



Barriers to return:  
Protection in international,  
EU and national frameworks

## Acknowledgements

This report was written by Marta Gionco, Advocacy Officer and edited by Michele LeVoy, Director of PICUM, the Platform for International Cooperation on Undocumented Migrants.

Information and inputs provided by PICUM members and other organisations working with people with barriers to return was of immense value in writing this report. In particular, each case study has been written in close collaboration with other organisations. We would like to thank the following organisations for their inestimable support:

- Cyprus: [Cyprus Refugee Council \(CyRC\)](#)
- France: [Forum réfugiés – Cosi](#)
- Germany: [Pro Asyl](#)
- Greece: [Human Rights 360°](#)
- Italy: [Associazione Studi Giuridici Immigrazione \(ASGI\)](#)
- The Netherlands: [Stichting LOS](#)
- Poland: [Association for Legal Intervention \(SIP\)](#)
- Spain: [Fundación Cepaim](#)

We would also like to thank the [European Network on Statelessness](#) and the [Plate-forme Mineurs en exil](#) (Belgium) as well as PICUM trainees, Federica Lucrezia and Carmen Díaz-Bertrana, for their various contributions.

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Design: [www.chocolatejesus.be](http://www.chocolatejesus.be)

Cover image: Pavel Danilyuk - Pexels



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This report has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2021-2027). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication does not necessarily reflect the official position of the European Commission.

## Contents

ACRONYMS . . . . .	4
EXECUTIVE SUMMARY . . . . .	5
INTRODUCTION . . . . .	8
<b>1. HUMAN RIGHTS BARRIERS TO RETURN AND DEPORTATION . . . . .</b>	<b>9</b>
Non-refoulement . . . . .	9
Protection of family and private life . . . . .	12
Best interests consideration . . . . .	14
Statelessness . . . . .	15
Other fundamental rights violations . . . . .	16
<b>2. OTHER BARRIERS TO RETURN AND DEPORTATION . . . . .</b>	<b>17</b>
<b>3. RESIDENCE PERMITS FOR PEOPLE WITH BARRIERS TO RETURN . . . . .</b>	<b>18</b>
International framework . . . . .	19
Regional framework . . . . .	20
National practices . . . . .	22
<b>Countries granting residence permits to people with barriers to return . . . . .</b>	<b>23</b>
<b>Humanitarian permits . . . . .</b>	<b>23</b>
Case study 1: The permit for special protection in <b>Italy</b> . . . . .	23
Case study 2: The humanitarian permit in <b>Spain</b> . . . . .	25
Case study 3: The humanitarian permit in <b>Poland</b> . . . . .	27
Case study 4: The permit for humanitarian or compassionate reasons in <b>Cyprus</b> . . . . .	28
<b>Medical reasons . . . . .</b>	<b>29</b>
Case study 5: The permit for medical barriers in <b>the Netherlands</b> . . . . .	29
<b>Permits for stateless people . . . . .</b>	<b>30</b>
Case study 6: The Statelessness Determination Procedure in <b>France</b> . . . . .	31
<b>Countries granting other types of statuses to people with barriers to return . . . . .</b>	<b>32</b>
Case study 7: The tolerated status in <b>Poland</b> . . . . .	32
Case study 8: The "no-fault" permit in <b>the Netherlands</b> . . . . .	33
Case study 9: The tolerated status in <b>Greece</b> . . . . .	34
Case study 10: The temporary suspension of deportation in <b>Germany</b> . . . . .	35
<b>Other residence permits . . . . .</b>	<b>37</b>
<b>4. CONCLUSION . . . . .</b>	<b>38</b>
Initiation of the procedure . . . . .	38
Right to work and access to social services . . . . .	39
Pathways to more secure status . . . . .	40
Protection from deportation . . . . .	40
<b>RECOMMENDATIONS . . . . .</b>	<b>42</b>
<b>ANNEX I: COMPARISON OF NATIONAL LEVEL CASE STUDIES . . . . .</b>	<b>44</b>

## Acronyms

<b>CEAS</b>	Common European Asylum System
<b>CJEU</b>	Court of Justice of the European Union
<b>CoE</b>	Council of Europe
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
<b>CRC</b>	Committee on the Rights of the Child
<b>CSO</b>	Civil Society Organisation
<b>EC</b>	European Commission
<b>ECJ</b>	European Court of Justice
<b>ECHR</b>	European Convention on Human Rights
<b>ECTHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>HRC</b>	UN Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>NGO</b>	Non-governmental organisation
<b>PICUM</b>	Platform for International Cooperation on Undocumented Migrants
<b>SDP</b>	Statelessness Determination Process
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>US</b>	United States
<b>UNHCR</b>	United Nations Higher Commission for Refugees

## Executive Summary

In recent years, EU migration policies have consistently focused on increasing the rate of returns.<sup>1</sup> Yet such an approach rests on the mistaken belief that for undocumented people, the only option is to return – either by force or “voluntarily”.

In reality, people continue to reside irregularly for a wide range of reasons, and may indeed have other grounds for residence than an asylum application. According to official estimates, every year 300,000 people cannot return from the EU for different reasons, including human rights and factual considerations.<sup>2</sup>

This report analyses the main human rights reasons for which people who do not qualify for asylum cannot be deported, as well as the external circumstances that can make deportation or return impossible. It concludes by advocating for the need to abandon the exclusive focus on return procedures in favour of a more holistic, comprehensive approach which takes into consideration a broader range of solutions. To do so, it analyses different policies adopted by EU member states to provide rights and protection for people with barriers to return, through the comparison of ten national level case studies from eight different countries (Cyprus, France, Germany, Greece, Italy, the Netherlands, Spain, and Poland).

### Human rights and other barriers to return

Under international and EU law, there are several human rights reasons for which people who do not qualify for international protection cannot be deported, such as the principle of *non-refoulement*, protection of family and private life, the best interests of the child, the prohibition of arbitrary detention and protection on the grounds of statelessness. In most countries, these considerations fall outside of the scope of the asylum procedure.

In addition, there can be practical reasons, outside of individual control, for which return and deportation might be practically impossible. For instance, people might not be able to obtain a valid passport, or they might be unable to travel due to medical reasons.

<sup>1</sup> For more information in this regard, please see: PICUM, 2021, [Why is the Commission's push to link asylum and return procedures problematic and harmful?](#), Briefing Paper.

<sup>2</sup> European Commission, 2019, [Commission Staff Working Document Fitness Check on EU Legislation on legal migration](#).

## Residence permits for people with barriers to return

Policies which focus on deportation and return as the only possible outcome for people in an irregular administrative situation are bound to create situations of socio-economic exclusion, discrimination and human rights violations, whether in the country of origin, when people are forcibly returned, or in the country of residence, when people are excluded from accessing pathways to regularise their situation and are forced into living in irregularity, often for years.

