“Children in an irregular migration situation” refers to children whose lives are affected by an irregular migration status. This is a diverse group. It includes children whose immigration status is irregular – “undocumented children”. The parent(s) or other caregiver(s) of these children may also be undocumented, for example, those who have entered irregularly or overstayed residence permits or visas as a family. The parent(s) or other caregiver(s) of these children may also be undocumented, because their parents are themselves undocumented - can access these rights.

Children in an irregular migration status may also be children whose own migration status is regular, but whose parent(s) or caregiver(s) are undocumented migrants. For example, some children gain citizenship through one parent or birthright citizenship laws. In some countries, such as France and Ireland, children are not required any documentation until the ages of 18 and 16 respectively. Therefore, in these countries there is no such thing as an “undocumented child”. However, they are still affected by the irregular migration status of their parents.

Undocumented children may also be sent by their families to Europe in search of better conditions, or have run away, and are therefore alone. Some children are trafficked to Europe, either alone or with their families, and so are also undocumented. This project focuses on children who are with their families or other caregivers, and their access to basic social rights. There is a concerning lack of visibility of these children and how they are affected by policies on irregular migration - they frequently live in extremely precarious situations with no access to basic social rights. Because most EU countries have specific systems in place, however flawed, to care for unaccompanied or separated children and victims of trafficking, this project does not address the particular issues these groups of children face. The issues regarding access to basic social rights are nonetheless relevant for those separated children who are outside of the reception circuits for unaccompanied children and are invisible to social services, and victims of trafficking before identification, in so far as they can access basic social rights.
Methodology:
Over the past 10 years of daily monitoring and advocacy for the rights of undocumented migrants, PICUM has noted a dangerous trend towards the erosion of the rights of children in an irregular migration situation.

The project focuses on the rights to education, health care and housing because they are fundamental to a child’s development. Nonetheless, despite legal entitlements, these basic social rights are often denied to children in an irregular migration situation living in Europe, particularly those who are accompanied by their families or other caregivers and so not under the direct care of the State. Only by guaranteeing basic access to education, health care, and housing, are these children allowed sure and solid development.

Through a series of intensive national workshops in seven countries - Belgium, France, Italy, the Netherlands, Poland, Spain, and the UK, project participants will build mutual understanding of the problems children in an irregular migration situation face in exercising their rights to education, health care and housing in each country, and devise concrete strategies to improve on some of the challenges identified.

The seven countries have been selected as they represent the northern, southern and eastern European regions, a mix of old and new European Union (EU) member states and different social welfare models. As well as the specific national recommendations, the findings will be generalised for pan-European application where possible, and customised to fit regional characteristics as needed. An instructional guide will be produced to aid efforts to secure these rights for children in an irregular migration situation in all Member States, and at the European level. It will be presented at a European conference in January 2013, and will be used to shape and support the ongoing advocacy work of PICUM and partner organisations.

What Now?
The “Building Strategies to Improve the Protection of Undocumented Children in Europe” project workshops provide an opportunity for stakeholders to come together to discuss the barriers children in an irregular migration situation face when exercising their rights to education, health care and housing, including those outlined in this brief.

The goal is to build common understanding and begin to develop strategies to overcome them. This is just the beginning. We invite you to pursue these goals outside of the workshops, raise awareness of the issues, and challenge the barriers through your work.

For more information on the project, or to continue your engagement as the project progresses, please contact Sangeetha Iengar, Project Officer, sangeetha.iengar@picum.org or Anne-Françoise Beguin afb@sdj.be.
In referring to migrants without a valid residence permit, the term 'undocumented migrants' (or alternatively, 'irregular migrants') is more appropriate. The term 'illegal' can be criticised for two main reasons:

1. Its connotation with criminality: being in a country without the required papers is, in most countries, not a criminal offence but an administrative infringement.
2. Defining an individual or group as 'illegal' can be regarded as denying them their humanity and risks violating their innate right to recognition as a person before the law.

While referring to migrants as ‘illegal’ has political and/or societal consequences, it also fails to take into account the varying degrees of compliance which may apply to the situation of any one migrant. For example, a migrant may be legally resident but working in violation of some or all of the conditions of their visa.

This position on terminology is increasingly being taken by a multitude of actors, including the United Nations, the Council of Europe, the European Parliament, and the European Commission, as well as numerous non-governmental organisations, local authorities, professionals from diverse fields, and undocumented migrants themselves.

Following the UN Convention on the Rights of the Child (CRC), ‘a child means every human being below the age of eighteen years.’ However, the age when someone is no longer defined as a “minor” varies from country to country.

Especially in a climate where undocumented migrants are de-humanised, referring to undocumented children as “minors” rather than “children” has potentially negative connotations and risks their exclusion from the child rights/child protection frameworks.
PROTECTION OF CHILD RIGHTS IN GENERAL

Are Undocumented Children’s Rights Protected in International and European Law?

The fundamental rights of children, regardless of immigration status, are protected in several legally binding international and European laws (see box on next page), most notably:

- The **UN Convention on the Rights of the Child** (CRC): Belgium ratified the CRC in 1991, making it directly part of national law.
- The **International Covenant on Economic, Social and Cultural Rights** (ICESCR): Belgium ratified the ICESCR in 1983 making it directly part of national law.
- The **European Convention on Human Rights** (ECHR): Belgium ratified the ECHR in 1955, making it directly part of national law.

Two fundamental legal principles are crucial when protecting the rights of children: non-discrimination and the best interests of the child. They are clearly laid out in the Convention on the Rights of the Child (CRC) as follows:

- **Non-discrimination**: the CRC obligates all states to protect the rights set out in the convention to:

  “*each child within their jurisdiction without discrimination of any kind irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*”

  (Article 2)

  The Committee on the Rights of the Child has explicitly stated that this means that the CRC applies regardless of immigration status.

- **The best interests of the child**: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

  (Article 3)

  The Committee on the Rights of the Child has made clear that interests in migration control cannot override considerations of the best interests of the child.

BELGIUM HAS A LEGAL OBLIGATION TO FOLLOW THE INTERNATIONAL AND EUROPEAN LAWS WHICH IT HAS “RATIFIED” (FORMALLY CONSENTED TO AND MADE VALID).

This means that any policy or practice which is contrary to these laws can be challenged as unlawful.
What Are the National Laws and Regulations?

The tension between immigration control and child protection results in children in an irregular migration situation being treated separately and differently from “all” children.

Children in an irregular migration situation are affected by repressive migration control policies and not adequately protected as children, first and foremost, under the systems for protecting children.

Belgium has an “interpretive declaration” regarding the principle of non-discrimination in Article 2 of the CRC, stating that the Belgian State has the possibility to limit the enjoyment of the rights set out in the CRC for children not having Belgian nationality.

