



EU agendas relevant to securing the protection of the fundamental rights of undocumented children living in European cities

Paper prepared for a round table to be held on 27 September 2013 at the Open Society European Policy Institute, rue d'Idalie 11-13, Brussels

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Summary

This paper explores the relevance of a range of EU policy agendas for the protection of the rights of undocumented children living in European cities. Noting the recent request from Eurocities that the Commission acknowledge the need to discuss the challenges raised by the needs of undocumented people, it summarizes the state of play in relation to agendas on poverty and disadvantage; child protection; apprehensions and returns; homelessness; data protection; discrimination; education and training; health care; and integration. In each case it poses questions for the round table discussion.

Introduction

At the Eurocities *Integrating Cities* conference in Tampere, Finland, on 10 September 2013, a petition was delivered by the cities to the European Commission's Director General of Home Affairs, Stefano Manservigi. It asked him to give his attention to an important issue

¹ Sarah Spencer has an Open Society Fellowship to study the responses of national, regional and municipal government in EU Member States to the service needs of migrants with irregular status, including children. The study, which is ongoing, is investigating entitlements in national law, the further extent of provision at regional and municipal level and, in particular, the reasons why provision is made. The study has to date involved more than 80 interviews across 14 EU States and 21 towns and cities, with the assistance of Vanessa Hughes. The author thanks Margaret Tuite, Costanza Hermanin, Michele LeVoy, Ann-Charlotte Nygard and colleagues for comments on a draft of this paper and Ralf Bendrath and Anna Fielder for advice on the relevance of data protection reform.

concerning the migration debate in Europe:

“We are referring to the reality of undocumented migrants that live in our cities. They are people, migrants that live in our cities, but officially to the eyes of the European Commission and the Member States, do not exist. Nevertheless we, local administrations are obliged to deal with this reality and deliver services for those persons when it is needed: for example, in the case of social emergency situations.

We would like the EU to overcome the denial phase and to start to admit that we have an important issue to discuss. We think that it is time for an exercise of “Realpolitik” on the issue of undocumented migrants in Europe. We would like to discuss the issue with the European Commission but not only from the narrow perspective of the Return Directive or from the security point of view.”²

The aim of the round table on 27 September is to discuss one dimension of this issue: the particular situation of undocumented children and young people, whether unaccompanied or living with their parents. The intention is to explore the potential relevance of EU agendas to protecting the fundamental rights of these children and to supporting cities as they face the challenge of meeting their needs, while identifying practical ways in which these agendas could be taken forward. Many of the policy areas concerned are primarily the responsibility of Member States (and within them of regional and local government), but in some respects the EU has legislative competence and in others it has guidance, coordination and monitoring functions.

DG Justice has a coordination role on the rights of the child across the Commission. In 2011 it set out an EU Agenda on the Rights of the Child³ with eleven priorities for action, including the Victims’ Directive, below. Through a Children’s Rights Coordinator (currently Margaret Tuite, appointed in 2011) and an inter-service group it liaises with other parts of the Commission with a view to ensuring that the rights of the child are reflected in all relevant

² Ramon Sanahuja i Véllez, Chair of the Eurocities Migration and Integration Working Group, speaking to the petition backed by elected politicians representing the cities of: Athens, Barcelona, Brussels, Genoa, Helsinki, Manchester and Toulouse. The Eurocities Working Group on Migration and Integration is composed of 36 major cities and capitals of Europe.

³ http://ec.europa.eu/justice/fundamental-rights/rights-child/eu-agenda/index_en.htm

policies and actions. In 2013 DG Justice created an informal Member State expert group on the rights of the child that meets once per quarter. The Directorate also has responsibility for some of the policy agendas relevant to protecting the rights of the child including data protection, equal treatment and the Roma. Other key Directorates in relation to children are DG Education and Culture (early childhood education and care, education including early school leaving, youth participation); DG Health and Consumers (child health and wellbeing); DG Employment, Social Affairs and Inclusion (poverty and social exclusion; investing in children) and DG Home (asylum and migration, child trafficking, sexual abuse and exploitation). A compilation of EU acquis and policy documents on the rights of the child, updated to 3 July 2013, can be found at http://ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en.pdf.

This note identifies some of the relevant agendas and queries ways in which the fundamental rights of undocumented children could be given greater focus as the agendas move forward.