For this reason, it is key to work towards a paradigm shift in the EU migration policies, from considering return, or deportation, as the primary – or often only – option for people in an irregular administrative situation, to considering different options for case resolution, including pathways to obtain a permanent or temporary residence status.

Permits and statuses available to people with barriers to return vary greatly from country to country, and can range from full-fledged residence permits (e.g., Italy, Spain, Poland) to temporary suspensions of deportation orders (e.g. Greece, Germany). However, the dividing line between the two sub-groups is often very thin, and the categories are far from being homogeneous or well-defined. Permits and statuses can be better described as being placed along a continuum which ranges from residence permits granting full access to labour and social rights, stability and protection from deportation; to mere suspensions of deportation with no rights nor security attached.

This report identifies four key elements which need to be fulfilled in order to ensure that people with barriers to return are granted rights and protection:

- **Initiation of the procedure:** permits and statuses accessible to people with barriers to return should be evaluated automatically by the authorities (*ex officio*) on an individual basis, before the issuance of a return decision or a refusal of entry. This is the case, at least for certain permits, in Italy, Spain, Poland, the Netherlands and Germany. In addition, individuals should be able to apply independently as well, as the authorities might not be aware of their specific barriers to return. Among the countries examined in this report, individuals can apply independently to certain permits or statuses in Italy, Spain, Cyprus, the Netherlands and France.
- **Right to work and access to social services:** access to the labour market and to social services should be automatic for any of these permit holders or statuses. Currently, the right to work is granted automatically only in five out of the ten case studies (Italy, Spain, Poland, France, the Netherlands), and full access to social services in four (Italy, Spain, France, the Netherlands).
- **Pathways to more secure status:** as barriers to return are often continuous, it does not make sense to limit access to secure, long-term permits. Secure permits allow people to acquire more certainty over their future, plan their lives and gain full access to social and labour rights. All countries analysed in this report except two (Greece and Cyprus) grant the possibility to apply to more secure, long-term permits.
- **Protection from deportation for the whole duration of the permit / status:** this is the case for all of the case studies considered, with the exception of the “no-fault” permit in the Netherlands and the “Duldung” in Germany.

## Preventing limbo situations

Despite different national-level policies which provide rights and protection for people with barriers to return, in practice many people still fall through the cracks.

This can happen, for instance, because the criteria to apply are either too stringent or, on the opposite, completely arbitrary;<sup>3</sup> and because of administrative or legal barriers to access these permits. In addition, several states still fail to grant any kind of permit to people who cannot be deported or return, and many others even fail to provide an official acknowledgement that the person cannot be deported, which is in breach of the EU Return Directive.<sup>4</sup>

When this happens, undocumented people with barriers to return find themselves in a limbo, often for years, unable to access healthcare, housing, education, and justice, and are often pushed into undeclared work and exploitation.<sup>5</sup>

To prevent this, it is essential for the European Union and member states to set an obligation to comprehensively assess fundamental rights considerations (including the right to health, private and family ties, best interests of the child, *non-refoulement* and the protection of stateless people) and whether third country nationals have the possibility to access an autonomous residence permit or other authorisation granting a right to stay before a return decision is issued.

<sup>3</sup> European Parliament, June 2020, [The Return Directive 2008/115/EC European Implementation Assessment](#), Study, p. 75.

<sup>4</sup> *Ibid.*, p. 64, 75.

<sup>5</sup> *Ibid.*

## Introduction

In recent years, EU migration policies have consistently focused on increasing the rate of returns. Yet such an approach rests on the mistaken belief that for undocumented people, the only option is to return<sup>6</sup> – either by force or “voluntarily”.

In reality, people continue to reside irregularly for a wide range of reasons, and may indeed have other grounds for residence than an asylum application. According to official estimates, every year 300,000 people cannot return from the EU for different reasons, including human rights and factual considerations.<sup>7</sup> Furthermore, 60 national protection statuses exist in the EU, in addition to international protection status (through asylum and subsidiary protection).<sup>8</sup>

While most of the EU policies are increasingly grounded on the assumption that asylum or return should be the only two options for people arriving or residing in the EU without a regular status, this report explains why this approach is oversimplistic and fails to recognise the reality of hundreds of thousands of people.

This report analyses the main human rights reasons for which people who do not qualify for asylum cannot be deported, as well as the external circumstances that can make deportation or return impossible. It concludes by advocating for the need to abandon the exclusive focus on return procedures in favour of a more holistic, comprehensive approach which takes into consideration a broader range of solutions. To do so, it analyses different policies adopted by EU member states to provide rights and protection for people with barriers to return, through the comparison of ten national-level case studies.

The final section includes concrete recommendations, to the EU and member states, on how to ensure that different pathways for permanent or temporary regular status are available and accessible, in order to ensure rights and protections for individuals with barriers to return.

6 The EU Pact on Migration and Asylum is built on this assumption and attempts to entrench it throughout the EU's immigration and asylum procedures. For instance, two of the legislative proposals included in the Pact, the Screening Regulation (European Commission, 23 September 2020, [Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations \(EC\) No 767/2008, \(EU\) 2017/2226, \(EU\) 2018/1240 and \(EU\) 2019/817](#)) and the amended Asylum Procedures Regulation (Amended proposal for a European Commission, 23 September 2020, [Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU](#)) assume that all people who arrive or reside in the EU irregularly and whose asylum applications are unsuccessful should immediately return or be deported. For more information in this regard, please see: PICUM, 2021, [Why is the Commission's push to link asylum and return procedures problematic and harmful?](#), Briefing Paper.

7 European Commission, 2019, [Commission Staff Working Document Fitness Check on EU Legislation on legal migration](#).

8 EMN, 2020, [Comparative overview of national protection statuses in the EU and Norway](#).

## 1. Human rights barriers to return and deportation

The right to asylum, granted by the 1951 Geneva Convention relating to the status of refugees<sup>9</sup>, is an international obligation for EU Member States, and is regulated at the EU level by the Common European Asylum System (CEAS).<sup>10</sup> The refugee status determination procedure, which is the core of asylum procedures, evaluates whether the person is at risk of persecution because of their “race, religion, nationality, membership of a particular social group or political opinion”, or would suffer serious harm

as defined by article 15 of the EU Qualification Directive.<sup>11</sup>

However, the right to asylum is not the only right which applies to people in situations of irregularity. Under international and EU law, other factors must be taken into consideration, as frequently clarified by the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU) as well as international organisations and committees.

