or regional levels. Exclusions affect certain groups of migrants in particular: migrants with irregular status, EU citizen jobseekers (in Berlin) and 'newer' migrants (in Madrid). To a certain extent, families are

privileged over and above single adults due to the provision of child benefit. However, the existence of a dependent child does not create a *de jure* right to accommodation or other non-contributory benefits in Madrid, and in Berlin such *de jure* rights are compromised by the potential implications of receiving such support: removal or deportation. In comparing migrants' access or incorporation into welfare states, it is difficult to reach a conclusion that one place is either more restrictive or generous than the other. The welfare systems include and exclude different categories of migrants for different reasons. Some limits to blanket exclusions are exemplified here by support for people fleeing domestic violence and winter shelters that are provided irrespective of immigration status, showing that safeguarding risks are recognised and can trump migration enforcement in certain limited situations.

## **MIGRANT PROFILES AND WELFARE NEEDS**

The second set of research questions concerned the profile of the migrants approaching agencies for support and the needs they present.

### *Welfare needs*

Given the subject matter of this study and the functions and responsibilities of research participants, it is no surprise that the most common welfare needs presenting to professionals in both cities was a lack of accommodation and income. Nevertheless, the absence of reference to additional child protection concerns – parenting issues, abuse or neglect, for instance – by interviewees was notable. The predominant discourse was that good parents were in need of support because they had insufficient resources to meet the basic living needs of their families.

The term ‘destitution’ as reported by research participants obscures more complex and varied circumstances. In particular, a lack of visibility of needs presented difficulties for statutory and non-statutory bodies in addressing potential safeguarding concerns. Although street homelessness was reported, with referrals to services from street outreach teams or the police, and families reported to be living in parks or public encampments, such instances were rare. Research participants talked about precarious housing, sofa surfing, families sleeping on shop floors and other informal set-ups, informal and illegal tenancies (often sublet to them by other migrants). Safeguarding concerns relating to adults and children were intimately related to the power relations of indebtedness to those providing informal support, including exploitation and a lack of safety and predictability. Participants also frequently talked about the lack of food and other basic essentials required for a basic existence.

The direct causes of these welfare needs included rent and mortgage arrears, evictions, unemployment, and domestic violence or other domestic incidents. The indirect causes were a lack of legal status, exclusions from welfare benefits and a lack of entitlement to work.

The consequences of the financial crisis have had and are having a significant impact on the welfare needs of migrants in Madrid, who are less likely than other residents to be cushioned from the effects of recession by family structures. This is exacerbated by statutory exclusions to welfare benefits and the inextricable link between work permits, lawful residence and entitlement to non-contributory accommodation and financial support. Every interviewee in Madrid talked of the disastrous and overwhelming impact of the crisis in fuelling demand for welfare services at a time when strain on public finances has resulted in a leaner public safety net.

In Berlin, the contrast in this regard was stark. The only context in which the financial crisis was mentioned by interviewees was in relation to citizens of southern European countries migrating to Berlin in search of work. Nonetheless, with its dramatically higher unemployment rate compared with other regions in Germany, lack of work was a key concern for research participants in Berlin.

### *Migrant groups*

Immigration status, as seen in the above legal and policy mapping sections, is arguably the key determinant of entitlement or exclusion from welfare benefits, and for this reason research participants frequently referred to immigration status in defining their service users and in grouping and explaining welfare needs. Specific welfare needs were often explained by the particular entitlements and exclusions that applied to that migrant group, suggesting a causal link between

migration/welfare policy and the needs of migrants on the ground. A list of migrants grouped by immigration status is given below. These are mutually exclusive with the exception of Romanian and Bulgarian nationals who are EU citizens but who, during the period of fieldwork, had diminished statutory entitlements.

- European Union citizens
- Romanian and Bulgarian nationals
- Third country nationals with residence permits
- Third country nationals with residence permits in other EU member states
- Migrants with irregular status (including refused asylum seekers and those whose residence permits have expired/been revoked)

### *Asylum seekers*

In Berlin, interviewees most often described their service users as: EU citizens (Spanish, Greek and Italian nationals in particular), Romanians or specifically Roma, asylum seekers, those with *Duldung* residence titles and nationals of African countries with humanitarian status granted by the Italian authorities. Participants rarely mentioned migrants with irregular status as a group seeking services, suggesting that their particular needs are hidden from both statutory and non-statutory organisations. Needs varied according to immigration status, with Romanians or specifically Roma, and African migrants with humanitarian status granted by the Italian authorities most likely to be sleeping rough, EU citizens (including Romanian and Bulgarian nationals) struggling to make ends meet and experiencing particular difficulties securing support from the Jobcentre, and asylum seekers/those with *Duldung* residence titles in precarious and inadequate accommodation.

In Madrid, interviewees most often described their service users as: migrants with irregular status, including people who had lost their residence permits, as Romanians or specifically Roma, and as Latin Americans. Many participants noted a change in the profile of their service users from new migrants, to those who had been living in Madrid for some time but had lost work because of the financial crisis and were vulnerable on account of rent arrears or failures to pay mortgages.

This is clearly explained, at least partly, by the type of migrants and the number of migrants in each city. City-level data is hard to come by, but national data categorised by immigration status are given in Figure 1 and are illustrative for purposes of analysis.