1. Poverty and Disadvantage

The Commission (DG Employment) recently published a Recommendation on 'Investing in Children: breaking the cycle of disadvantage' which may, at the least, provide a means to improve data collection on those who are undocumented. The context for the Recommendation is the Social Investment Package for Growth and Cohesion and the EU target of reducing child poverty by 20 million by 2020. Providing guidance to Member States on a broad range of measures it specifically refers to the need to ensure health care for children who are undocumented⁴ and refers inclusively to *all* children in relation to access to other essential services. The Commission will monitor and support implementation, advise Member States how to use EU funds to invest in children, collect and disseminate innovative practices through the European Platform for Investing in children (EPIC⁵), support research and discuss with Member States how to improve EU wide indicators related to children. EPIC is the web platform set up by the Commission to monitor and disseminate

⁴ Brussels, 20.2.2013 C(2013) 778 final, page 8.
http://ec.europa.eu/justice/fundamental-rights/files/c_2013_778_en.pdf

⁵ http://europa.eu/epic/about/index_en.htm

innovative practice relating to the investing in children strategy through engagement with all relevant stakeholders.

Does the inclusive message in relation to essential services provide an avenue for bringing undocumented children into guidance on good practice? Is EPIC one means through which the inclusion of undocumented children in data collection could be encouraged?

2. Child Protection

The Commission gave priority to child protection at the high level annual meeting of the European Forum on the Rights of the Child in November 2012. It focused on means to strengthen child protection systems across the EU, including means through which the EU can itself support child protection systems in view of its competences. The paper prepared for the meeting by the Commission emphasised in bold print that “A systemic, holistic approach to child protection ensures that no child falls through a child protection gap” and its paper on children ‘on the move’ made particular reference to those who are undocumented.⁶ The 2013 European Forum on the rights of the child will continue to address this theme: “Towards integrated child protection systems through the implementation of the EU Agenda for the rights of the child”, with one session focused on children on the move. One outcome may be EU guidelines for child protection systems.

Is there scope for the EU guidelines to highlight that undocumented children need to be protected at the same level as other children?

The **EU Directive on Victims’ Rights** was adopted on 4 October 2012 by the Council of Ministers having had near unanimous support in the European Parliament. It sets out minimum rights for victims and, significantly, has a non-discrimination clause relating to the victim’s residence status. The Directive obliges Member States to ensure that victims have access to free and confidential victim support services. The UK and Ireland have opted in, but not Denmark. Member States have three years to implement the Directive in national law.

⁶ http://ec.europa.eu/justice/fundamental-rights/rights-child/european-forum/seventh-meeting/index_en.htm page 4; Workshop background paper: http://ec.europa.eu/justice/fundamental-rights/files/background_cps_children_on_the_move_en.pdf

What scope is there to use implementation of the Directive to promote the kind of arrangements we see in Spain (for victims of domestic violence) where the law specifically provides for reporting an offence without fear of removal and likewise, informally, by the police, in Amsterdam for instance, for other offences?

There is also a recent **Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography** (2011) ⁷ which defines child inclusively to mean ‘any person below the age of 18 years’ (Art 2).

Is there scope for ensuring that measures taken to ensure that children feel able to report offences include undocumented children by ensuring that it does not lead to them and their family being reported to the immigration authorities?

3. Apprehensions and Returns

The **EU Return Directive** of 2008⁸, which entered into force at the end of 2010, requires Member States to ensure access to emergency health care, treatment of illnesses and school education for those who are in the Return procedure (pending return or who cannot be removed) (Article 14). It also emphasises the need throughout to take due account of the best interests of the child and family life (Art 5). There is a first report on the Directive and a Communication on the future of EU return policy due to be published by the Commission by the end of 2013. Although not all States have transposed the Directive it grants rights to migrants which are nevertheless applicable in national courts.

Guidance from the EU Fundamental Rights Agency (FRA) on apprehensions has suggested that the police should not seek to apprehend people near hospitals, schools or religious establishments.⁹ It also says that medical establishments and schools should not be required to share migrants’ personal data with immigration law enforcement authorities for eventual return purposes. Parents should be able to register the birth of their child and obtain a birth

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:335:0001:0014:EN:PDF>

⁸ Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>

⁹ ‘Apprehension of migrants in an irregular situation – fundamental rights considerations’, October 2012 <http://fra.europa.eu/en/news/2012/fundamental-rights-considerations-apprehending-irregular-migrants>

certificate, and victims of crime able to report the offence without fear of being apprehended. The guidance was welcomed by Commissioner Malström, saying

“access to healthcare, basic education, religious institutions, birth registration and justice should indeed be considered fundamental rights for anyone present in the EU. No-one should be denied access to these rights out of fear of being apprehended and returned”.¹⁰