### Non-refoulement

International law prohibits states from removing people from their jurisdiction to a place where they would be at risk of persecution, torture, ill-treatment, or other fundamental rights violations, or of further transfer to a third state where there would be a real risk of such violations.<sup>12</sup> This is an absolute principle which cannot be breached for any reason, and it applies wherever a state exercises jurisdiction or

effective control over a person, including outside its territory. As such, its application is broader than the refugee status.<sup>13</sup> This principle is explicitly enshrined in several international treaties.<sup>14</sup> At the EU level, this principle is reiterated by article 19 of the Charter of Fundamental Rights of the European Union (CFEU) and article 5 of the EU Return Directive (RD).<sup>15, 16</sup>

9 UNCHR, 1951, [Convention Relating to the Status of Refugees](#), Geneva.

10 Currently under reform. European Parliament, August 2021, [Reform of the Common European Asylum System \(CEAS\)](#).

11 European Parliament and the Council, 2011, [Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011](#).

12 OHCHR, [The principle of non-refoulement under international human rights law](#).

13 In *Hirsi Jamaa and others v. Italy*, the ECtHR clarified that the obligation under art. 1 of the ECHR to secure rights and freedoms under Section 1 of the Convention apply “whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction”. In the specific case, the Court applied the principle of non-refoulement to Somali and Eritrean migrants who were intercepted by boat in the high seas by an Italian military vessel, and then transferred onto the Italian military ship and return to Libya (ECtHR, 23 February 20, case of [Hirsi Jamaa and others v. Italy](#), App. no. 27765/09, para. 74).

14 OHCHR, 26 June 1987, [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), Art. 3; OHCHR, 23 March 1976, [International Covenant on Civil and Political Rights](#), Art. 7; UN Committee Against Torture (CAT), 9 February 2018, [General Comment No. 4 \(2017\) on the implementation of article 3 of the Convention in the context of article 22](#), para. 29(o); UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 16 November 2017, [Joint General Comment No. 3 \(2017\) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 \(2017\) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration](#), para. 45; UN Committee on the Rights of the Child (CRC), 1 September 2005, [General comment No. 6 \(2005\): Treatment of Unaccompanied and Separated Children Outside their Country of Origin](#), para. 27; UN Human Rights Committee (HRC), 26 May 2004, [General comment no. 31 \[80\], The nature of the general legal obligation imposed on States Parties to the Covenant](#), para. 12.

15 Official Journal of the European Union, 26 October 2012, [Charter of Fundamental Rights of the European Union \(CFEU\)](#).

16 European Parliament and the Council, 16 December 2008, [Directive 2008/115/EC of the European Parliament and of the Council](#).

The principle of *non-refoulement* requires each case to be examined individually by the state. Each deportation decision should be reviewed in light of this principle and individuals should always have the right to stay in the country while their appeal is being examined (so-called suspensive effect).<sup>17</sup> The principle of *non-refoulement* further requires that states establish a legal framework providing adequate safeguards to examine with necessary rigour the risk of *refoulement*.<sup>18</sup> This also applies when people are deported to a country which is not their country of residence, for instance in the context of refusal of entry at the external borders and subsequent return or push-back to a transit country. In this context, it is particularly important to examine any protection concerns and risks of human rights violations separately from the asylum application, which would only focus on the circumstances in the country of nationality or habitual residence (in case of stateless people). The principle of *non-refoulement* also applies when people who would otherwise qualify for asylum are excluded because they have committed a serious crime.<sup>19</sup>

One of the cornerstones of the principle of *non-refoulement* is the **prohibition of ill-treatment and torture** (European Convention on Human Rights (ECHR), art. 3).<sup>20</sup> This prohibition is absolute, meaning that “it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State”.<sup>21</sup>

In order to effectively assess the risks of torture or ill-treatment, states must take into account individuals’ vulnerability, and in particular pre-existing psychological trauma which might impact their ability to engage with the standard procedures.<sup>22</sup>

17 Please see: UN Committee Against Torture (CAT), 9 February 2018, [General Comment No. 4 \(2017\) on the implementation of article 3 of the Convention in the context of article 22](#), para. 13; UN Committee Against Torture (CAT), 18 December 2017, [Concluding observations on the combined fifth and sixth periodic reports of Italy](#) (CAT/C/ITA/CO/5-6), para. 21; UN Committee Against Torture (CAT), 16 July 2007, [Consideration of Reports Submitted by State Parties under Article 19 of the Convention - Italy](#) (CAT/C/ITA/CO/4), para. 12; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, 26 February 2018, [Report of the Special Rapporteur on Torture](#), A/HRC/37/50, para. 40; ECtHR, 26 July 2007, [Gebremedhin \[Gaberamadhien\] v. France](#) App. no. 25389/05; ECtHR, 23 February 20, case of [Hirsi Jamaa and others v. Italy](#), App. no. 27765/09; Court of Justice of the European Union, 18 December 2014, [Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida](#), C-562/13, para. 53.; Council of Europe, September 2005, [Twenty Guidelines on Forced Return](#).

18 ECtHR, 11 January 2012, [Case of Auad v. Bulgaria](#), App. no. 46390/10, para. 107.

19 European Parliament and the Council, 2011, [Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011](#), art. 12.

20 ECtHR, 3 September 1953, [European Convention on Human Rights](#).

21 ECtHR, 28 February 2008, [Case of Saadi v. Italy](#), App. no. 37201/06, para. 138.

22 Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, 26 February 2018, [Report of the Special Rapporteur on Torture](#), A/HRC/37/50, para. 42.

In *D. vs. Bulgaria*, the ECtHR ruled that Bulgaria violated Article 3 and Article 13 of the ECHR by deporting a Turkish journalist without prior assessment of the risk of torture and ill-treatment he faced in Turkey.<sup>23</sup> The case concerned a Turkish journalist who was apprehended in a truck at the Bulgarian-Romanian border in 2016 and sent back to Turkey in less than 24 hours, without having been able to see a lawyer or an interpreter.

The principle of *non-refoulement* also requires states to assess the impact of return procedures on individuals’ **medical condition and overall health situation**. In this context, states have the obligation to assess the impact of removal on an applicant by considering how an applicant’s condition would evolve after their transfer to the receiving state.<sup>24</sup> This should be evaluated on a case-by-case basis. States have the obligation to ensure that sufficient and appropriate medical care is available not merely in theory but in reality, taking into consideration factors such as the costs of the treatment, the existence of a social and family network and the distance to be travelled to receive treatment.<sup>25</sup> When assessing whether the level of severity would amount to ill-treatment under art. 3 of the ECHR, the court shall consider all the circumstances of the case, including its physical and mental effects and the sex, age and state of health of the victim, and consider sources from international and non-governmental organisations and individual medical certificates.<sup>26</sup>

23 ECtHR, 20 July 2021, [case of D. vs. Bulgaria](#), 29447/17.

24 ECtHR, 13 December 2016, [Case of Paposhvili v. Belgium](#), App. no. 41738/10, para. 188.

25 Ibid., para. 190.

26 Ibid., para. 174, 187.

27 Court of Justice of the European Union, 18 December 2014, [Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida](#), C-562/13, para. 53.