Therefore the Belgian State considers that it can exclude undocumented children from this important human rights instrument.

The Committee on the Rights of the Child has recommended that Belgium speed up the process of withdrawing this declaration.

- Otherwise, Belgian law at all levels protects the rights of all children. Competence for children’s rights is shared between the Federal State authority, the three Regions and the three Communities.

  - At the national level, the following laws are important:
    - The Belgian Constitution, which states that: “Each child is entitled to have his or her moral, physical, mental and sexual integrity respected... Each child has the right to benefit from measures and facilities which promote his or her development. In all decisions concerning children, the interest of the child is a primary consideration...”.15
    - The Law organising the CPAS/OCMW (centre public d’action sociale/ openbare centra voor maatschappelijk welzijn), which states: “Every person has the right to social welfare. The aim of this is to allow every person to live a life in conformity with human dignity”.16
    - The Law organising the CPAS/OCMW (centre public d’action sociale/ openbare centra voor maatschappelijk welzijn), which states: “Every person has the right to social welfare. The aim of this is to allow every person to live a life in conformity with human dignity”.16
    - In both the French and Dutch speaking communities, the legislation on youth assistance is applicable (with undocumented children included in references to “all children”)
      - For the French community: the Decree of 4 March 1991 related to youth assistance.17
      - For the Dutch speaking community: the Decree of 7 March 2008 on special youth assistance.18

  - The Committee is concerned at continuous discrimination suffered by children of foreign origin
    - Committee on the Rights of the Child (2010)
For the Region of Brussels Capital, the Decree of 29 April 2004 related to youth assistance is also relevant, and makes specific reference to the inclusion of children regardless of immigration status within the scope (Article 3.2).  

- Government policy on all levels states its strong commitment to supporting the well-being of every child.

- The National Action Plan for Children 2005-2012, integrates the contributions from the different federal entities according to the same 10 strategic priorities, including: providing priority to children and the protection of families, eliminating poverty, making sure that no child is forgotten, taking care of every child, and allowing every child to have access to education.  

However, both the Committee for the Rights of the Child and NGOs draw attention to the lack of concrete and measurable actions in the plan. The Committee concludes “that the National Plan of Action for Children (2005-2012) does not contain clear goals, targets, indicators and timetables, any mechanism to monitor progress in the achievement of goals and any specific budget allocated to it.”

- There is a Commission for the Rights of the Child, established in 2006, which brings together institutional and non-institutional actors in the field of the rights of the child on a national level.

However, the Commission has been criticized regarding its decision-making arrangements —although various bodies are associated with this work (ombudsmen, experts, NGOs, governments, etc.), all decisions are made by representatives of the authorities (“members who are entitled to vote”). This deprives the Commission of its own autonomy and real power to influence political decisions affecting the rights of the child.

- There is an Ombudsman for Children - a spokesperson for the rights of the child, to defend rights such as those provided by the Constitution and the CRC — for Flanders (Kinderrechten commissaris), for the French-speaking community (délégué général aux droits de l’enfant), and for the German-speaking community (Ombudsmanns der Deutschsprachigen Gemeinschaft).
Do Undocumented Children Have a Right to Education in International and European Law?

Yes, their right to education can be found in several laws: 26
In particular:

- The Convention on the Rights of the Child (CRC) says:
  'States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.' (Article 28, see also Article 29)

- The International Covenant on Economic, Social and Cultural Rights (ICESCR):
  'The States Parties to the present Covenant recognise the right of everyone to education.' (Article 13, see also Article 14)

- The European Convention on Human Rights (ECHR):
  'No person shall be denied the right to education.' (Protocol 1 Article 2)

What Are the National Laws and Regulations?

The Belgian Constitution states that, "Everyone has the right to education with the respect of fundamental rights and freedoms. Access to education is free until the end of obligatory scholarity." 29

Education in Belgium is compulsory from age 6 to 18. 30 Full-time education is compulsory from age 6 to 16 (sometimes 15). 31 From age 16 to 18, part-time education is compulsory, and children can choose to continue their full-time education or participate in a “cooperative education” (work-study) programme, including an official apprenticeship or traineeship. 32

As education is organised on community level, it is the governments of the three different communities that are responsible for the implementation of these principles and the drafting of specific decrees.

In both the French and Flemish speaking communities, the inclusion of undocumented children in the right to education is explicit:

- In the French speaking community, the Decree of 30 June 1998 states:
  "Children staying illegally on French-speaking territory are, as long as they stay with their parent or guardian, admitted into educational establishments." 33

- In the Flemish community, the Minister of Education sent a circular letter on 24 February 2003 explicitly stating that:
  "All children residing on the Belgian territory have the right to education (...) A registration cannot be refused on basis of the sole finding that the residence status of the pupil or his parents is not regular. (...) If, at the moment of registration, the pupil cannot prove his identity with documents, he can still be enrolled, under the condition that the pupil is present during the registration."

Further, in both the French and Dutch speaking communities, registration is regulated to protect undocumented children’s access to education. 34

- In the Dutch-speaking community, the absence of a regular immigration status is not one of the grounds for refusal of registration.
- In the French-speaking community schools must provide justification for refusal of registration in writing, and the justification must be according to the law. 35

The right to receive official certification of studies completed and diplomas is also explicit.

- In the French-speaking community:
  "The right to education also includes the right to obtain certificates and diplomas. A school director may not refuse to deliver a certificate or diploma on the grounds that, for example, the school fees have not been paid or the child is in an irregular stay." 36
- In the Flemish-speaking community:
“Every student – regardless of his residential status – who has attended the courses regularly and completed the period of study successfully must be granted a certificate/diploma.”

The issue of detection is also addressed. The same circular letter of the Flemish Minister of Education also makes clear that headmasters and teachers do not have to inform the immigration authorities or police about the registration of undocumented children, and that these authorities cannot use schools as a means to detect families in an irregular migration situation.

This is extended to all Belgian territory. A further circular letter was signed by the Minister of Interior on 29 April 2003 and sent to all the police services in Belgium, recalling a 1994 agreement that police services can not enter schools in order to carry out a deportation. It forbids the arrest of children, but only during school time, and recommends that police do not wait for children at school gates.

What is the situation in practice?

- Most children in an irregular migration situation are able to register in primary and secondary schools in Belgium.
- Registration is possible, even if no ID documents are available, based on the child’s presence and testimonial evidence of their name, age and educational level.
- However, there are a number of practical issues:
  - The Despite regulations regarding legitimate reasons for refusing registration, discretion at the local level is still an issue - schools are sometimes reluctant to accept undocumented children due to perceived difficulties regarding their integration, or simply discriminate, so may reject their registration or impose requirements, such as language skills and strict registration timetables, which exclude migrant children.
  - School administrations are still sometimes uncertain about their responsibilities towards undocumented children. For example, schools sometimes register undocumented children as ‘free’ students, which prevents then from receiving formal certification of their studies or a diploma.
  - Parents face difficulties meeting school costs, such as books, uniforms and school trips as well as extracurricular expenses, such as meals, transportation, etc.
- The circular also mentions the possibility for families to request that their deportation be postponed until their child finishes the school year.
- There is no specific regulation referring to undocumented children in the German-speaking community.