The Contact Committee of EU Member State representatives, convened by the European Commission under the Return Directive, decided on 15 March 2013 to include the guidance document in the minutes of the meeting. The aim of the minutes is to develop joint views on how the requirements set out in the Return Directive might be met. The minutes state that the legitimate aim of fighting illegal migration may be balanced against other legitimate State interests, such as general public health considerations, the interest of the State to fight crime, the interest to have comprehensive birth registration, respect for the best interest of the child as well as other relevant fundamental rights recognised by the EU Charter.¹¹

In September 2013 the European Parliament adopted a resolution calling for the EU to adopt ‘strategic guidelines’ with common minimum standards to provide greater protection for unaccompanied children during the entire process from arrival through to a durable solution.¹²

Is there scope for ensuring that the Communication on the Return Directive provides guidance on the extent to which health care and education should be provided; to promote awareness of the FRA guidance among the police/immigration authorities across the EU28; and to ensure guaranteed access to a birth certificate (as exists in some Member States)?

4. Homelessness

¹⁰ Letter to FRA Director Morten Kjaerum, 28 August 2012

¹¹ <http://fra.europa.eu/en/node/6041>

¹² European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263(INI))
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-387>

While responsibility for tackling homelessness primarily lies with Member States and their regional and local responsibilities, it regularly features on the agenda of EU institutions and is identified as a key issue in efforts to tackle poverty and social exclusion within the 2020 process. A European Commission Staff Working Document setting out background evidence makes frequent reference to the situation of undocumented homeless people and notes that undocumented children are known to be particularly at risk: “Spells of rough sleeping have been reported for children under the age of 12”.¹³ A study commissioned by the EC in 2011 on mobility, migration and destitution in the EU is expected to provide more evidence.

The **Facilitation Directive** (2003)¹⁴ requires Member States to impose sanctions on those who facilitate an irregular migrant to enter, transit or reside. There is an exception where the aim is humanitarian assistance, but only in relation to entry and transit (Art 1(2)) so that provision of accommodation may not be covered. The Directive can thus be implemented in a way that deters or penalises organisations from providing assistance to migrants in an irregular situation and prevent them renting housing in the private rental market. A number of Member States have done so (whether or not because of the Directive)¹⁵. FRA has recommended revision of the Directive to prohibit the penalisation of those providing housing with a humanitarian aim, and to exclude punishment of those renting accommodation ‘unless this is done for the sole purpose of preventing removal’. Until the Directive is revised, FRA’s opinion is that it should be applied in a way that does not prevent migrants renting accommodation.¹⁶ It can be argued that to be fundamental rights compliant, the Member States would need to interpret the Directive to mean that renting of

¹³ European Commission (2013) Social Investment Package, Commission Staff Working Document Confronting Homelessness in the European Union, Brussels, 20.2.2013, SWD(2013) 42 final; Accompanying the document COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, *Towards Social Investment for Growth and Cohesion - including implementing the European Social Fund 2014-2020*; citing as the source of that evidence: SPC Advisory Report to the European Commission on Tackling and Preventing Child Poverty, Promoting Child Well-Being, June 2012.

¹⁴ COUNCIL DIRECTIVE 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:328:0017:0018:EN:PDF>. The UK and Ireland signed up to the Directive, Denmark did not.

¹⁵ Fundamental rights of migrants in an irregular situation in the European Union., p. 63,

http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf

¹⁶ FRA (2011) *Fundamental rights of migrants in an irregular situation in the European Union*, page 70.

http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf

housing is not considered as facilitation of residence and thus does not fall under Article 1 (b) (a person who for financial gain intentionally assists....).

Is there scope for securing clarification from the Commission that this is how it will interpret the Directive and guidance to Member States on the need to address the situation of irregular migrants within national homeless strategies?

5. Data Protection

The absence of a guarantee that personal information on service users will not be passed on to the police or immigration authorities is a barrier to children's take up of services. This has not been prevented by the EU Data Protection Directive (1995). In 2012 the Commission proposed replacement of the Directive with a Regulation that will be directly applicable in Member States. The Parliament (LIBE committee) is currently considering the proposal and discussion with the Council is expected after a vote at the end of October. An unprecedented number of amendments has been proposed. The sensitivity of data on undocumented children does not appear to have been raised in the debates but the provisions of the proposed Regulation are relevant. Art 6 (Lawfulness of Processing) would preclude the disclosure of data by service providers without the service user's consent unless it is to meet an 'objective of public interest' and if disclosure is 'proportionate to the legitimate aim pursued'. The question then would be if the transfer of personal data on an undocumented child, with the consequences that would entail, would be considered proportionate. If national law conflicts with these criteria the Commission could take infringement proceedings against that Member State.