28 Human Rights Committee, 5 June 2015, [case of A.H.G. v. Canada](#), Communication No. 2091/2011, U.N. Doc. CCPR/C/113/D/2091/2011 (2015), para. 10.4.

29 ECtHR, 16 April 2013, [Case of Aswat v. the United Kingdom](#), App. no. 17299/12, para. 57.

In *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida* (2014), the Court of Justice of the European Union stated that the enforcement of a return decision entailing the removal of a third country national suffering from a serious illness to a country in which appropriate treatment is not available and which might lead to serious and irreparable harm may constitute an infringement of Article 5 of Directive 2008/115 (para. 49, 50).<sup>27</sup>

When assessing whether the return or deportation would amount to *non-refoulement*, states should take into consideration the **mental health state of the individual**. In *A.H.G. v. Canada*, the Human Rights Committee (which oversees states’ implementation of the UN International Covenant on Civil and Political Rights) stated that the deportation of a person living with a mental illness and which effectively resulted in the separation from the supporting family and the interruption of medical support constitutes a violation of the prohibition of ill-treatment.<sup>28</sup> In *Aswat v. the United Kingdom*, the ECtHR found that the extradition of the applicant, who suffered from several mental health problems, from the UK to the United States, where he was accused of terrorism offences, would constitute a breach of article 3 of the ECHR because the conditions of detention in the United States would have aggravated his mental illness.<sup>29</sup> In *Savran v. Denmark*, the ECtHR stated that the return of the applicant with a severe mental illness to a country where it was not clear whether they would have

access to “psychiatric treatment, including the necessary follow-up and control in connection with intensive outpatient therapy” would amount to a violation of article 3.<sup>30</sup>

Further to the abovementioned principles, the principle of *non-refoulement* precludes states

## Protection of family and private life

Another key fundamental right which comes into play when assessing the lawfulness of a return decision is the right to family and private life, which is enshrined by article 8 of the ECHR and article 7 of the Charter of Fundamental Rights of the EU.

Unlike the prohibition of torture and ill-treatment, the right to protection of family and private life is not an absolute right, which means that in some circumstances it can be lawfully breached, provided that this respects the principle of proportionality. In order to assess whether the deportation of someone would breach their right to private or family rights, states have an obligation to conduct a rigorous balancing exercise before the issuance of a return decision.<sup>34</sup>

from deporting individuals when there are risks of breaches of different human rights violations, including **degrading living conditions**.<sup>31</sup> UN bodies have also adopted General Comments reiterating that states should not deport individuals at risk of serious forms of **gender-based violence**<sup>32</sup> and **prolonged solitary confinement**<sup>33</sup>.

In *Boultif v. Switzerland*<sup>35</sup> and *M Üner v. the Netherlands*<sup>36</sup>, the ECtHR clarified that, when the return of a third country national would separate them from their family or when the person has been previously residing regularly in the country, states have the obligation to balance:

- the nature and seriousness of the criminal offence committed by the applicant;
- the length of the applicant’s stay in the country from which they are to be expelled;
- the time elapsed since the criminal offence was committed and the applicant’s conduct during that period;
- the nationalities of the various persons concerned;
- the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life;

30 ECtHR, 1 October 2019, *Case of Savran v. Denmark*, App. No. 57467/15 Eur. Ct. H.R. (2019).

31 ECtHR, 21 January 2011, *Case of MSS v Belgium and Greece*, App. no. 30696/09.

32 UN Committee on the Elimination of Discrimination Against Women (CEDAW), 5 November 2014, *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW/C/GC/32, para. 23.

33 UN Human Rights Committee (HRC), 10 March 1992, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, para. 6.

34 Council of Europe, September 2005, *Twenty Guidelines on Forced Return*, guideline 2 para. 2; PACE, 2006, *Human rights of irregular migrants*, para. 12 (12).

35 ECtHR, 2 August 2001, *Case of Boultif v. Switzerland*, App. no. 54273/00, para. 48.

36 ECtHR, 18 October 2006, *Case of M Üner v. the Netherlands*, App. no. 46410/99, para. 58.

- whether the spouse knew about the criminal offence at the time when they entered into a family relationship;
- whether there are children involved, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural, and family ties with the host country and with the country of destination.

In *Unuane v. the United Kingdom*, the Court clarified that “all [of these] factors should be taken into account *in all cases*” concerning the deportation of settled migrants facing a return order following a criminal conviction.<sup>37</sup>

Article 8 applies also in situations in which the applicants do not have family ties in the country of residence. Indeed, the ECtHR has clarified that the right to private and family life “protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of ‘private life’ within the meaning of Article 8”.<sup>38</sup>

In *K.A. and Others*, the Court of Justice of the European Union clarified that, when issuing a return decision, including with respect to an individual who has been previously subject to an entry ban, member states should take into consideration their family life and in particular the best interests of minor children.<sup>39</sup>

In certain cases, the ECtHR clarified that article 8 can lead to a positive obligation for member states to grant a residence permit (see below, chapter 3).

37 ECtHR, 24 February 2021, *Case of Unuane v. the United Kingdom*, App. no. 80343/17, para. 74, emphasis added.

38 ECtHR, 23 June 2008, *Case of Maslov and Others v. Austria*, App. no. 1638/03, para. 63; ECtHR, 20 September 2011, *Case of A.A. v. the United Kingdom*, App. no. 8000/08, para. 49.

39 ECtHR, 8 May 2018, *Case of K.A. and Others*, C-82/16, para. 104.

## Best interests consideration

Under the UN Convention on the Rights of the Child<sup>40</sup> and the EU Charter on Fundamental Rights<sup>41</sup>, before issuing a decision on return, states are required to consider, as a primary consideration, the best interests of each child affected by the decision.