Although the right to education is guaranteed regardless of immigration status, the legal duty of parents to register their children in school within a certain time period does not necessarily apply to undocumented parents, as the obligation is to register children within the 60 days following registration on the ‘population’ register (and undocumented parents will not be registered). However, undocumented parents remain obliged to send their children to school.

- Both the French and Flemish speaking communities have “gateway” classes for children who have recently arrived in Belgium (regardless of status), which they can attend for up to a year, to learn the language and/or to read and write. Participation in such classes can be successful, and represent an opportunity for teachers to help undocumented children integrate into mainstream schooling, even though they have no targeted programs. However, poor knowledge of the language can still be a barrier to education.
- Undocumented children are among those that are sometimes inappropriately channelled into such “special education” classes and kept there for longer than necessary. This segmentation delays integration into mainstream education and can reduce educational attainment and cause stigmatisation.
- Undocumented children are sometimes denied access to “cooperative education” (work-study) programmes as well as the official apprenticeships and traineeships that can be part of compulsory 16-18 education. This is discriminatory and has no basis in the law, which specifies that students do not need a work permit to do traineeships which are part of the curriculum (regardless of immigration status).
- Precarious living conditions can affect performance and attendance in school.
- Fear that the information provided to schools could lead to detection and deportation, or the authorities taking the child into care, can prevent parents from registering their children in schools.
Undocumented pupils are often not where they should be in relation to their competences and ambitions. For example, many enter the part-time learning/part-time working system, not because it fits their abilities, but because of the opportunity to earn some money, and thus support their family.

Tine Debosscher, Kruispunt Migratie-Integratie

Undocumented children can attend public nurseries, that are recognised and subsidised by the government, in both the French and Flemish-speaking communities. Normally, the financial contribution is calculated according to parents’ incomes, but there is the possibility to adapt this for undocumented parents.

For those that are able to complete their education until 18 years, access to further education at university is at the discretion of the institution. It is also difficult for undocumented young people to meet the fee requirements, and they are not eligible to apply for study grants.

The inclusion of undocumented children in school, and their de facto integration, can also cause imbalance within families in an irregular migration situation, where parents have much more restricted access to rights and society as a whole. Children with better knowledge of the language and country’s culture and systems, often assume the role of translator to assist parents. This change in intergenerational relations and responsibilities can put a strain on families and children.

“Undocumented pupils are often not where they should be in relation to their competences and ambitions.

For example, many enter the part-time learning/part-time working system, not because it fits their abilities, but because of the opportunity to earn some money, and thus support their family”.

Tine Debosscher, Kruispunt Migratie-Integratie
Do Undocumented Children Have a Right to Healthcare in International and European Law?

Yes, their right to healthcare can be found in several laws. In particular:

- The Convention on the Rights of the Child (CRC) says:
  
  “States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”
  
  (Article 24(1); see also Articles 25 and 39)

- The International Covenant on Economic, Social and Cultural Rights (ICESCR) says:

  “The States Parties...recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”
  
  (Article 12(1))

- The European Convention on Human Rights (ECHR) says:

  “No person shall be subjected to torture or inhuman or degrading treatment or punishment.”
  
  (Article 3)

What are the National Laws and Regulations?

- The Belgian Constitution states that:

  “Everyone has the right to lead a life in keeping with human dignity. To this end, the laws... guarantee economic, social and cultural rights... These rights include among others... the right to social security, to health care and to social, medical and legal aid”.

- Emergency care is always provided to free of charge to everyone, including undocumented children, without any administrative requirements.

- Up to the age of six, all children have free access to preventative care - consultations and vaccinations - from the Office of Birth and Childhood (ONE) and Kind en gezin centres.

  Otherwise, although unaccompanied children have the same access to health care as national children, undocumented children who are accompanied by their families or other caregivers have access under the same conditions as adult undocumented migrants.

  They are excluded from the mainstream health insurance system but are eligible for “Urgent Medical Assistance” (AMU/ DMH) free of charge.

  The Royal Decree regulating “Urgent Medical Assistance” does not provide a concrete definition of this concept, however it clearly states that:

  - the assistance provided should be exclusively of a medical nature;
  - the “urgent” character must be certified by a doctor;
  - health care provided can be preventive and curative;
  - the medical help given can be both mobile or provided in a health centre;
  - the assistance cannot consist of financial help, housing or any other provision of service in kind.

  The procedure is managed by the social welfare centers (CPAS/ OCMW).

  To obtain AMU/ DMH, the family must register with their local CPAS/ OCMW, who will provide the patient with a medical card allowing the care, once:

  - They have verified that the family lives irregularly in their local area (commune) and that they live below a certain economic threshold and can be considered “destitute”.

  - A medical certificate proving the urgent necessity of the care is provided by a doctor.

  The care must be provided by a health care provider recognized by the National Institute for Health and Disability Insurance (INAMI/ RIZIV). The doctor sends the bill and “urgent medical assistance certificate” to the CPAS/ OCMW. This is necessary in order for the social welfare centre to have its costs reimbursed by the State.

  They are liable to pay the full costs for any other treatment or diagnosis.
What is the Situation in Practice?

- Many undocumented children receive health care through the AMU/DMH system.
- There is no legal or medical definition of “urgent medical care”, so interpretations can vary at the local level.
- This can allow for inclusive interpretations, covering most secondary care. However, this is subject to discretion by doctors.
- Undocumented children face a number of difficulties when accessing the care they are entitled to:
  - The procedures are complex and vary locally. Each CPAS/OCMW has its own procedures relating to AMU/DMH - each has its own ‘urgent medical assistance certificate’ for doctors to complete and applies different criteria to decide whether or not someone is entitled to the care and is destitute.
  - It is easier for undocumented children to access AMU/DMH through some CPAS/OCMW than from others. For example, some CPAS/OCMW issue medical cards for longer periods of time and/or have agreements with certain doctors, simplifying the whole process. On the other hand, some CPAS/OCMW ask for an ‘urgent medical assistance certificate’, which states which medical needs there will be in the future, before they open a dossier. In this case, the family has to pay for the first consultation themselves.
  - This local variation exacerbates lack of awareness on the part of both health care providers and undocumented families about children’s entitlements and how the AMU/DMH system works (conditions, procedures, approved doctors etc).
  - When a home inspection visit is required by the CPAS/OCMW, it can be difficult for undocumented families, who may not have a fixed address or be staying with friends or relatives. It may also increase fear of detection and/or possible repercussions for hosts.
  - The duration of the medical card varies considerably and is always temporary – this requires regular renewal of AMU/DMH coverage.
  - Lengthy and bureaucratic systems for reimbursement can make doctors reluctant to treat undocumented children.
  - The procedures for hospitals to receive reimbursement are also complicated and vary depending on whether the patient is eligible for AMU/DMH. This can lead to problems, particularly for patients that do not have AMU/DMH coverage yet, including being presented with a bill for treatment (afterwards).
  - The process to access AMU/DMH can take a long time if the person does not yet have a dossier with the CPAS/OCMW. This can result in parents accessing care for their child from a doctor without prior approval from the social welfare centre and them having to cover the costs, or from a hospital emergency department.