The Charter of Fundamental Rights has, unlike other human rights treaties, made specific provision for data protection as a fundamental right (Art 8) distinct from the protection of the right to private and family life (Art 7). The binding legal status of the Charter should mean that this strengthens protection of personal data, though the implications of this are not yet clear.¹⁷

¹⁷ The FRA, in its Opinion on the proposed data protection reform package has noted that the acknowledgement in the draft Regulation that children "may be less aware of risks, consequences, safeguards and their rights in relation to the processing of personal data" points to the need for children to have the right not only to lodge a complaint to a Data Protection Authority and/or have the right to a judicial remedy, but also to receive legal advice provided in a child-friendly manner. Similarly, complaint procedures should be

The drivers of reform of the Data Protection Directive were the need to reduce disparity in regulations across Member States and to address challenges arising from technology not envisaged in 1995, as well as to give people more control over their own data and to have more rigorous enforcement.¹⁸

Is there nevertheless any scope to address the need for confidentiality of data relating to essential services for undocumented children or to use the debate to raise awareness of the need to address that issue at the national level?

6. Discrimination

Undocumented children can experience discrimination when seeking access to those goods and services to which they are entitled. EU law explicitly precludes discrimination on grounds of race or ethnic origin, religion or belief, disability, age, sex and sexual orientation to 'all persons', regardless of immigration status. The Commission takes action to support the law including raising awareness of rights, supporting intermediary bodies to improve capacity to tackle discrimination and facilitating the exchange of good practice.

Are there steps that the Commission could take to ensure that service providers are aware that discrimination against undocumented children on protected grounds is unlawful and ensure child victims of discrimination have access to justice without fear of removal? Could this be addressed in steps to promote good practice?

7. Education and Training

Council Conclusions in 2009 on the education of children with a migrant background urged Member States to ensure that "all children" are given an equal opportunity through

made available in a child-friendly manner. In particular, consideration could be given to the provision of adequate legal representation, advice and counselling, as well as free legal aid. In the specific context of criminal proceedings, the FRA notes that consideration could be given to the need to undertake appropriate measures to protect privacy, including personal characteristics and images of victims and family members. In case of a child victim, furthermore, the need to prevent public dissemination of any information that could lead to the identification of a child victim could be considered.

¹⁸ Editorial by the EU Data Protection Supervisor, Peter Hustinx, , A Clear Signal for Stronger EU Data Protection "Zeitschrift für Datenschutz", 17 June 2013
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2013/13-06-17_Editorial_ZfD_EN.pdf

education to develop their full potential.¹⁹ While education and training systems are the responsibility of Member States, cooperation was strengthened in 2009 by agreement on a Strategic Framework for Education and Training 2020, from pre-primary through to higher education, to address common challenges. Its aims include promoting equity and cohesion, and two of the priority areas are early childhood, school and vocational education. A benchmark for 2020 is that at least 95% of children between the age of four and starting compulsory education should participate in early childhood education. The Commission organises peer learning activities/exchange of good practice and publishes guidance.²⁰

In the Charter of Fundamental Rights of the European Union, Article 14 states that “everyone has the right to education and to have access to vocational and continuing training; this right includes the possibility to receive free compulsory education.”

Undocumented children do have the right to go to compulsory age schooling in most but not all Member States. The lack of access to a work permit prevents access to vocational training in most but not all States.

Might there be any scope here for guidance on the inclusion of undocumented children in the entitlement to pre-school education, as in Italy; and to apprenticeships, at least where begun during compulsory school age, as in the Netherlands? Could those States that do not grant an entitlement to school education be encouraged to do so?

8. Health Care

The Health for Growth programme (2014-2020)²¹ supports Member States to achieve a series of objectives. These include promoting the up-take of best practices for cost-effective prevention measures by addressing the key risk factors (smoking, abuse of alcohol and obesity), as well as HIV/AIDS, in order to prevent diseases and promote good health. It has a budget of €446 million and can make grants including to NGOs and research bodies.