**Figure 1<sup>10</sup>**

Immigration status	Germany	Spain
<b>Total population</b>	<b>80,619,000 (2013)<sup>11</sup></b>	<b>46,609,700 (2013)<sup>12</sup></b>
EU citizens	3,700,000 (2010)	2,500,000 (2010)
Romanian and Bulgarian nationals	394,000 (2011)	950,900 (2011)
Third country nationals with residence permits	4,660,000 (2012)	3,210,000 (2012)
Migrants with irregular status	196,000 - 457,000 (2008)	280,000 - 354,000 (2008)
Asylum seekers	85,560 (2012)	2,790 (2012)

The data in Figure 1 show that on the whole, the numbers of particular migrant groups are not dramatically different in the two countries. It is not possible to explain Germany's position towards

<sup>10</sup> Data from European Commission Country Factsheets 2012

<sup>11</sup> Statische Amter des Bundes und des Länder.

<sup>12</sup> Instituto Nacional de Estadística.

EU citizens in these figures; contextualised in the current financial crisis however, it could be argued that it is a political response to increase in Southern and Eastern European citizens moving to Germany for work.

One obvious difference is the number of asylum seekers in each country, explaining the extent of law making and litigation on this in Germany and the prominence of this group in interviews with research participants as having particular welfare needs.

## **IMPLEMENTATION OF LAW AND POLICY**

### **Variation in practice**

Almost every participant claimed that the responses of public authorities in the assessment of need and provision of services to migrant families were inconsistent. Variation in practice was evident at different levels, from the micro-level decisions of street-level bureaucrats (public employees enacting statutory powers and duties) to the perceived and substantive approaches of institutions, and the decisions of social courts. Variation in practice was noted in the services of both governmental and non-governmental organisations to varying degrees.

Before launching into normative judgements on the prevalence of variation in practice in the delivery of services, it must be accepted that to a certain extent, variation in practice is intrinsic to it. One cannot assume or indeed, expect, that policies will be implemented perfectly and consistently in practice. Moreover, some may argue that variation in practice is the result of necessary flexibility and the exercise of discretion in responding to changing, complex problems on the ground. The appropriate balance between policy and practice raises questions around the necessary freedom of street-level bureaucrats as professionals, the extent to which policies are implementable and adaptable to the heterogeneity of real-life situations, and the way in which practitioners are monitored and held to account, among many others. In accepting that a certain level of inconsistency is intrinsic to service provision, it is necessary however to scrutinise whether in fact statutory duties are being met, minimum standards are being upheld and whether in some instances gatekeeping and the shifting of responsibilities is taking place.

It is not possible in this study to provide authoritative evidence on the extent of inconsistency in public service delivery. Nonetheless, the data shows that inconsistency was a major concern for participants in Berlin in regards to accessing non-contributory benefits from the Jobcentre, and to a lesser extent from social services departments. Inconsistency in Madrid was raised mainly in regards to the process of registering with municipalities and to a lesser extent in accessing social services support.

It is however possible to attempt to explain this inconsistency and to suggest the ways in which it could be detrimental to, or beneficial to, the interests of those with welfare needs. Some key differences in the reasons for inconsistency were observed in the two cities, which are discussed below.

Firstly, the personal values of street-level bureaucrats were felt to impact their approach to service provision, assessments and decision-making in both cities, underpinned by normative understandings of deservingness and belonging:

*within the ... department of social services ... there is one woman who really likes to work for the asylum seekers because she thinks there is difficulties in the countries and we are a rich country and it's ok to do that and she helps them and tells them what they have a right for. And there are others who say, who think: 'when did they come, shouldn't they have stayed, what they tell is lies, nobody can prove that'. And the other woman says: 'I'm watching television, I am reading, I know what is going on in Africa and beyond.' So it's the person. A person to person contact. It's the point if it's a warm place or a cold place... there is always leeway in decision-making.*

Municipal Migrant Integration Manager, Berlin



The 'moral agency' of street-level bureaucrats in part manifested itself in the level of information they were willing to provide to service users to help them resolve their situations, which varied from one worker to the next. It was interesting that participants seemed resigned to the impact of personal values on the eventual outcomes for service users.

*I don't know. Attitudes. At the end of the day it's your personal influence, who you are as a person, the law is there and they shift it somewhat to look for solutions or they say 'we can't help' and leave the person there.*

NGO worker, Madrid

Some participants interpreted the approaches of certain service providers as discriminatory and that individual prejudices informed their decisions:

*Sometimes I think they have prejudices, many times the solution that they give to [my service users] they wouldn't give to Spanish families: "why can't you go back to your country?" Or taking the children into care. Or sometimes I know there are some benefits that are available to residents in Madrid, the Renta Minima, and they don't give them information about it.*

NGO worker, Madrid

Secondly, variation in practice can partly be explained by the complexity of the legal and policy frameworks determining entitlements and restrictions to welfare benefits, and the level of skills/qualifications and training of those implementing them. This is especially the case in Berlin, where welfare laws and policies are particularly interlinked with exclusions set out in migration law and policy, which has led to an intricate patchwork of rules and regulations. It was felt that those working in the Jobcentre in Berlin with responsibility for welfare benefits lacked adequate qualifications to carry out assessments (it is worth noting that Jobcentre employees with responsibility for employment support and training were felt to have better qualifications); local authority social workers on the other hand were considered to be more professional and had received more relevant training. Staff turnover was also said to be frequent within the Jobcentre resulting in a recurring loss of knowledge and skills.