This means including a formal, individual and fully-documented procedure examining all aspects of a child's situation and considering all options in order to identify which durable solution is in the best interests of the child.<sup>42</sup> It must be undertaken by a multi-disciplinary, independent, and impartial team that duly hears and considers the views of that child and provides or ensures the provision of child-friendly information, counselling, and support. It must lead to a reasoned, documented decision that can be appealed with suspensive effect. A fully-fledged best interests procedure should always precede a return decision for it to be in line with international standards and children's needs.<sup>43</sup>

The best interests of minor children should also be taken into account in the balancing exercise with regard to expulsion of a parent.<sup>44</sup>

In *TQ v Staatssecretaris van Justitie en Veiligheid*, which concerned an unaccompanied child who was to be deported to Guinea on his 18th birthday, the EU Court of Justice stated (i) that EU member states have an obligation to take into account the best interests of the child at all stages of the return procedure; that (ii) a child cannot be deported when reception facilities are absent, and (iii) that under the Return Directive Member States are not allowed to issue return decisions when these cannot directly be enforced. This applies independent of a child's age. The Court further underlined that Member States must refrain from keeping children in limbo until their 18th birthday, and then forcibly return them, because that is at odds with the child's best interests.<sup>45</sup>

<sup>40</sup> Please see: Committee on the Rights of the Child, General Comments 6, 12, 13, 14, 22 and 23.

<sup>41</sup> Official Journal of the European Union, 26 October 2012, [Charter of Fundamental Rights of the European Union](#) (CFEU), art. 24. For more information, see: PICUM, Unicef, IOM, UN Human Rights, Save the Children, ECRE and Child Circle, September 2019, [Guidance to respect children's rights in return policies and practices Focus on the EU legal framework](#).

<sup>42</sup> Three durable solutions are possible: integration in the country of residence, integration in the country of return or integration in a third country (e.g. family reunification). For more on durable solutions and how to identify them, please see: PICUM, [Doing What's Best of Children](#).

<sup>43</sup> For more information, see: PICUM, Unicef, IOM, UN Human Rights, Save the Children, ECRE and Child Circle, September 2019, [Guidance to respect children's rights in return policies and practices Focus on the EU legal framework](#).

<sup>44</sup> ECtHR, 18 October 2006, [Case of M Üner v. the Netherlands](#), App. no. 46410/99, para. 58; ECtHR, 7 June 2018, [Case of Kolonja v. Greece](#), App. No. 49441/12, Eur. Ct. H.R. (2016); ECtHR, 31 January 2006, [Case of Rodrigues de Silva and Hoogkamer v. The Netherlands](#), App. no. 50435/99.

<sup>45</sup> CJEU, 14 January 2021, [Case of TQ v Staatssecretaris van Justitie en Veiligheid](#), Press Release no. 5/21.

## Statelessness

Migrants can be unable to return because they are **stateless**, meaning that they are not considered as a national by any state under the operation of its law.<sup>46</sup> Almost all EU Member States<sup>47</sup> are party to the 1954 Convention relating to the Status of Stateless Persons, which requires states to ensure that stateless people on their territory have access to juridical rights, the right to work, economic and social rights including housing, education and social security, freedom of movement, identity and travel documents, facilitated naturalisation, and protection from expulsion. The obligation to identify and determine statelessness is implicit in the 1954 Convention, as reiterated by UNHCR<sup>48</sup> and the European Court of Human Rights,<sup>49</sup> and is best fulfilled through a dedicated statelessness determination procedure (SDP).<sup>50</sup>

Furthermore, according to UNCHR's "Handbook on Protection of Stateless Persons" stateless people can only be deported when they are able to acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or if they enjoy permanent residence status in a country of previous habitual residence to which immediate return is possible.<sup>51</sup> It is not sufficient that the person holds a permanent right to reside in that country; such status must also be accompanied by a full range of civil, economic, social and cultural rights, as well as a reasonable prospect of obtaining nationality of that state, in conformity with the object and purpose of the 1954 Convention.<sup>52</sup> In all other circumstances, their return would be unlawful.

<sup>46</sup> UNHCR, 1954, [Convention relating to the Status of Stateless Persons](#), art. 1.

<sup>47</sup> Only three EU MS have not yet acceded to the 1954 Convention on statelessness: Cyprus, Estonia, and Poland.

<sup>48</sup> UNCHR, 'Handbook', para. 144; UNHCR 'Good Practices Paper - Action 6', p. 4.

<sup>49</sup> *Hoti v Croatia* (2018), application no 63311/14 (European Court of Human Rights, 26 April 2018); *Sudita Keita v Hungary* (2020), application no. 42321/15 (European Court of Human Rights, 12 May 2020).

<sup>50</sup> UNHCR, 'Handbook'.

<sup>51</sup> UNHCR, 2014, [Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons](#), Geneva.

<sup>52</sup> *Ibid*.

## Other fundamental rights violations

Importantly, states might also be prevented from deporting someone because of risks of fundamental right violations other than those based on art. 3 and 8 ECHR. For this reason, it is essential that they carry out an individualised, comprehensive assessment before issuing a return decision.

For instance, in *Othman v. UK*, the ECtHR found that the deportation of the applicant to Jordan, where he risked being tried based on evidence obtained by torture of a third person, would amount to a violation of article 6. The Court clarified that “[a] flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release.”<sup>53</sup>

In the same decision, while a violation of article 5 was not found in the specific case, the ECtHR also stated that a return order could also be unlawful because there is a risk of arbitrary detention, for instance if the person would face years of arbitrary detention without any trial.<sup>54</sup>

<sup>53</sup> ECtHR, 20 February 2007, *Case of Al-Moayad v. Germany*, App. no. 35865/03, para. 101.

<sup>54</sup> ECtHR, 17 January 2012, *Case of Othman v. UK*, App. no. 8139/09, para. 233.

## 2. Other barriers to return and deportation

In addition to the human rights concerns that shall be assessed before a decision to return is adopted, there can be practical reasons, outside of individual control, for which return and deportation might be practically impossible.

For instance, **migrants might not have a valid passport on which to return to their country of origin, or another travel document.** This can be because their embassy might be unable or unwilling to provide these documents.

A concerning practice in this regard is the use of a “laissez-passer” (travel document) which is often not shown to returnees but handed directly to the authorities upon the return. When this happens, people who have been deported find themselves without documents and risk being unable to access services and prove their identity, in certain cases leading to detention in their country of origin. PICUM’s booklet “Removed” collects several testimonies of returnees deported on a “laissez-passer” they were never allowed to see.<sup>55</sup>

Secondly, return and deportation might be impossible when **travelling is not possible due to medical reasons.** This should be examined separately from the assessment of whether someone’s return amounts to a violation of the principle of *non-refoulement* (see chapter 1), as this assessment regards whether someone’s health condition allows them to travel, and not the future likely developments of their health situation upon return. In some cases, someone’s health status might not impede their return under article 3 ECHR, but they might still be unfit to return by flight. Frontex’s “Code of Conduct for return operations and return interventions coordinated or organised by Frontex” (art. 8) clarifies that a return operation can only take place if returnees are “fit to travel”.<sup>56</sup> However, civil society reports show that in practice, this is often not implemented and people suffering from serious health conditions preventing their travel are frequently denied the right to see a doctor and deported nonetheless.<sup>57</sup>

<sup>55</sup> PICUM, September 2020, *Removed, Stories of hardship and resilience in facing deportation and its aftermath.*

<sup>56</sup> Frontex, 2018, *Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex.*

<sup>57</sup> Point of No Return, January 2014, *Point of No Return. The futile detention of unreturnable migrants.*

### 3. Residence permits for people with barriers to return

Over the past years, there has been a greater push to increase the number of deportations at all costs. In particular, EU and national level policy-makers frequently present deportation or return as the only option for people whose asylum application is rejected.<sup>58</sup> However, this policy fails to recognise that deportation measures – often euphemistically called “returns” – are violent practices which can have extremely harmful consequences. Deportation disrupts people’s lives and can lead to economic, psychosocial and safety risks.<sup>59</sup> Moreover, as analysed in sections 1 and 2, for hundreds of thousands of people deportation is simply not an option, either for legal or practical reasons.