“Dental care is something that is often a problem, as is eye care; sometimes it is very obvious that the children have eye-sight problems and the school will see this very easily in the classroom, but then you have a problem with glasses. You can have your eyes checked but you cannot buy glasses. They can have the test for free but they have to pay for the glasses.”

Karen Malfliet, Kom-Pas

- All children in an irregular migration situation - both children of undocumented migrants and those who are undocumented themselves - may also be prevented from accessing health care by several other obstacles:
  - Migrants may lack awareness of their entitlements and the services available (e.g. at Kind en gezin or ONE).
  - There is a fear of being detected.
  - The costs can be prohibitive for care that is not considered to fall under AMU/DMH and must be paid for. This can make access to specialist, dental or optometry treatment difficult.
  - As a result of moving frequently, children in an irregular migration situation rarely have proper medical records and do not receive continuous care. This can be highly detrimental to children’s health.
  - There are language barriers.
  - Some mental health care is available, but access can be difficult (e.g. long waiting lists, lack of parental consent, reluctance to work with interpretation.)
Yes, their right to housing can be found in several laws. In particular:

- The Convention on the Rights of the Child (CRC): “States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development” and “in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.” (Article 27(1) and (3))

- The International Covenant on Economic, Social and Cultural Rights (ICESCR) says: “The States Parties...recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...The States Parties will take appropriate steps to ensure the realization of this right...” (Article 11(1))

- The European Convention on Human Rights (ECHR) has the prohibition of inhuman and degrading treatment (Article 3) and, in Article 8: “Everyone has the right to respect for his private and family life, his home and his correspondence.”

Whilst there is no duty to provide housing, European Court of Human Rights jurisprudence indicates that these rights can imply a positive obligation on States to avoid imposing “intolerable living conditions” that would breach these rights.

What Are the National Laws and Regulations?

The Belgian Constitution states that:

“Everyone has the right to lead a life in keeping with human dignity. To this end, the laws... guarantee economic, social and cultural rights... These rights include among others... the right to decent accommodation”

A Constitutional Court ruling on 22 July 2003 established that the government is required to give children, regardless of immigration status, social assistance that is necessary for their wellbeing, including housing.

However, the royal decree of 24 June 2004 restricted the provision of this assistance and shelter to families in an irregular migration situation (undocumented parents and their children) to that provided in federal reception centres for asylum seekers (organised by Fedasil and partner agencies, the Red Cross and Rode Kruis).

Once a request for social assistance has been introduced to CPAS/ OCMW by or for a child in an irregular migration situation with their parents, the CPAS/ OCMW carries out a “social enquiry”. This is to confirm the state of need. In order to access this assistance, it is necessary to show that the parents are not assuming or are not able to fulfil their maintenance obligations (e.g. provision of food, shelter, clothing, education to the child), that the request concerns only expenditure essential for the development of the child, and that the centre will ensure that the assistance will be allocated exclusively to cover these expenses. This assistance should be provided on a voluntary basis.

The Organic Law on Social Welfare Centres, which details the provision of material help for undocumented families, was modified in 2005 following another Constitutional Court ruling – so that parent(s) are now guaranteed accommodation in the centre along with their child.
What is the Situation in Practice?

- Children in an irregular migration status are not entitled to access social housing with their family unless one member of the family has a residence permit.

- Fedasil is legally obliged to provide material assistance to undocumented families, in the form of shelter in the reception centres for asylum seekers:
  - Due to a severe shortage of places, there is “reception crisis” (ongoing since 2009) and undocumented families are systematically excluded from this right to material assistance.
  - To access their right to shelter, undocumented families must make an appeal in court. Cases taken to court against Fedasil are usually successful (Fedasil condemned for not providing shelter). However, lawyers must also follow up to ensure the decision is implemented.
  - Families may also introduce a complaint to the Federal Ombudsman, which will then send a recommendation to Fedasil. Fedasil is again responding positively to these recommendations.
  - Fedasil and the Office for Foreigners signed a protocol of cooperation on 17 September 2010, according to which families are accommodated in a reception centre and protected against eviction if they are cooperating with a process leading to regularisation or return.
  - This accommodation is not appropriate housing for children.

- Shortage of social housing makes cheap, decent housing difficult to find on the private market.

- A residence permit is sometimes required by landlords when renting on the private housing market.

- Housing arrangements are often insecure, with families having to move frequently and rely at times on friends and family.

- When accessing the private housing market, undocumented families often:
  - face racism and discrimination
  - are forced to live in sub-standard conditions (overcrowded, unsanitary, squats, without heating etc)
  - have their precarious situation exploited by landlords (“marchands de sommeil”)
  - rarely report such exploitation to the authorities for fear of being identified, or at best having to find alternative accommodation

- Lack of a fixed address can pose significant barriers to accessing all other rights and services provided by the local social welfare centre and to maintaining regular communication with legal counsel and the foreign office (e.g. if a regularisation is in process).

- Some families become homeless. While there are some temporary solutions implemented by NGOs (for example, during winter) there are currently no structural solutions envisaged.

“In Anderlecht an apartment block had been sub-let, the flats inside had been sub-let again, and finally the rooms were also sub-let. Each room was filled with six to eight people, and even the cellar was full. In 2006 the whole block was inspected. In the basement they found a mother with a 15-week old child. The building was declared insalubrious and all of the occupants were expelled directly to his or her country of origin (most were from Brazil).”

Mônica Pereira, Abrasão

“A woman who fled from Guinea when she was pregnant, fearing her unborn daughter would face the same fate as she had, and is subject to Female Genital Mutilation, applied for asylum in Belgium. When her asylum application was refused, both the mother and her then two year old daughter had to leave the Fedasil reception centre. They have not been able to find housing since, and get by staying with people they meet on the street. The last news was that they have temporary accommodation in a night shelter in Liege. SDJ has written to CPAS a number of times to demand material assistance for this mother and daughter, but to no avail.”

Sandra Tailhades, Service Droits de Jeunes
Cross-cutting Issues

- **Interdependence of rights**—children's health, living conditions and access to education are all closely interlinked, and only by guaranteeing basic access to education, health care, and housing, are these children allowed sure and solid development. To deny access of one of these rights affects all the others.\(^78\).