Research has shown that there is considerable variation in the extent to which

¹⁹ Council Conclusions of 26 November 2009, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:301:0005:0008:EN:PDF>

²⁰ http://eur-lex.europa.eu/education/lifelong-learning-policy/framework_en.htm

²¹ http://ec.europa.eu/health/programme/docs/prop_prog2014_en.pdf

undocumented migrants, including children,²² can access health care across EU Member States. That variation includes access to treatment for HIV/AIDS and infectious diseases such as TB and hepatitis.²³

The EU funds an agency, the European Centre for Disease Control (ECDC)²⁴ based in Sweden, which has some focus on children, including in relation to the eradication of tuberculosis, which is increasing in some communities. Its action plan to fight TB in the EU (2008) notes part of the increase is among migrants and says: “It is important to note that undocumented persons have particular difficulty accessing diagnosis and treatment. Tackling the TB situation in these vulnerable populations must be a key element in any comprehensive strategy to reduce and eventually eliminate TB.”²⁵ The four principles on which its strategy is based include to “ensure prompt and quality care for all”. The Centre’s work on HIV also recognises specifically the difficulties undocumented migrants have in accessing HIV diagnosis and treatment: a technical report found “Policy and legal frameworks are a challenge to the provision of HIV services to migrants. Inconsistencies between health and immigration policies may be counterproductive to public health. The access to HIV treatment for undocumented and uninsured migrants is a key area of concern.”²⁶ Policy and legal frameworks to protect undocumented migrants’ access to HIV care are among the recommendations.

A European Parliament resolution on the health of irregular migrants in February 2011 called on Member States to assess the feasibility of supportive health care for them with a

²² EU FRA (2011) *Fundamental rights of migrants in an irregular situation in the European Union*, http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf, p. 80, where a table on healthcare entitlement of children are included.

²³ EU FRA (2011) *Migrants in an irregular situation: access to healthcare in 10 European Union Member States* http://fra.europa.eu/sites/default/files/fra_uploads/1925-FRA-2011-fundamental-rights-for-irregular-migrants-healthcare_EN.pdf

²⁴ <http://www.ecdc.europa.eu/en/Pages/home.aspx>

²⁵ http://ecdc.europa.eu/en/publications/Publications/0803_SPR_TB_Action_plan.pdf page 8.

²⁶ http://www.ecdc.europa.eu/en/publications/publications/0907_ter_migrant_health_hiv_access_to_treatment.pdf page 1.

clear definition on what should be provided; and to ensure that all pregnant women and children, irrespective of their status, are entitled to and receive social protection.²⁷

Is it feasible to get a focus on the particular health needs of undocumented children in order to ensure that the full access to health care for children provided in some Member States (and recently introduced in Sweden for instance)²⁸ is recognised as good practice across the EU? In the specific field of AIDS, the UK has recently agreed access to free treatment for all because of indisputable scientific evidence on the need for this to prevent the spread of the disease. Could this be considered a good practice model for infectious diseases?

9. Integration

EU cooperation on integration of non EU nationals has developed since the Tampere Programme on migration was adopted in 1999, with Common Basic Principles agreed in 2004²⁹ and a Common Agenda on Integration in 2005 that was followed by the establishment of a fund for the Integration of Third Country Nationals. The Lisbon treaty extended EU competency to the promotion of the integration of third-country nationals residing legally in Member States (Article 79.4 TFEU). A Communication setting out the current strategy was published in 2011. It emphasises the key role of Local Authorities in delivering a wide range of services, acknowledging their importance in shaping the interaction between migrants and the receiving society.³⁰ There is a network of national contact points on integration ‘with the purpose of finding successful solutions for integration and keeping national policy coherent with EU initiatives³¹; and initiatives to promote good practice including a web site and integration handbook. Throughout, the focus has been on legally residing migrants, effectively marginalising the issues raised by undocumented migrants from the dialogue between national contact points and preventing

²⁷ Resolution 2010/2089(INI) on reducing health inequalities in the EU, 8 February 2011, at AD, 5 and 22.

²⁸ See p. 48, “Fundamental rights: challenges and achievements in 2012”

http://fra.europa.eu/sites/default/files/annual-report-2012_en.pdf

²⁹ http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/82745.pdf#zoom=100

³⁰ http://ec.europa.eu/dgs/home-affairs/doc_centre/immigration/docs/agenda/1_en_act_part1_v10.pdf#zoom=100. P8

³¹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/integration/index_en.htm

cities and NGOs from using any of the resources from the Integration fund to meet their needs.

Recognising that many undocumented children are in practice resident in European cities, is there any scope for discussion under the auspices of the integration agenda of the issues that this raises and for the provision of guidance on good practice, notwithstanding the Treaty limitation to legal residents for EU instruments supporting integration per se?

The nine policy agendas identified here are not an exhaustive list of those that are pertinent to the protection of undocumented children. The relevance of EU law to the avoidance of statelessness would be one further example and round-table participants may want to raise others for consideration.

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