[the Jobcentres] have employees who are really poorly trained, by design I think. People who have no training in administrative work but come from many [different professional backgrounds], like former policemen, former fire fighters, unemployed people... They get very short job training and are then supposed to apply a law which is really a disaster in terms of law-making and social policy.

Solicitor, Berlin

In addition to problems with understandings of the application of legal and policy frameworks, participants in both cities felt that street-level bureaucrats lacked training in the softer social skills necessary to develop an open mind in working with migrants:

*The most important things are personal skills and qualities. Everything that's factual, that's laws and policy, they can learn. But the hardest thing is to teach people to be open inter-culturally and inter-religiously. And that's sort of the hardest thing because many of those who work there are not particularly open and have prejudices. And that's the hardest thing to work on.*

Jobcentre worker, Berlin

Thirdly, whilst participants noted inconsistency in the interpretation of legislation (which may result from the moral agency of street-level bureaucrats and/or poor understanding of the complex legal and policy frameworks), flexibility can also be built in to the legislative framework itself. This is evident in the discretionary nature of basic social services support in Madrid; powers of social services departments in Germany to sanction those with *Duldung* residence titles by providing a diminished level of support compared with asylum seekers (under Section 1a) Asylum Seekers' Benefits Act); and the power to revoke the residence status in Germany of those who claim welfare benefits (under Paragraph 5 Residence Act). It is interesting to note that in spite of the arguably more complex legislative and policy framework in Germany and the associated proliferation of rules and regulations, variation in practice and flexibility was noted in both cities, suggesting that spaces for interpretation exist in both the more and in the less detailed legal and policy frameworks.

In Madrid, the level of municipality debt was noted by participants as the main underlying structural reason for inconsistency of approach, and that the situation has intensified since austerity measures were rolled out following the 2008 financial crisis. When local authorities in Spain use their budget before the end of the financial year, services cease to operate. Participants reported that larger local authorities in the central areas of Madrid had greater debts than the smaller peripheral local authorities, resulting in less capacity to provide services.

## Gatekeeping

One of the extreme symptoms of inconsistent practice is the failure to provide services when there is a duty to do so. Excessive 'gatekeeping', the process of limiting access to support and services, was felt to take place in exactly the same places as variation in practice was reported: at the Jobcentre in Berlin and, to a lesser extent, at social services; and in Madrid at the municipal register and at social services. However, participants did not report excessive gatekeeping of RMI specifically in Madrid, the equivalent non-contributory benefit to the German Jobcentre's Hartz IV, in spite of this being assessed by social services. Gatekeeping at the municipal register in Madrid has significant implications for families as it is a prerequisite to accessing education and health care as well as social services and welfare benefits. In both cities, gatekeeping could take the form of refusing applications or refusing to assess an application in the first place. Additionally, it was felt by many interviewees in Berlin that gatekeeping migrants' Hartz IV access was systematic, with all applications from migrants receiving an initial refusal with an expectation that claimants would be required to challenge decisions in order to receive a fair assessment.

### *Gatekeeping techniques*

At the Jobcentre in Berlin, interviewees reported that service users would be told that they couldn't submit an application for Hartz IV or that there would not be any point in doing so because they are excluded from it, in spite of the Jobcentre's statutory duty to assess all applications, even oral ones. At the point of presenting in need, it was reported that migrants could be told they were not entitled to apply or it could take a more subtle presentation of their more limited options: that claiming Hartz IV *could* jeopardise their residence permit or *would* jeopardise their residence permit. The technical difference is likely to be lost on those who are not aware of the intricacies of the system. Another way in which the mechanism of presenting information to service users was felt to be a technique of gatekeeping was the way questions were asked in the assessment process. For example, street-level bureaucrats may ask service users how they were planning to support themselves in Berlin, to which they might answer "by claiming benefits" (the reason they are in that office), at which point it can be justified that they are excluded from accessing Hartz IV under

Paragraph 7 Sozialgesetzbuch II because it could be argued (and documented) that their residence in Germany is solely for the purpose of looking for work.

Participants in Berlin frequently noted that lack of language skills was used deliberately in order to create a barrier to accessing support at both the Jobcentre and at social services. They felt that little flexibility was shown and that this was underpinned by the moralised notion that German should and would be the language of public administration, with no exception, or indeed that if migrants are going to ask for help, they should ask in German. Participants did not seem to take issue with the fact of using German in public institutions, but rather the way in which language was used as a technique of gatekeeping: using technical administrative language or failing to providing interpreters (which is a statutory duty).

In both cities, participants noted the tendency for street-level bureaucrats and those working for non-governmental organisations to signpost to alternative organisations as a matter of course, often to avoid responsibility, or 'passing from pillar to post'. It was suggested that the complexities associated with the legal and policy framework governing migrants' access to welfare benefits resulted in statutory services referring to migrant NGOs with particular expertise, even if the duty was theirs.

*My criticism of social services is...I understand because they have managers saying "don't give that, don't give that." But I know that there are other ways to help, it's not just financial help... they don't look for alternative solutions, calling, coordinating with others, they don't do it and I don't understand. So their job is doing interviews, hearing people's problems, saying no and then the next interview and the next and the next. I guess they're not all like that, but that's my experience.*

NGO worker, Madrid

In Berlin, NGO participants felt that bureaucracy was used as a gatekeeping tool, with street-level bureaucrats asking for supporting documents that no longer existed. In Madrid, NGO participants also felt that unnecessary procedural hurdles were used as a barrier at the offices of the municipal register including asking for more documents than is necessary or stipulated in policy and showing no flexibility even when there is a great deal at stake: access to schools, social services and health care. NGOs were often required to negotiate burdensome administrative requirements by making special requests to social workers to prove that families were in circumstances which didn't allow them to demonstrate the necessary documents, and this was time-consuming and they felt unnecessary.

