



Protection of Undocumented Children – the EU Perspective

Save the Children Spain 7 PICUM
GROWING UP UNDOCUMENTED IN EUROPE
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Current EU legal and policy framework

Major EU policy initiatives cover all migrant children, irrespective of their migration status

- [2017 Communication on the protection of children in migration](#) (COM(2017) 211 final of 12.4.2017)
- [EU Strategy on the rights of the child](#) (COM(2021) 142 final of 20.3.2021)
- [EU Child Guarantee](#) (20.3.2021)

However:

- No piece of Union legislation dealing with basic minimum rights of irregular migrants as its primary objective.
- Sole exception: EU Return Directive (2008/115/EC) (ancillary objective)

The situation of irregular migrants who cannot be returned and who continue to stay in the EU in a limbo situation remains largely outside the focus of current EU policy debate – not addressed in the [New Pact on Asylum and Migration](#) (September 2020).

Current EU policy framework (2)

New Pact on Asylum and Migration

“The system needs to be geared to reflect the particular needs of children at every stage, providing effective alternatives to detention, promoting swift family reunification, and ensuring that the voice of child protection authorities is heard. Children should be offered adequate accommodation and assistance, including legal assistance, throughout the status determination procedures.”

Action Plan on Inclusion and Integration 2021-2027

Does not address explicitly the integration and inclusion of irregular/undocumented migrants.

Current situation

- According to Eurostat, the number of third-country nationals found to be irregularly present in the EU has decreased by 70% from 2015 (2,155,485) to 2018 (650,175).
- Many rejected asylum applicants, representing around 370,000 people in the EU every year, end up as undocumented and need to be channeled into the return procedure.
- The **European Migration Network** is currently preparing a study on long-term irregular migrants, which also touches upon the topic of migrants who cannot be returned. (to be published during the summer of 2021).
- **Children:** Unaccompanied minors benefit in some Member States from protection until turning 18, irrespective of their migration status. The children of migrant families who are/remain irregular and cannot be returned usually follow the status of the parents.

Return Directive

- Under the Return Directive (2008/115/EC), Member States are obliged to issue a return decision to any third-country national staying illegally in their territory. They are not allowed to tolerate in practice the presence of illegally staying third-country nationals on their territory without either launching a return procedure or granting a right to stay.
- In *Mahdi* (case C-146/14) the ECJ stressed that: ‘... the purpose of the directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision. However, Article 6(4) of Directive 2008/115 enables the Member States to grant an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory’.
- The recitals of the Directive expressly refer to the need to address also the situation of third-country nationals who are staying illegally but who cannot yet be removed. They also emphasize that **fundamental rights need to be respected** and make reference to the European Convention on Human Rights, the Convention of the Rights of the Child, the Geneva Convention and the EU Charter of Fundamental Rights, all of which contain a number of rights to be granted to any human being, notwithstanding his/her migratory status.

Return Directive – basic rights

Article 14 of the Return Directive sets out that, pending postponed removal as well as pending an eventually granted period of voluntary departure, the third country national subject of a return decision benefits from a number of 'safeguards pending return' under Union law. These basic minimum safeguards include: **family unity, emergency health care; respect for situations of vulnerability; access to education and documentation.**

The **Fundamental Rights Agency** pointed that these **safeguards are not comprehensive**, as they do not reflect all human rights to which migrants in an irregular situation are entitled under international law. For example, they do not mention **access to justice** or the **right to be registered at birth.**

Article 14(1)(c) provides for a right of minors to get **access to education.** However, the wording of the Directive allows Member States to make this right subject to the length of stay.

Return Directive – relevant provisions

Article 5: When implementing this Directive, Member States shall take due account of:

- (a) the best interests of the child;
- (b) family life;
- (c) the state of health of the third-country national concerned,
- and respect the principle of non-refoulement.

Article 6.4. “Member States *may* at any moment decide to grant an autonomous residence permit or other authorization offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorization offering a right to stay.”

Article 10: 1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the *best interests of the child*. 2. *Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.*”

Case C-441/19: return of unaccompanied minors

- The judgment concerns mainly the interpretation of Articles 6 and 10 of the Return Directive read in conjunction with Article 24 of the Charter of Fundamental Rights of the EU. According to Article 10(2) of the Return Directive, before removing an unaccompanied minor, the authorities of the Member State in question have to be satisfied that there is appropriate and adequate reception in the country of return. The Court judgment reaffirms this point and clarifies that the authorities have to carry out such assessment before the adoption of a return decision.
- The ECJ stated that the age of the unaccompanied minor returnee in question is just one factor that has to be taken into account in assessing the adequacy of the reception in the country of return. If, following the assessment of the best interests of the child as well as adoption of the return decision, and if the authorities are satisfied that adequate reception facilities in the country of return exist, Member States have an obligation to enforce that decision pursuant to Article 8(1) of the Return Directive. Therefore, the Member State cannot for example wait until the person reaches the age of 18 in order to enforce the decision.