As underlined by the European Parliament Horizontal substitute impact assessment on the EU Pact on Migration and Asylum *“the exclusive emphasis on the rate of enforced returns is likely to incentivise a policy of return at any cost. This, in turn, will increase recourse to coercive means such as forced repatriation and detention, which, according to existing evidence, produces harm on individuals without having any significant impact on the effectiveness of the return policy.”*<sup>60</sup>

Policies which focus on deportation and return as the only possible outcome for people in an irregular administrative situation are bound to create situations of socio-economic exclusion, discrimination and human rights violations, whether in the country of origin, when people are forcibly returned, or in the country of residence, when people are excluded from accessing pathways to regularise their situation and are forced into living in irregularity, often for years.

Frequently, individuals who cannot return or be deported find themselves in an administrative limbo, considered by authorities as irregularly residing despite their inability to leave the country.<sup>61</sup> When undocumented, people face restrictions in access to healthcare, housing, education and justice.<sup>62</sup>

For this reason, it is key to work towards a paradigm shift in the EU migration policies, from considering return, or deportation, as the primary – or often only – option for people in an irregular administrative situation, to considering different options for case resolution, including pathways to obtain a permanent or temporary residence status.

<sup>58</sup> For more information in this regard, please see: PICUM, 2021, [Why is the Commission's push to link asylum and return procedures problematic and harmful?](#).

<sup>59</sup> PICUM, September 2020, [Removed, Stories of hardship and resilience in facing deportation and its aftermath](#); DIIS, November 2016, [Post-deportation risks. People face insecurity and threats after forced returns](#), Policy Brief.

<sup>60</sup> EPRS | European Parliamentary Research Service, 2021, [Horizontal substitute impact assessment on the EU Pact on Migration and Asylum](#), p. 20.

<sup>61</sup> Please see: Point of No Return, January 2014, [Point of No Return. The futile detention of unreturnable migrants](#).

<sup>62</sup> PICUM, 2021, [Living Undocumented in Europe](#), video.

#### International framework

The United Nations Global Compact on Safe, Orderly and Regular Migration, to which 18 out of 27 EU Member States are signatories,<sup>63</sup> encourages member states to:

“Develop accessible and expedient procedures that facilitate transitions from one status to another and inform migrants of their rights and obligations, so as to prevent migrants from falling into an irregular status in the country of destination, to reduce precariousness of status and related vulnerabilities, as well as to **enable individual status assessments for migrants, including for those who have fallen out of regular status, without fear of arbitrary expulsion** [and to] [b]uild on existing practices to **facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status**, on a case-by-case basis and with clear and transparent criteria, especially in cases where children, youth and families are involved, as an option for reducing vulnerabilities, as well as for States to ascertain better knowledge of the resident population.”<sup>64</sup>

As recently underlined by the UN Network on Migration, **“return is only one among several options available to any migrant”**. The Network encouraged states to provide a range of alternative options to return, such as “a right to temporary or permanent residence in the country based on

compassionate, humanitarian or human rights grounds; relocation to a third country; regularisation or special leave to remain for migrants in irregular situations or at risk of falling out of regular status; and/or specific protection, including a right to remain, for migrant victims of trafficking or aggravated smuggling, and for migrant children based on upholding their best interests, or other migrants in vulnerable situations.”<sup>65</sup>

Recently, the UN Network on Migration clarified that international human rights obligations and principles can require states to implement grounds for admission and stay based on the right to private and family life, the principle of the best interests of the child, the right to health, the principle of non-discrimination, rights at work, the principle of *non-refoulement*, emotional, personal, economic or social ties in the country of residence, and barriers to return.<sup>66</sup>

With regards to children, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child “recognizes the negative impacts on children’s well-being of having an insecure and precarious migration status” and “recommends that States ensure that there are clear and accessible status determination procedures for children to regularize their status on various grounds (such as length of residence).”<sup>67</sup>

<sup>63</sup> Three EU Member States voted against the GCM (Czech Republic, Hungary and Poland), five abstained (Austria, Bulgaria, Italy, Latvia and Romania) and Slovakia did not attend this UN General Assembly meeting.

<sup>64</sup> Resolution adopted by the General Assembly on 19 December 2018, [Global Compact for Safe, Orderly and Regular Migration](#), A/RES/73/195, Objective 7, para. 23 h and i.

<sup>65</sup> United Nations Network on Migration, March 2021, [Ensuring Safe and Dignified Return and Sustainable Reintegration](#), Policy Brief, para. 6.

<sup>66</sup> [United Nations Network on Migration, 15 July 2021, Guidance Note: Regular Pathways for Admission and Stay for Migrants in Situations of Vulnerability](#), para. 19 and 20.

<sup>67</sup> Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. United Nations, 16 November 2017, [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Convention on the Rights of the Child](#).

## Regional framework

The EU legal framework requires or encourages permits to be granted in certain circumstances, such as victims of domestic violence with a dependent status, for instance in the cases of victims of domestic violence with a dependent status,<sup>68</sup> victims of human trafficking (Residence Permit Directive) and labour exploitation (Employers' Sanctions Directive).<sup>69</sup>

In addition, in a number of decisions concerning the right to private and family life (art. 8), the ECtHR has clarified that states have a positive obligation to afford the opportunity to exercise the rights included in the Convention without interference which, in certain cases, can amount to an obligation to grant a residence permit. The Court has further stated that article 8 imposes a positive obligation on States to provide an effective and accessible procedure, or a combination of procedures, enabling the applicants to have the issues of their further stay and status in the country determined with due regard to their private life interests, preventing States from perpetuating a situation of uncertainty.<sup>70</sup>

In *Jeunesse v. the Netherlands*, the ECtHR assessed the case of the refusal of a residence permit to the mother of three children with Dutch nationality. The Court considered that, considering the case's circumstances, although there would be no insurmountable obstacle for the family to settle in Suriname, this would likely have caused them a degree of hardship if they were forced to do so (para. 117). The court found that the refusal to grant a residence permit amounted to a violation of article 8 and the best interests of the child (para. 122).<sup>71</sup>

Furthermore, in several instances, the European Court of Justice has determined that EU-citizen children of undocumented parents may not be forced to leave the territory.