*People's real lives are at odds with the formal administrative requirements at play here.*

Government official, Madrid

### *Why gatekeeping occurs*

Many of the reasons given above to explain inconsistency in service provision are relevant to this discussion of gatekeeping, including the impact of street-level bureaucrats' personal values, and the complexity of legal and policy frameworks causing a lack of understanding, with insufficient training to support staff in their day-to-day work with migrants.

Another key argument to seek to explain gatekeeping is that decisions about service provision are not driven by need but by budgetary considerations. A key observation to support this claim is the relationship between decision-maker and budget-holder. In relation to access to Hartz IV,

where gatekeeping was reported to take place most frequently, the decision-maker is also the budget holder; whereas for RMI, where gatekeeping was not reported to take place significantly, the decision-maker (municipality) is one step removed from the budget-holder (the region) and a recommendation based solely on need is then passed to the budget holder to process. What may explain gatekeeping at the municipal register in Madrid is that the municipality is the budget holder for social services, for which successful municipal registration is a prerequisite.

In times of austerity, and in the context of aforementioned municipality debts, it could reasonably be argued that greater scrutiny of budgets creates barriers of access. Indeed, many participants noted that the administrative burden on claimants since the onset of the financial crisis had become more exacting.

Participants in Berlin however were not immune to budgetary pressures. The importance of budget was highlighted by a Jobcentre worker in Berlin who said that migrants are expensive because getting them into jobs costs more because they need more training, resulting in pressure from above to reduce the amount of migrants claiming Hartz IV.

## **Accountability**

One of the most striking differences between the statutory welfare services of Berlin and Madrid is the extent to which processes of accountability are built into the welfare support systems.

Participants in Madrid were frequently resigned to the meagre statutory responses to service users' welfare needs and legal checks and balances of municipality decision-making are rare. It was interesting that this sentiment was often coupled with a sense of solidarity for statutory services, in recognition of their difficult financial circumstances:

*Yes, we make complaints sometimes. The problem is that the municipalities don't have money, so the complaints don't really serve any purpose.*

NGO worker, Madrid

In Berlin on the other hand, internal reviews and legal challenges of Jobcentre assessments formed a core part of the decision-making process, highlighting a great tension between migration policy and principles of universality in the provision of basic subsistence as played out through the courts. With comparatively high rates of negative Hartz IV decisions overturned at the social courts, it exposes flaws in initial decision-making and the failure to meet statutory duties and is an example of deferring responsibility to a higher authority. The systematic nature of interdependency with the legal system suggests an ongoing process of strengthening the enduringness of restrictive migration policies in a drawn out legal battle with a comparatively liberal NGO lobby and court system. It could be argued that even though the federal government staff know that a majority of decisions will be overturned in court, they persist in refusing them because that is what they think is right and will be what they eventually achieve. At a micro-level, the system of checks and balances is an additional bureaucratic layer which is costly and distressing for appellants.

Moreover, questions of migrants' entitlement to welfare have been clarified through strategic litigation, the most high profile of which was the constitutional court decision in July 2012 to raise the subsistence support levels of asylum seekers almost to the levels provided under Hartz IV. This landmark case involved NGOs and legal advocates using the court system strategically to enhance migrants' entitlements, with substantial implications for asylum seekers.

In spite of the ostensible clarity which court decisions imply however, it is interesting to note that inconsistency in implementation still persists in both examples. Participants noted that the July 2012 court decision was implemented at different times in different regions of Germany. But perhaps most interestingly, the question of EU citizens' access to Hartz IV is viewed differently by different courts, with some taking the viewpoint of the federal government and others taking the position of the EU, meaning that if the case of an appellant reaches this stage, the outcome will depend on which court happens to be making the decision on that day:

*The local Sozialgericht and Landessozialgericht, it's like a lottery if you win or not... The Landessozialgericht has twelve different senates, twelve different chambers or courts that have decision-making power. And it depends on the time you put in an application, which chamber or court you end up with. So it is a bit of a lottery who will be processing and deciding your case.*

NGO worker, Berlin

Legal processes nonetheless are bureaucratic and time-consuming, with final decisions taking up to six months to be handed down. Furthermore, the eligibility rules for claiming legal aid in Germany – that cases need a good chance of being successful in order to be eligible – means that the financial viability of representing these cases is a risky business for legal aid solicitors, resulting in a dearth of capacity. As a result, some NGOs have dedicated legal aid funds, outside the statutory system, to meet the needs of claimants.

The juridical nature of the relationship (or lack of) between claimant and the state also helps to explain general observations in the contrasting relationship between NGOs and statutory welfare providers in the two cities; the relationship in Berlin being comparatively more adversarial than in Madrid. Without courts to settle disputes between migrants with welfare needs and the state, NGOs and local/regional government in Madrid worked more visibly in partnership to seek practical solutions to the needs presented by destitute migrants, albeit in a relatively informal and ad-hoc way. An example of this (state-funded accommodation projects for destitute migrants) is discussed in more detail below. This must be seen however in the broader context in Madrid in which legal challenge of street-level bureaucrat decisions is rare and weakens the ability of claimants and their advocates to hold public authorities to account.