- **The use of child poverty as a tool of immigration control**—migration control tends to take priority over child protection, so much so that repressive policies are often justified by the (flawed) logic that making life as intolerable as possible will motivate “voluntary” return. There is also concern that, in this context, the power to separate children from their families could be used to be ‘tough’ on irregular migrants, rather than only in cases where it is clearly in the best interests of the child. These policies are implemented without consideration of the impact on children.

- Although Belgium is often cited as an example of the implementation of an alternative to detaining families, the practice of **child detention is a major concern**. Despite the “open return houses” being considered successful, in terms of most families being able to regularise their stay or cooperate with a return process within the 2 months envisaged (the maximum duration of stay), the government has announced proposals to create “family units” within closed detention centres. A new article\(^79\) came into force on 27 February 2012, and states that “normally” a family would not be placed into a closed center, “unless this center is adapted to the needs of families with minor children”, and that “a family (...) may be detained in order to proceed to the deportation (...) in a center adapted to the needs (...) for a duration as short as possible.” This indicates a return to child detention.\(^80\)

Children's access to their rights to education and heath care is severely limited in detention. It is a de facto breach of their right to housing as detention centres are completely unsuitable accommodation for children.

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Common Barriers to Accessing All Social Rights

- National Legislation that is below the standards set out in human rights law, inexplicit or contradicted by other rules and practices
- Lack of clarity in the rules and frequent changes in policy
- Discretion and lack of awareness on the part of local authorities / service providers
- Fear
- Lack of awareness of undocumented families of their rights
Regularisation

There is also a pressing need for **durable solutions** for undocumented children – pathways into a regular migration status and documentation.

As outlined in this brief, all children are entitled to various rights regardless of immigration status, but the precarious living conditions associated with irregular migration status are highly detrimental to their wellbeing. Further, as children grow older and transition to adulthood, they must face the reality of living as an adult with undocumented status, which is particularly harsh for the many that have spent many years and grown up in Belgium.

In Belgium, there are two main means of regularization:

- There is the so-called “regularisation on the basis of Article 9bis”, also known as “**authorisation of stay for exceptional circumstances**”.\(^{81}\)
  - Normally, request for authorisation of stay for more than 3 months has to be introduced in the country of origin. The 9bis is an exception to this principle and is applicable for persons already in Belgium, often already in irregular stay.
  - The person has to demonstrate that there are exceptional circumstances making return to his country of origin, even a temporary return, extremely complicated or impossible. There is no legal definition of these “exceptional circumstances”.
  - Some criteria are mentioned in some Instructions from the Foreign Office\(^{82}\) which revolve around unreasonably long asylum procedures, with special consideration for families with children attending school.\(^{83}\)
  - “Exceptional circumstances” can also be justified by an urgent humanitarian situation and specific attention is provided to vulnerable groups.
  - The authorisation of stay may be delivered for a limited or unlimited duration.
  - However, the admissibility criteria are very strict\(^{84}\) and it is necessary for people to have a fixed address to introduce their application for regularisation. This can be difficult for undocumented families, who may move frequently, rely on friends and family for accommodation or be living in temporary shelter accommodation.\(^{85}\) Absence of a fixed address to demonstrate length of residence in Belgium is also a major challenge.

- There is regularisation based on **medical grounds** (article 9ter of the Foreigners law).\(^{86}\)
  - There are no exceptions to the requirement of proof of identity unless an asylum application is being processed.
  - The applicant has to prove that they suffer from an illness which implies a real risk for his/her life or physical integrity, and that there is a real risk of inhumane or degrading treatment because there is no adequate treatment in the country of origin or in the country where the person regularly resides. There are numerous technical conditions and exclusions.
  - The authorisation of stay begins with a temporary permit (one year), which can be renewed and can become permanent after 5 years following the introduction of the request.
  - Regularisation under this provision is subject to a large degree of discretion by the Foreign Office, with regularisation considered a “favour” rather than a right (also for the 9bis procedure). Interpretations at the local level of key factors such as the accessibility of health care in the country of origin and the severity of the illness vary, resulting in unfair discrimination.
  - The procedure is very slow – an admissibility step was introduced to allow admissible applicants to quickly get a temporary residence permit and access medical care. However, because the process is slow, access to health care is delayed.

The temporary regularisation measures introduced in 2009 have enabled some undocumented families to be regularised over the last two years. Local ties and children’s attendance in school in Belgium were amongst the criteria considered.\(^{87}\) However, it is also important to highlight a number of problems with these measures (for example, lack of a legal basis, length of the process/ until a decision, the fact that deportations continued nevertheless, and that the regularisation on the basis on employment was very difficult to access in practice.

There are **no special procedures for regularisation of children**.
TERMINOLOGY

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

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

3 The European Parliament “Calls on the European institutions and Member States to stop using the term ‘illegal immigrants’, which has very negative connotations, and instead to refer to ‘irregular/undocumented workers/ migrants’” (European Parliament, Report on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI), Recommendation 158); and “stresses that the EU institutions should endeavour to use appropriate and neutral terminology in legislative texts when addressing the issue of third country nationals whose presence on the territory of the Member States has not been authorised by the Member States authorities or is not longer authorised. In such cases, EU institutions should not refer to “illegal immigration” or ”illegal migrants” but rather to “irregular immigration” or “irregular migrants” (European Parliament legislative resolution of 13 September 2011 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) (COM(2010)0061 – C7-0045/2010 – 2010/0039(COD), page 41)

PROTECTION OF THE RIGHTS OF THE CHILD IN GENERAL

4 Policies can be challenged internally, both informally and through official complaints procedures. Complaints can be taken to the Centre for Equal Opportunities and Opposition to Racism (http://www.diversite.be). The CEOOR is a National Human Rights Institution, but only accredited with B status, which means that certain changes are necessary for it to gain full accreditation (for more details, see International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 29 March -1 April 2010). The regional and international legal instruments have monitoring bodies to which State Parties must report periodically. Alternative reports can be submitted to complement information provided in the government self-assessments, and some bodies accept communication from individuals or collective complaints. Details of the UN monitoring bodies can be found here, of the Committee on the Rights of the Child here, and the European Committee on Social Rights (European Social Charter) here. Breaches of international and regional human rights laws that have been ratified can also be taken to court. Violations of the ECHR can also be taken to the European Court of Human Rights if all options in the domestic courts have been exhausted and violations of EU law can be taken directly to the European Court of Justice. Find details of the European Court of Human Rights here and of the European Court of Justice here

5 The full text of the CRC is available here.

6 Jurisprudence has established that international treaties are directly applicable in Belgium as domestic law. For further information, see Peeters (1993) “The Priority of Treaty Law over Domestic Law – Belgium” (available here).