<sup>68</sup> Official Journal of the European Union, 3 October 2003, [Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification](#), L 251/12.

<sup>69</sup> Official Journal of the European Union, 6 August 2004, [Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities](#), L 261/19; Official Journal of the European Union, 30 June 2009, [Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals](#), L 168/24.

<sup>70</sup> For instance, in *Hoti V. Croatia* (ECtHR, 26 April 2018, app. no. 63311/14), the ECtHR stated that: "Neither Article 8 nor any other provision of the Convention can be construed as guaranteeing, as such, the right to the granting of a particular type of residence permit, provided that a solution offered by the authorities allows the individual concerned to exercise without obstacles his or her right to respect for private and/or family life (B.A.C. v. Greece, § 35). In particular, if a residence permit allows the holder to reside within the territory of the host country and to exercise freely there the right to respect for his or her private and family life, the granting of such a permit represents in principle a sufficient measure to meet the requirements of Article 8. In such cases, the Court is not empowered to rule on whether the individual concerned should be granted one particular legal status rather than another, that choice being a matter for the domestic authorities alone" (para. 121).

For further references, please see: ECtHR, 15 January 2007, [Case of Sisojeva and Others v. Latvia](#); ECtHR, 22 June 2006, [Case of Kaftailova v Latvia](#), App. no. 59643/00, para. 69; ECtHR, 31 January 2006, [Case of Rodrigues de Silva and Hoogkamer v. The Netherlands](#), App. no. 50435/99.

<sup>71</sup> ECtHR, 3 October 2014, [Case of Jeunesse v. the Netherlands](#), App. no. 12738/10, para. 117 and 122.

In the *Zambrano*<sup>72</sup> case, the Court held that, by not giving the third country national father of a Belgian child a derived residence right, Belgium would oblige the child to leave the territory of the EU as a whole, and therefore deprive the child of the genuine enjoyment of the substance of the rights conferred by the EU citizenship status. Six years later, the Court further clarified in *Chavez-Vilchez* that it is not enough for member states to determine that the child can live with the other (EU-citizen) parent.<sup>73</sup> Instead, Member States must determine whether the third country national parent is the actual caregiver to the child, and to what extent the child is dependent on that parent. The Court mentioned the following factors to be considered in the assessment: whether the other parent can take care of the child, the age of the child, the physical and emotional development of the child, the strength of the affective bond between the child and both of its parents, and the risks to the development and wellbeing of the child if it is separated from the third-country national parent.

Furthermore, the EU Return Directive imposes an obligation on member states to respect the principle of *non-refoulement*, the best interests of the child, family life and the state of health during return

procedures (art. 5) and to postpone return in case of violations of the principle of *non-refoulement* (art. 9(1)). In addition, art. 6(4) of the Return Directive states that "Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons". Although this does not request member states to grant an autonomous residence permit for people who cannot be deported under the principle of *non-refoulement*, academics have argued that such an obligation could be inferred from a combined reading of art. 5 and art. 6(4).<sup>74</sup> The EU Return Handbook also requires Member States to pay attention to the 'specific situation of stateless persons'<sup>75</sup> and the complexity of return for those who hold no nationality.

In December 2020, the European Parliament published a Resolution on the implementation of the Return Directive, in which it "stresses the importance of successfully exhausting the options provided in the directive to enforce return decisions, with an emphasis on voluntary return; [...] underlines the fact that **granting residence permits to individuals who cannot return to their country of origin could help to prevent protracted irregular stays and reduce vulnerability** to labour exploitation and may facilitate individuals' social inclusion and contribution to society; notes that this would also help to get people out of administrative limbo where they may be stuck".<sup>76</sup>

<sup>72</sup> CJEU, 8 March 2011, [Gerardo Ruiz Zambrano v. Office national de l'emploi](#), C-34/09.

<sup>73</sup> CJEU, 10 May 2017, [H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others](#), C-133/15.

<sup>74</sup> I. Majcher, 2019, [The European Union Returns Directive and its Compatibility with International Human Rights Law](#), Leiden, The Netherlands: Brill, p. 117.

<sup>75</sup> Annex to the Commission Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks (2017) 6505 ANNEX 1, para. 14.4.1, p. 72, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927\\_recommendation\\_on\\_establishing\\_a\\_common\\_return\\_handbook\\_annex\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170927_recommendation_on_establishing_a_common_return_handbook_annex_en.pdf).

<sup>76</sup> European Parliament, 2 December 2020, [Report on the implementation of the Return Directive](#), (2019/2208(INI)), Committee on Civil Liberties, Justice and Home Affairs, para. 23.

## National practices

Despite prevailing national and EU narratives which focus exclusively on returns, most European states have carried out regularisation mechanisms at least once in the past twenty years, and often several times.<sup>77</sup> The report “Regularisation of Migrants in an Irregular Situation in the OSCE Region Recent Developments, Points for Discussion and Recommendations” of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE, which provides an overview of noteworthy regularisation programmes and measures across the OSCE region, identified 27 regularisation programmes in 13 countries across the OSCE region during the period between 2006–2020.<sup>78</sup>

In 2020, the European Migration Network (EMN) identified 60 national protection statuses in 23 Member States, the UK and Norway.<sup>79</sup> This study found that in several cases, these national protection statuses are not examined as part of the application for international protection or at the end of the international protection procedure but, rather, in a separate procedure.

Pathways to regularisation on different grounds have been analysed by PICUM in previous reports, such as “Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe” (2009); the “Manual on regularisations for children, young people and families” (2018) and “Insecure Justice? Residence permits for victims of crime in Europe” (2020).<sup>80</sup>

This section provides an overview of some policies adopted by states to address the situation of people who cannot return or be deported for human rights or practical reasons.

Permits and statuses available to people with barriers to return vary greatly from country to country, and can range from full-fledged residence permits, which grant access to work and social rights and can be convertible into long-term residence permits, to temporary suspensions of deportation orders.

In the following analysis, the different types of existing permits will be categorised in two main sub-groups, depending on whether individuals receive a residence permit, or another status. However, the dividing line between the two sub-groups is often very thin, and the categories are far from being homogeneous or well-defined. Permits and statuses can be better described as being placed along a continuum which ranges from residence permits granting full access to labour and social rights, stability and protection from deportation; to mere suspensions of deportation with no rights nor security attached.