### **Capacity dwindling, demand increasing**

The 2008 financial crisis precipitated cuts in public services in Spain at a time when demand for services was increasing. Participants reported that social services were overwhelmed by the level of welfare needs in their communities. In stark contrast, the only context in which the financial crisis was mentioned by participants in Berlin was in reference to increasing numbers of migrants from Southern Europe arriving in the city in search of work.

*The government is reducing all social benefits – less money is being given to regional government, then less from regional to local government. It's a snowball effect. There are many local NGOs at the neighbourhood level disappearing at a time when needs are increasing.*

NGO policy manager, Madrid

In Madrid, interviewees noted several impacts of the financial crisis on the responses of statutory welfare services. Firstly, there were cuts to all 'non-essential services' such as complementary support for families with children who have disabilities, and specific programmes such as the Network of Help for Mothers and the Basic and Urgent Needs Service (*Servicio de Atencion Basica y Urgente*). Secondly,

the crisis resulted in cuts in the numbers of social workers and other staff resulting in diminished capacity, skills and expertise to manage welfare needs. Thirdly, there was an increasing reliance on NGOs to plug the gaps in statutory support. And fourthly, delays in assessment processes with families emerged so that they were waiting for up to six months for decisions on RMI applications when before 2008 they would have received a decision promptly. Imbalances in, and a general decline in capacity, help to explain aforementioned gatekeeping and variation in practice.

At the same time, migrants were losing their jobs and incomes, resulting in them losing their residence status and consequently their eligibility for welfare benefits, which is otherwise available to Spanish nationals, EU citizens and those with lawful immigration status who are in the same situation. The economic circumstances are one battle for individuals and families to fight; for migrant families, they face the additional battle caused by their exclusion from statutory safety nets in times of need. One interviewee eloquently described the 'precarious balance' migrant families couldn't have imagined the impending crisis would destroy:

*There was a time when migrants could come here to improve their lives, with or without papers, there was work, with or without a contract, with or without permission, but there was work. A family, even if they were living together with four other families in a house and living, mother, father, son, daughter in one room, it didn't matter, they had a roof over their heads, they had an income to be able to eat, they could send the children to school because it didn't cost them money. This was a fragile, precarious balance, because as soon as the work went, these situations fell apart.*

Regional government policy manager, Madrid

One side effect of the crisis which links the two countries is migration from Spain (and other EU countries such as Italy and Greece) to Germany of those looking for work. Participants in both cities were aware of this phenomenon. In Madrid, interviewees had worked with service users who had left to seek work in other EU countries, particularly those who had acquired Spanish nationality (nationals of Latin American countries for instance only require two years of lawful residence in Spain before becoming eligible for Spanish citizenship), as well as migrants who had returned to their countries of origin. Some families, they noted, had made a financial decision to live separately as a result of the crisis with one parent moving to another country to seek work whilst the other stayed in Madrid with their children, so that they could continue going to the same school.

One related phenomenon, though no causal link can be demonstrated with the data from this study, is the migration of African migrants with humanitarian status in Italy to Germany, many of whom have migrated in search of work opportunities not available to them in Italy. Their status however does not allow them to work in Germany and many have set up encampments in city centres (including Oranienplatz in Berlin) alongside asylum seekers, to protest against the restrictions imposed on their access to labour markets and welfare services.

### *Discourses of inclusion and exclusion*

It is worth noting that, on the whole, participants from local and regional government whom we interviewed had views that were sympathetic to the needs of migrants who faced statutory exclusions to welfare benefits. The provisions that were available were celebrated, perhaps even embellished, to create a perceived sense of inclusion in their welfare systems and, by association, in their cities.

Nonetheless, a subtle discourse was noticeable amongst some government participants in Berlin around the perceived abuse of statutory services by migrants, of welfare dependency as an endemic issue, and the potential for welfare to attract migrants to the country and to the city. The idea that Berlin is a liberal city and a 'soft-touch' was felt to be a potential magnet for migrants to the city:

*I guess people know - different to Munich, or Hamburg, or Stuttgart - that the Berlin government is not so strict, compared to the Bavarian government and that in Berlin there is a culture of, maybe not helping, but there are so many different groups who support.*

Social services manager, Berlin.



## IMPLICATIONS, SOLUTIONS AND ADAPTATIONS

Above we have analysed the way in which formal exclusions to welfare benefits apply to certain categories of migrants in Berlin and Madrid, and how informal exclusions apply because of the way in which laws and policies are implemented in practice. The implications are that some migrants, including those with dependent children, are destitute, but not always as a result of being formally excluded from services of the welfare state. The extent, however, of destitution caused by exclusions to welfare benefits set out in law vis-à-vis that caused by informal exclusions in the implementation stage requires further study. Participants noted that the overall outcomes of exclusions took many forms. The most visible consequences are evident in informal settlements such as La Cañada Real on the outskirts of Madrid, the largest shanty town in Europe whose residents are mostly migrants; and the protest camps of asylum seekers and migrants from Africa with Italian humanitarian status in German town centres, including Oranienplatz in Berlin.