7 The full text of the ICESCR is available here.

8 The full text of the ECHR is available here.

9 Belgium has clarified that: “1. With regard to article 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals. This concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies.” (Interpretive Declaration 1 on the CRC). The Committee of the Rights on the Child has recommended that Belgium withdraw this declaration (OHCHR Committee on the Rights of the Child (2010) “Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Fifty-fourth session, Concluding observations: Belgium” (Combined Third and Fourth Periodic Reports), 2010, available online here).
10 “State obligations under the Convention apply to each child within the State’s territory and to all children subject to its jurisdiction (art. 2). [...] Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.” (Paragraph 12, General Comment No. 6 (2005), Committee on the Rights of the Child).

11 “Exceptionally, a return to the home country may be arranged, after careful balancing of the child’s best interests and other considerations, if the latter are rights-based and override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.” (Paragraph 86, General Comment No. 6, Committee on the Rights of the Child.) Although this paragraph refers specifically to return, the general principle may apply to every right.

12 Another relevant legal instrument is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). Although no EU Member State has ratified the ICRMW, it reiterates international standards. Other relevant EU policies include the EU Strategy on the Rights of the Child and the EU 2020 Strategy; regarding education, the 2000 Lisbon Agenda and Proposed Directive on equal treatment (COM (2008) 426) extending protection against discrimination to education; regarding adequate standard of living/ child poverty, Articles 13, 136 and 137 EC, the Lisbon Strategy and Social Inclusion Process, the On-going Work of the Social Protection Committee EU Indicators Sub-group.

13 The Committee on the Rights of the Child has also expressed concern that the principle of the best interests of the child is “not reflected as general principle in all legislation regarding children.” (OHCHR Committee on the Rights of the Child, “... Concluding Observations: Belgium”, ibid).


15 It also states that: “Each child has the right to express his or her views in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and maturity.” and that “The law, federate law or rule referred to in Article 134 ensures these rights of the child.”, Article 22(bis) (2nd modification), Constitution of Belgium, (available online here (FR) and here (NL)).

16 Article 1 Organic law organizing the Social Welfare Centres (public social action centres) of 8 July 1976 (available online here (FR) and here (NL).

17 Décret du 4 mars 1991 relatif à l’aide à la jeunesse (available online here).

18 Decreet van 7 maart 2008 inzake bijzondere jeugdbijstand (available online here).

19 Ordonnance du 29.04.2004 de la Commission communautaire de la région de Bruxelles capitale relative à l’aide à la jeunesse (available online here).

20 In line with those in the document “a world fit for children” which was adopted by the Committee on the Rights of the Child during a Special Session in May 2002 and requires all State parties to establish or strengthen national action plans (point 59).

21 The other are: Protecting children against offenses and exploitation, protecting children against war, fighting against AIDS, listening to children and ensuring their participation, protecting earth for the children, National action plan dedicated to children, (available to download here).


23 Loi du 1er mai 2006 portant approbation de l’accord de coopération entre l’Etat, la Communauté flamande, la Région flamande, la Communauté française, la Région wallonne, la Communauté germanophone, la Région de Bruxelles-Capitale, la Commission communautaire commune et la Commission communautaire française portant création d’une Commission nationale pour les droits de l’enfant, conclu à Bruxelles, le 19 septembre 2005, M.B., 10 novembre 2006 (available online here).


25 The Ombudsmen for Children for the German-speaking community was appointed for the first time on 17 May 2010/
Article 28, 29 CRC, Article 26 (1) UDHR, Article 13 (1) (2), 14 ICESCR, Article 5 (e)(v) ICERD, Protocol 1 Article 2 ECHR, and Article 14 of the Charter of Fundamental Rights. It is also in Article 17(2) ESC - the Committee on Social Rights has not stated explicitly that undocumented children must have equal access to education, but it has found that, notwithstanding the general exclusion of undocumented migrants from the scope of the ESC, other basic social rights, such as health care and housing, must be provided to children in an irregular migration situation in certain conditions (see footnotes 31 and 42). Further, it has said that "Particular attention must be paid to ensure that vulnerable groups benefit from the right to education and have equal access" (e.g. Secretariat for ESC, "Children's Rights under the European Social Charter"). Therefore, it is likely that the Committee would find that Article 17 ESC applies to undocumented children. Though not legally binding, it can also be found in Article 30 ICRMW and Article 3 (1)(e) UNESCO Convention Against Discrimination in Education

"The Committee takes note of Article 2 of the Convention on the Rights of the Child and Article 3(e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status." (Paragraph 34, General Comment No. 13, Committee on Economic, Social and Cultural Rights).

Protocol 1 was signed and ratified 1952 (Entered into force 1954). In the case Timishev v. Russia, the European Court of Human Rights ruled that the exclusion of two children (aged seven and nine) from school as a result of their Chechen father no longer having a migrant's card was a violation of the ECHR. (European Court of Human Rights, Timishev v. Russia, judgment of 13 December 2005, Application Nos. 55762/00 and 55974/00, para. 66.

The Belgian Constitution, October 2007, Article 24 (3) (op cit note 15).

Education is compulsory for a period of twelve years, starting with the school year (September) that begins in the year of the child’s sixth birthday, and ending on the 30th of June of the calendar year in which the student turns 18.

It is also possible to enter a part-time education/ part-time working system from the age of 15, if the student has finished the first two years of full-time secondary education. The student has to prove his educational past.

Law of 29 June 1983 concerning obligatory schooling (available online here & here).

Article 40 of the Decree of 30 June 1998 as amended under the Decree of 27 March 2002. Also in the National Action Plan, it states “The French speaking community has considered as its duty, to ensure education to all minors, regardless of whether or not their stay on the territory is legal” (Plan d'action national consacré aux enfants, ibid, p.22).

Circular letter of 24/02/2003 from the Flemish Minister for Education on the right to education for children without legal residence status (replacing the circular of 24/06/1999). The legal bases of the circular are the Decree of the Flemish government regarding ethnic and cultural minorities (28/04/1998); the Law regarding school obligation (29/06/1983); Art. 26 of the Decree on basic education (25/02/1997); the Decree on equal opportunities in education (28/06/2002).

In the French speaking community, regardless of the time of year, the director or administrative body of a subsidized school, who refuses the registration of a pupil who asks for it, has to provide a “proof of request of registration”, which states the reason leading to the refusal of registration and provides contacts of services where the pupil may obtain assistance to be registered in an other school. The causes of refusal have to be relevant, legitimate and lawfully acceptable (missions decree).


Police are permitted to wait for children at school gates when their parents have already been arrested and so are unable to collect them themselves (Centre pour l'égalité des chances et la lutte contre le racisme (2004) “Analytical Report on Education”, p.15, available online here).