**La Cañada Real, Madrid**

image by Rafael Robles via Wikimedia Commons



**Oranienplatz, Berlin**

image by by Montecruz Foto via <https://www.flickr.com/photos/libertinus/14250541972>

Participants in both cities noted that street-homelessness occurs but is rare and stated that problems resulting from exclusions were largely hidden and caused a heightened level of precariousness and vulnerability. Some safeguarding risks for adults and children, such as sleeping on floors in the back rooms of shops, churches or ruined buildings with no access to basic sanitation, were on the radar of social services even though they may not have – or may dispute that they have – powers to do anything about it:

*A good part of this problem is ignored. We know we have in our district a former ice-cream factory, where about fifty people from Romania and Bulgaria are staying. They definitely don't get any social welfare, but we know there are no toilets, there is no electricity, there is no shelter against rain, it is just a ruin where they are living. And it is really a tough question what to do with these people. In an emergency situation – one woman apparently is pregnant – it is no problem to get help for her. She can go to the hospital, she can give birth to her child. Or if she has an accident, she can go to the hospital and the hospital covers the costs. But to pay social workers to find, or to try and find a solution for these people, nobody is really responsible for them and so you close your eyes and ears and pray that this problem is solved by itself.*

Social services manager, Berlin

To the extent that destitution of migrant families is mitigated, this is in large part by the informal support provided by social networks – communities of co-nationals, friends and family – or by charities and faith-based organisations. Social networks play a key role in both conservative-corporatist and Mediterranean welfare models such as Germany's and Spain's, where informal support provided by family and the church complement the formal support provided predominantly to those with a connection to the labour market. However, the extent to which migrants are forced to rely on informal networks in place of the safety net provided by the state could be argued to cause a greater level of strain on these networks vis-à-vis those of national residents in the long term. Further, participants felt that some migrants were disadvantaged compared with national residents as they may be less likely to have a network of family in Berlin/Madrid to support them.

There was however awareness amongst participants that significant safeguarding risks were not on the radar of the authorities or even to NGOs, and that support provided through informal networks could also constitute safeguarding risks. Sofa surfing and other such ad hoc temporary solutions to destitution can create risky power relations, often for homeless women and their children, who may become dependent on boyfriends or other men to provide informal support. Statutory exclusions can push safeguarding issues beyond the radar of social services. An escalation of risk or a crisis situation may become known through schools, hospitals, street-homeless services, NGOs or faith-based organisations. Where this risk falls short of a child protection concern however, social services may not have powers to directly provide accommodation and financial support in order to eliminate those risks. Nonetheless, below we discuss some ways in which statutory services have worked around statutory exclusions in order to deal with the most serious fallouts of this policy.

As such, the binary of formal exclusions and informal inclusion fails to explain the whole picture. At a strategic governmental level in both cities, attempts to solve these problems were evident, enabling us to identify the existence of formal mechanisms of inclusion alongside statutory exclusions to welfare support.

### *Outsourcing accommodation to NGOs*

In Madrid both local and regional government are funding NGOs to provide accommodation for destitute migrants, including those who are formally excluded from RMI and social services support by regional government statute. The accommodation centres pick vulnerable individuals and families who are excluded from support minimising safeguarding risks whilst regional government does not commit to a potentially costly general entitlement to welfare benefits.

Accommodation projects were being run by six of the NGOs we interviewed in Madrid. These included self-contained apartments in the centre of Madrid, communal housing and accommodation centres (that were originally intended to be temporary structures) on the city's outskirts. Broadly speaking, the projects aimed to provide interventions to service users at different levels of need and NGOs coordinated with each other and with social services departments to ensure relevant referrals were being made, including from one service providing emergency accommodation to another providing longer-term accommodation if their level of need changed over time.



Accommodation project for destitute migrant families, Madrid  
Image by Jonathan Price

NGOs are providing intensive support to residents, principally around routes into employment, but also language support, immigration advice, and emotional and psychological support.

Interviewees conceded that demand for places in the accommodation projects outstripped supply. Most applied a system where those in the most vulnerable situations would be prioritised e.g. pregnant women, those with babies or young children. Some projects were however specifically for men or for care leavers. Perhaps surprisingly, some of the residents were in receipt of RMI and were still being housed by the projects despite families remaining on their waiting lists. This challenges the idea that allocation is based on need and level of vulnerability, and is arguably not the best use of limited resources.

Although NGOs in Berlin were reported to be providing accommodation to migrants, we did not establish if any of this support was being funded by the state, and the accommodation arrangements did not seem to be as well established as in Madrid. This could possibly be explained by the mechanism for providing temporary *Duldung* residence titles to destitute families thereby bringing them within scope of support.



## *Regularisation*

Regularisation programmes in Germany and Spain are relatively small in scale, but they provide a mechanism for those with irregular status to come within scope of welfare benefits, thereby resolving their destitution. Although the motivation for regularisation cannot necessarily be reduced to the accommodation and financial needs of claimants, for service providers this is a key concern to ensure safeguarding risks are minimised in the long-term. The *Härtefallkommission* (Hardship Commission) and *La Figura del Arraigo* (Roots mechanism) arguably address the phenomenon of migrants who have lived in Europe for long periods of time and whose cases are complex. An equivalent provision in the UK is managed by the Home Office under the terms of the Human Rights Act 1998. Leave to remain in the UK can be granted in order to prevent breaches of rights under the Act to private and family life (Article 8 Human Rights Act), for instance. It should be noted that these programmes may not self-identify as 'regularisation programmes', not least because the term itself is highly politicised.

The *Härtefallkommission* is administered by the regional government and can grant residence permits to those with compelling cases based on any or a combination of length of residence, medical concerns, domestic violence, having integrated children, and so on. *La Figura del Arraigo* translates roughly as "roots mechanism" and is a process for granting residence status on the basis of strong family, social or employment ties with Spain. Decisions on these claims are made by federal immigration department.

These programmes are designed to provide a solution to what has become an emerging phenomenon in Germany, Spain and many other European countries: long-term irregularity. In reality, migrants with irregular status may be well integrated, their children may be born in that country, and they may have strong roots and connections there, making it legally and practically difficult to enforce removal. With large-scale regularisation programmes, or 'amnesties', being so politically problematic and discouraged by the EU, these small-scale programmes enable states to assess the merits of each case individually, or more specifically the balance of compelling circumstances and removability. Crucially, interviewees saw these programmes as a way to get people out of situations of vulnerability and into welfare support. Perhaps unintentionally then, excluding people from welfare services leads to people needing to establish more permanent residence in order to deal with immediate, practical problems.

## *Formalisation of irregular status*

Similarly, *Duldung* and *Grenzübertrittsbescheinigung* residence titles are mechanisms of formalising irregular status and also bring migrants within the scope of welfare support provided in Germany under the Asylum Seekers Benefits Act, solving the immediate problem of destitution for those who are excluded from welfare benefits. Many participants argued that the *Duldung* residence title was akin to a probationary residence status for those who don't meet immigration criteria but are unlikely to be removed and require an intermediate solution. The *Duldung* residence title lasts for a period of several months and is extended regularly, up to periods of many years. Many long-term, complex *Duldung* cases eventually get resolved by the *Härtefallkommission*.

## CONCLUSIONS

Focusing on two contrasting European cities, the aim of the study has been to understand how entitlements and restrictions to welfare services for migrants – welfare benefits and other forms of subsidiary statutory financial and accommodation support in particular – have been constructed in law and policy, and implemented in practice. We looked at how migrants access or are unable to access services to which by law they are entitled, the implications when they are not entitled or able to access those services, and city-level responses to any problems these restrictions create. The study was structured in four key sections, corresponding to four broad groups of questions: Firstly, on how law and policy frames entitlements and restrictions for different categories of migrant to welfare benefits. Secondly, identifying among them who the migrants are that are in need of such support. Thirdly, on how that support is implemented (or not) in practice, and finally whether systems adapt to address any gaps in the support framework.

Our legal and policy mapping shows a certain degree of inclusion in the provision of welfare benefits or other statutory accommodation and financial support for migrant families in Berlin and Madrid, including for refugees, those with subsidiary humanitarian status (granted in that country), some third-country nationals, asylum seekers, some EU citizens, and those with a longer period of residence. Further, certain forms of statutory accommodation and financial support are not subject to any immigration restrictions, namely support for those fleeing domestic violence and winter shelters. However, restrictive laws and policies set at federal or regional levels have the effect of excluding some categories of migrants from the basic support provisions of the welfare state. In Berlin, these include migrants with irregular status and job-seeking EU citizens; in Madrid, these include migrants with irregular status and new migrants with less than a year's residence. The absence of *de jure* rights to welfare benefits for families with dependent children in Madrid and the potential implications of seeking rights to support in Berlin (removal or deportation) acting as deterrents, leaves some migrant families without any statutory safety net to prevent destitution. The national or regional origin of these restrictions point to a domestic legal focus in spite of the universal, inclusive principles and rights that impact welfare benefit entitlements, set out in certain EU and Council of Europe legal instruments (such as EU Directive 2004/EC/38, the European Social Charter and the ECHR) to which both countries are signatories. Greater clarity on the extent to which practice in Germany and Spain departs from the standards set by the Social Charter in particular and the scope that may provide for steps to address those gaps would be of value here.

Where migrant families did enjoy legal entitlements to welfare benefits, some problems were identified in the implementation of policies. Experiences of migrants seeking support from welfare services could be disempowering; and some service providers considered the approach of welfare services to be discriminatory. Service provision was found to vary considerably from one local area to the next and to the micro-level of interactions with different 'street-level bureaucrats'. At one extreme end, it was felt that some local government institutions and/or some street-level bureaucrats were gatekeeping (restricting services) excessively, for reasons of budgetary pressures or because of their own 'moral agency'; at the other end, such discretion could facilitate access to support. In this sense, inconsistency could be interpreted as the necessary flexibility to deal with complex, changing circumstances on the ground. Checks and balances in decision-making, however, were evident primarily in Berlin, in the form of internal appeals and court challenges. Although this was an important mechanism for some migrant families to secure support to which they were entitled, in comparison with observations in Madrid, such accountability appeared to have little impact on initial decisions, with inconsistency and gatekeeping taking place in the welfare services

of both cities. Furthermore, in Madrid, the financial crisis was considered to be having a substantially negative impact on the capacity of welfare services to exercise their statutory powers and fulfil their duties.

For those who fall through the gaps of statutory safety net support, whether by design of law and policy or the failure of welfare services to carry out statutory duties, the implications for migrant families can be severe, destitution in particular being a condition seen frequently by service providers. Destitution can be in the form of illegal encampments, sleeping in abandoned buildings or the back rooms of shops, sofa surfing and the inability to afford basic living needs such as food for children. Although a significant cushion for some of these families was provided by social and community networks, greater understanding of the safeguarding risks resulting from this often insecure and unpredictable form of support is urgently needed.