If a family with a child attending school receives an expulsion order in the period from the beginning of the Easter holidays until the end of the school year, they can ask for their deportation to be postponed until the end of the school year (or the end of the re-examination) (Centre pour l'égalité des chances et la lutte contre le racisme, 2004, ibid, p.14).

Prof. Dr. Chr. Timmerman et al. « Quel droit à l’enseignement pour les enfants en séjour précaire ? Une analyse de la situation des enfants sans titre de séjour légal ou avec un titre de séjour précaire dans l’enseignement fondamental en Belgique. », Droit de l’enseignement pour des enfants sans titre de séjour (UCARE), March 2010, p. 48.

In this brief, the term “parent” is used for the sake of brevity, but is meant to also refer to other caregivers.

PICUM (2009) PICUM’s Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe, p.16
43 Where there is electronic registration requiring a national registration number, e.g. in Ghent, Antwerp and the schools for the Flemish community in Brussels, it is possible to register at the local Integration Office ("Onthaalbureau (inburgering)") or Local Consultation Platform (Lokaal Overleg Platform (LOP)) with a specific code.

44 In the French speaking community, see Décret du 14 juin 2001 visant l’inscription des élèves primo-arrivants dans l’enseignement organisé ou subventionné par la Communauté française. A proposal for a new decree is currently under discussion and if voted would enter into force for admissions for the school year 2012-2013. For the Flemish speaking community, see Omzendbrief van 30 juni 2006 betreffende het onthaalonderwijs voor anderstalige nieuwkomers in het basis onderwijs and Besluit van de Vlaamse regering inzake de organisatie van onthaalonderwijs voor anderstalige nieuwkomers in het gewoon voltijds secundair onderwijs.

45 Due to a lack of specific programs targeted at the needs of children in an irregular migration situation, they are sometimes channeled into special classes inappropriately, especially if children move and change schools frequently. The special classes where undocumented children are typically channeled include those for mild disability (type 1), behavioral issues (type 3), and learning disabilities (type 8) ("Alternative Report by the NGOs on the Implementation of the UN Convention on the Rights of the Child in Belgium", 1 March 2010 (Alternative Report to the Committee on the Rights of the Child 2010 Session) (available online here). See also Prof. Dr. Chr. Timmerman et al., March 2010, op cit note 41, p. 14.

46 The principle behind these classes is to provide equal opportunities for children (Décret définissant les missions prioritaires de l’enseignement fondamental et de l’enseignement secondaire et organisant les structures propres à les atteindre (available online here) and Decreet van 28/06/2002 betreffende grijper onderwijskansen (available online here)).

47 All migrant children have similar difficulties, so this is not necessarily due to immigration status, but general discrimination, language barriers, etc

48 To safeguard the right to education, the modified Royal Decree (implementing the Law of 30 April 1999) on the employment of foreign workers (9 June 1999) provides an exemption of the requirement of a work permit for two categories of foreign students (regardless of their residential status): 1. All students who have to do a ‘compulsory’ traineeship as part of their curriculum. (A Flemish Ministerial Circular also confirms this exemption, that students do not need a work permit to enter traineeships and that they should be allowed to do them) and 2. Students (younger than 18 years old) who enter the part-time working, part-time studying system. Even after the 18th birthday, the student stays exempt from the work permit requirement until the end of their course, but only if he/she stays within the same field of study (Article 2) (available online here & here).

49 In the Flemish-speaking community, Article 3 of the Besluit van de Vlaamse Regering (BVR), 23/02/2001 states that no child may be discriminated against. If no official document is available regarding parental income, a social rate is applied. In the French-speaking community, access to a quality childcare facility is the right of every child (in function of the number of available places); the role of the childcare facility is to allow parents to combine their different duties and to contribute to the harmonious development of the children. Children whose parents are in irregular stay may also be received; indeed about 10% of the total capacity of the childcare facilities is reserved to answer to their particular reception needs. The financial contribution from parents can be subsidized and is calculated based on the net income of the household and a specific scale determined by decree, with a minimum and maximum amount. The social worker from the childcare facility may also undertake a social inquiry allowing them to derogate from this scale (L’Arrêté du 27 février 2003 du Gouvernement de la Communauté française portant réglementation générale des milieux d’accueil, (available online here) l’Arrêté du 17 décembre 2003 du Gouvernement de la Communauté française fixant le code de qualité et de l’accueil (available online here).

50 E.g. Prof. Dr. Chr. Timmerman et al., March 2010, op cit note 41, p. 11-12.

51 Article 24 (1), 25, 39 CRC, Article 25 UDHR, Article 12 (1) ICESCR, Article 5 (e)(iv) ICERD, Article 14 (2b) CEDAW, Article 3 ECHR, and Article 24 and Article 35 of the Charter of Fundamental Rights. It is also in Article 11 and Article 13 ESC, which the European Committee of Social Rights has extended to apply to irregular migrants. Further, the Committee found that limiting care of children to emergency situations was a violation of Article 17 (International Federation of Human Rights Leagues (FIDH) v. France, complaint n° 14/2003, decision on the merits of 8 September 2004, §§ 26-32; Council of Europe (2008) “Digest of the Case Law of the European Committee of Social Rights”, page 183-184. Though not legally binding, it can also be found in Article 28 ICRMW. As a WHO Member State, Belgium also "has a duty to ensure that national and regional healthcare systems and, in particular, hospitals and health services, address migrant children’s right to healthcare; and hospitals and health services have a duty to empower migrant children and their families, by promoting knowledge and awareness on migrant children’s rights" (IOM (2009) Ensuring the Right of Migrant Children to Health Care: The Response of Hospitals and Health Services, page 9-10).
In the case Pretty v. United Kingdom, the European Court of Human Rights ruled that treatment which risks exacerbating suffering from illness can fall under Article 3, where the authorities can be held responsible (e.g. detention, expulsion). (European Court of Human Rights, Pretty v. United Kingdom, judgment of 29 April 2002 (Application No.2346/02), para. 52.53 The Belgian Constitution, October 2007, Article 23 (op cit note 15).

The Belgian Constitution, October 2007, Article 23 (op cit note 15).

Act on emergency medical assistance of 8 July 1964 (available online here & here).

As a result of advocacy efforts, the law was modified on 13 December 2006, with the “Law supporting various provisions regarding health care” (Loi portant dispositions diverses en matière de santé) and a successive circular OA n 2008/198 of 9 May 2008. There are a number of conditions in order to be eligible for the health insurance, such as to have attended a primary or secondary school, recognized by the Belgian authorities, for three consecutive months.

Technically, undocumented migrants can access private health insurance, but the premiums for such health insurance are very expensive, so few undocumented migrants can afford this health insurance coverage.

See Organic Law on Social Welfare Centres (op cit note 15) and Royal Decree of 12 December 1996 on state medical assistance (available online here).

Article 1 of Royal Decree of 12 December 1996 on state medical assistance (ibid).


The CPAS/OCMW has to make a decision in thirty days as to whether to agree on paying medical assistance. They will also specify if the validity of the document is just for one consultation or for a longer but determined period of time.

12th December 1996 Royal Decree concerning the urgent medical assistance dispensed by the Centre of Social Welfare (SWA) to the aliens who stay illegally in the Kingdom.

The concept encompasses a wide variety of care provisions, such as medical examinations, operations, childbirth, physiotherapy, medications, tests and exams. The only exceptions are medical materials such as dental prosthesis, wheelchairs, etc., as well as some types of medicine.


There are also cases reported of the social welfare centre refusing to officially process applications for AMU from people who are squatting or on hunger strike HUMA Network (2009) “Access to Health Care for Undocumented Migrants and Asylum Seekers in 10 EU Countries: Law and Practice”, page 39 (available to download here).


The Médecins du Monde health centre (centre d’accueil de soin et d’orientation - CASO) can provide care pending CPAS approval but also faces complex administrative requirements for reimbursement. (HUMA Network (2009), ibid: page 39).

Article 27 (1) (3) CRC, Article 25 (1) UDHR, Article 11 (1) ICESCR, Article 5 (e)(iii) ICERD, Article 14 (2h) CEDAW, Article 3, 8 ECHR, and Article 34 (3) of the Charter of Fundamental Rights. It is also in Article 31 ESC, which the case law of the European Committee of Social Rights establishes applies to irregular migrant children (the usual scope of the ESC is limited to nationals or regular workers of Contracting State Parties). (Complaint No. 47/2008, Defence for Children International (DCI) v the Netherlands; Carrera & Merlino (2010), “Assessing EU Policy on Irregular Immigration under the Stockholm Programme”; page 28-30. Though not legally binding, it can also be found in Article 43.1 ICRMW

Cholewinski (2005) Study on obstacles to effective access of irregular migrants to minimum social rights, page 32-33; See also e.g. Gillow v. UK, judgement of 24 November 1986 (Application no. 9063/80), Buckley v. UK, 15 September 1996 (20348/92), Connors v. UK, 27 May 2004 (66746/01).

The Belgian Constitution, October 2007, Article 23 (op cit note 15).

The Court found that it was it was a violation of the Belgian constitution and the Convention on the Rights of the Child to deny children residing irregularly with their parents in Belgium all social assistance (22 juillet 2003 – Arrêt n° 106/2003 de la Cour d’Arbitrage statuant sur une question préjudicielle relative à l’article 57, §2, de la loi du 8 juillet 1976 organique des centres publics d’aide sociale (M.B. du 04/11/2003, p. 53695) (available online here). Corte Costituzionale sentenza no. 61/2011 (available online here).
71 Royal decree of 24 June 2004 fixing the conditions and modalities for the granting of material help for a foreigner minor, residing illegally in the Kingdom with his parents (available online here), modified by the royal decree of 1 July 2006 which foresees an individual support programme (“le trajet d’accompagnement”/ “begeleidingstraject”) (with the insertion of Article 7).


73 In 2005, a new ruling of the Constitutional Court intervened and sanctioned the system put in place by the legislator for not guaranteeing that the parents could also receive shelter in the centre where their child was receiving material assistance. This has been translated into a modification of the Organic Law on Social Welfare Centres of 8 July 1976 - Article 57§2 2° (op cit note 16) (through Article 22 of the Law adopting various provisions of 27 December 2005 (available online here & here). The presence of the parents or representatives of parental authority, is now guaranteed.

74 Housing which is subsidized by the state for people with low-income.

75 Protocole de coopération entre l’Office des Etrangers et Fedasil concernant le trajet d’accompagnement des familles avec mineurs qui séjournent irrégulièrement sur le territoire et qui sont accueillies en vertu de l’arrêté royal du 24 juin 2004 (available online here).

76 However, returns are not currently being enforced in cases where families refuse to return voluntarily.

77 Accommodation in large shelters can not be considered an appropriate housing solution for children. Families are often accommodated together in one room, not providing for individual space and adequate privacy. Shelters are often mixed, with both families and single adults accommodated. Parents are often disempowered by the structure of social assistance, for example, without control over their meals and meal times. While education is provided in the shelters, children are segregated from mainstream education and from the local community, particularly in shelters which are in isolated locations. Such factors can negatively impact family relations and child development.

78 For example, a report by Shelter warns that children in poor housing conditions have up to 25% higher risk of severe ill-health and disability during childhood and early adulthood. Both unstable and unsuitable housing and poor health affect children’s ability to attend school and academic achievement (Harker (2006) Chance of a lifetime: The impact of bad housing on children’s lives). See also Médecins du Monde European Observatory on Access to Healthcare (2009), op cit note 63: page 109-111.

79 Article 74/9 Law of 15 December 1980 concerning the access to the territory, the stay, the settlement and eviction of foreigners.

80 The Belgian NGOs for the Defence of the Rights of Children issued a joint press release on 21 March 2012 denouncing this return to child detention. The press release is available in Dutch and French.

CROSS-CUTTING ISSUES

81 Article 9 bis of the Law of 15 December 1980 (ibid); circular letter of 21 June 2007 relating to modifications of the regulation related to the stay of foreigners after the implementation of the law of 15 September 2006.

82 Instructions of 19 July 2009 of the Foreign office, “Instructions related to the previous article 9.3 and the article 9bis of the foreigners law” (available online here).

83 Unreasonably long asylum procedure, unreasonably long asylum procedure including procedure to the Supreme Administrative Court (Conseil d’État) and/or subsequent request for regularisation, asylum procedure of at least one year, introduced before 1 June 2007 for families with children going to school.

84 During the 2009 regularisation campaign, clear criteria were announced, which resulted in many regularisations under this provision. However, since the end of the campaign, it is again very difficult to get a positive result.

85 Undocumented families who are staying with friends or family may not be able to use that address as their address for their regularisation application, because the host may fear negative consequences if their presence is known, especially if they are living in social housing or receiving social allowances, which may be reduced as a result. Families staying in temporary shelters, such as samu social, are often denied use of the shelter as an official address. Families staying in the
86 Article 9ter Foreigners law; Articles 2-10 Royal Decree of 17 May 2007 concerning the implementation of the Foreigners law (available online here); Circular letter of 21 June 2007 related to modifications in the regulation related to the stay of foreigners after the implementation of the law of 15 September 2006 (available online here).

87 For more information, see CIRÉ, “Quelle politique de régularisation passée, présente et à venir pour le Belgique?”, Présentation à l’Institut Émile Vandervelde, 27 January 2010 (available online here); De Standaard, “Papieren voor 28.000 illegalen” 19 July 2011 (available online here).