Whilst national/regional governments have ostensibly felt it necessary to exclude certain migrant families from welfare benefits, they have simultaneously implemented systems to deal with part of the fall out from these policies. Special provisions for destitute migrant families take the form, in Berlin, of a formalised system administered by local authorities for those deemed to be 'tolerated' or 'imminently deportable', and in Madrid in a less formalised but nonetheless government-funded, network of NGO-managed temporary housing and subsistence support. Longer-term solutions for these families, particularly those with longer periods of residence in those countries, are sought via small-scale regularisation programmes.

Our analysis of the legal and policy frameworks governing migrant families' entitlements to welfare benefits, and of policy implementation and adaptation suggest an overall tension between migration enforcement and the protection of public resources on the one hand, and pragmatic inclusion and the management of safeguarding risks on the other. The extent and nature of policies of welfare benefit inclusion for migrant families provide a barometer for understanding the point at which regional and local governments feel that pragmatic inclusion and the management of safeguarding risks override the aims of migration enforcement and/or budgetary considerations, for instance policies that include migrants with lawful and more permanent residence, or those fleeing domestic violence or sleeping on the streets in winter. The gaps in protection for those who fall outside of these categories or circumstances can and do result in destitution and can lead to potentially risky situations. Such a scenario requires considering difficult questions, particularly where they involve dependent children. If migrant families remain in Berlin and Madrid without recourse to public funds, which many do, then is it proportionate to the aims of migration enforcement or the protection of public resources for children and families to be hidden homeless, sofa surfing or sleeping in abandoned factories? Whilst it could be argued that in theory, the welfare state should be based on a principle of reciprocity, the reality for many of these families is that whilst they are living in these cities, often for considerable periods of time, their ability to contribute to the welfare state through formal mechanisms is limited. Where these families then develop welfare needs, this presents real and difficult problems that need to be dealt with at a local level. Whether it is appropriate to rely on informal networks to deal with the fall out of these restrictions requires further thought.

An additional layer of welfare benefit 'policy-making' was identified at the level of implementation resulting in migrant families being included or excluded according to localised practices with inadequate mechanisms of accountability. The extent of 'street-level bureaucrat' discretion can create real problems for migrant families and brings to light the need for greater managerial oversight that is based on a fundamental rethink of safeguarding risks in the broader context of

restrictive migration policies. The limits of internal and external accountability are highlighted by the persistence of variation in practice (insofar as this is a problem) and gatekeeping in spite of vastly divergent systems of accountability. Overreliance on the courts in Berlin to overturn decisions and the absence of mechanisms to challenge decisions in Madrid suggest that solutions to the arguably disproportionate impact of policies of welfare benefit exclusion should be more political than legal.

The limits of welfare benefit exclusions do however appear to be recognised in the various attempts to adapt systems to meet the needs of destitute migrant families – whether this is by formalising irregular migration status or the state funding NGOs to provide accommodation to destitute migrant families. Although these go some way to resolving the problems resulting from welfare benefit exclusions, this approach could be characterised as a sticking-plaster solution, unsustainably operating at the margins. A more nuanced understanding of the implications of welfare benefit exclusions in the context of safeguarding risks and the lived realities of destitute migrant families is needed to inform a debate on a more appropriate and proportionate balance of welfare benefit inclusion vis-à-vis the protection of public resources and enforcement of immigration controls.



## RECOMMENDATIONS

5. Dialogue is needed between national, regional and local tiers of government on ways of addressing this situation that is underpinned by an understanding and acceptance of competing responsibilities and objectives. The dialogue could work towards a consensus on the appropriate and proportionate balance of immigration enforcement vis-à-vis prevention of safeguarding risks, regardless of immigration status. This could form the basis for developing systems for protection from risks that, rather than operating on the margins, are sustainable for migrants and for the municipalities responsible for them. NGOs should be involved in this dialogue in recognition of the crucial role they play in providing an appropriate level of services alongside the role of statutory authorities.
6. Dialogue would also be of value between cities and across Member States to learn from policy and practice approaches the welfare benefit inclusion and exclusion of migrant families, and to develop and share better understandings of policy successes and failures. Entitlements relating to protection from domestic violence in Berlin and Madrid is one positive example on which to build.
7. At European level there is arguably a need to strengthen the legal basis for minimum standards of existence for migrant families; and to explore ways to ensure the realisation of the fundamental economic and social rights protected by the existing European legal instruments. A more coordinated and better supported strategy for taking test cases under the complaints mechanism of the European Social Charter in order to clarify its scope in relation to this section of the population, and in relation to shadow reports to the Committee of Social Rights when relevant Member States are reporting on relevant sections of the Charter, could be an effective way to highlight and protect access to the rights it enshrines.
8. Further research is needed, first, to compare cities and regions in Germany and Spain to identify regional differences in policy approaches and solutions so that 'best practice' can be identified and inform reforms in those countries. Research in other countries in Europe dealing with similar challenges is required to strengthen the evidence base for local, national and European policy-making and identify whether the priorities for reform are changes in law, policy or practices of local implementation.
9. Focused research would in particular make it possible to develop a better understanding of the lived realities of the most vulnerable individuals within migrant families, not least those with irregular status, in order to identify and find means to address safeguarding risks for children and adults who are excluded from welfare benefits.

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