For this reason, this analysis focuses, rather than on the official label, on different concrete aspects:

- Whether there is an automatic assessment of the permit / status (*ex officio* examination);
- Whether individuals can apply independently;
- Whether the permit or status grants access to work and social services;

77 OSCE/ODIHR, August 2021, [Regularisation of Migrants in an Irregular Situation in the OSCE Region Recent Developments, Points for Discussion and Recommendations](#), p. 3.

78 Ibid., p. 7.

79 EMN, 2020, [Comparative overview of national protection statuses in the EU and Norway](#).

80 PICUM, 2009, [Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe](#); PICUM, 2018, [Manual on regularisations for children, young people and families](#); PICUM, 2020, [Insecure Justice? Residence Permits for Victims of Crime in Europe](#).

- Whether it can be converted into another, more secure / permanent residence permit;
- Whether it ensures protection from deportation for the whole duration of the permit / status.
- In addition, it is important to stress that despite these different existing national-level policies which provide rights and protection for people with barriers to return, in practice many people still fall through the cracks.

This can happen, for instance, because the criteria to apply are either too stringent or, on the opposite, completely arbitrary;<sup>81</sup> and because of administrative

or legal barriers to access these permits. In addition, several states still fail to grant any kind of permit to people who cannot be deported or return, and many others even fail to provide an official acknowledgement that the person cannot be deported, which is in breach of the EU Return Directive.<sup>82</sup>

When this happens, undocumented people with barriers to return find themselves in a limbo, often for years, unable to access healthcare, housing, education, and justice, and often pushed into undeclared work and exploitation.<sup>83</sup>

## Countries granting residence permits to people with barriers to return

### Humanitarian permits

Several member states provide pathways to regular status based on humanitarian reasons. In the EU, humanitarian permits exist, under asylum or immigration law, in Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Greece, Ireland, Italy, Lithuania, Malta, Poland, Portugal, Slovak Republic, Spain, and Sweden.<sup>84</sup>

### Case study 1: The permit for special protection in Italy

In Italy, the special protection permit (*“protezione speciale”*) was introduced by a legal reform in 2020.<sup>85</sup> This permit replaces the former humanitarian permits, which were abolished in 2018.<sup>86</sup> The special protection permit was introduced in

the Italian migration law as part of an article which addresses different “prohibitions of deportations”<sup>87</sup>. Under this article, people can obtain a permit when there are barriers to return related to art. 3 ECHR (prohibition of torture and ill-treatment); when they are relatives of Italian citizens; and for barriers related to art. 8 ECHR. The latter includes both family and private life; therefore, people who do not have a family in Italy but have strong links with the community are also covered by this provision. To evaluate whether someone’s return would violate their private and family life, different factors have to be balanced: the presence of close family members in Italy, how long the person has been living in Italy, the work and housing situation, the length of stay and existing ties with the country of origin.

81 European Parliament, June 2020, [The Return Directive 2008/115/EC European Implementation Assessment](#), Study, p. 75.

82 Ibid., p. 64, 75.

83 Ibid.

84 OSCE/ODIHR, August 2021, [Regularisation of Migrants in an Irregular Situation in the OSCE Region Recent Developments, Points for Discussion and Recommendations](#), p. 11.

85 [Decree Law, 21/10/2020](#) n°130, G.U. 19/12/2020, known as “decreto Lamorgese”.

86 [Decree Law, 04/10/2018](#) n° 113, G.U. 03/12/2018, known as “decreto Salvini”.

87 [Decree Law, 25/07/1998](#) n° 286, G.U. 18/08/1998, «Testo Unico Immigrazione », art- 19.

Individuals can apply for this permit to the police (*questura*), without having to hire a lawyer. In this case, the police decide on the application, often based on an opinion from the International Protection Commission (*Commissione territoriale per il Riconoscimento della Protezione internazionale*). When an individual applies for a special protection permit, the return procedure is automatically suspended.

In addition, the International Protection Commission has an obligation to assess automatically (*ex officio*) whether these grounds subsist when rejecting an application for international protection.

The residence permit is valid for two years, and grants access to work and social services. After two years, it can be converted into a work permit. People cannot be deported during its duration, but the permit can be revoked in case of criminal offences, which have to be balanced with the reasons which led to the issuance of the permit. However, as of September 2021, there had been no case of revocation. The majority of these permits are

granted to applicants for international protection whose application is rejected. The decision to deny this permit must be motivated and can be appealed.

In Italy, the rejection of an application for a residence permit does not lead to the automatic issuance of a return decision. Thanks to this safeguard, individuals are not discouraged from applying for the humanitarian permit due to fears of being deported if their application is unsuccessful.

The (re)introduction of the special protection permit has been considered a very positive improvement, especially if compared with the period which followed the abolishment of the humanitarian permit (2018-2020), during which at least 37,000 people became undocumented.<sup>88</sup>

In addition, in Italy there is the possibility to apply before the Juvenile Court for a permit based on the best interests of the child. However, it is likely that this permit will be *de facto* replaced by the permit for special protection, which is cheaper, faster and does not require hiring a lawyer.

Italy					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
Yes (by the asylum authorities)	Yes	Yes	Yes	Yes	Yes

<sup>88</sup> Sunderland J., 2020, [Finally, Good News for Asylum Seekers in Italy](#), Human Rights Watch.

## Case study 2: The humanitarian permit in Spain

In Spain, third country nationals can apply for humanitarian permits based on different grounds, and under different conditions.<sup>89</sup>

- The humanitarian permit for **victims of labour exploitation, hate crime or discrimination** is valid for one year, and can be renewed as long as the grounds persist.<sup>90</sup> This permit is convertible into a residence and work permit if the conditions are fulfilled. Under this permit, it is possible to apply for a work authorization under specific conditions, and only upon initiative of the employer.
- The humanitarian permit for **illness of serious nature** can be granted when the individual requires specialised health care that is not available in the country of origin, and the interruption or the lack of such care poses a serious risk to their health or life.<sup>91</sup> The serious illness must not pre-date their arrival in Spain. In order to apply for this permit, a clinic's report issued by the relevant health authority is required. This permit is issued for one year but is renewable if the medical condition continues to exist. However, it does not grant access to work.
- The humanitarian permit for **victims of "violent conduct in the home environment" (domestic violence)** is granted for five years.<sup>92</sup> To apply for this permit, the victim must submit a final judicial decision establishing that they are the victim of such a crime.
- The humanitarian permit for **risks in the country of origin** is usually granted to unsuccessful asylum seekers when there are risks to their safety or their family members.<sup>93</sup> For instance,

in recent years this permit has been issued to people from Venezuela. This permit is valid for one year and can be extended as long as the grounds persist.

- The humanitarian permit for **collaboration with the authorities** is granted to individuals collaborating with the authorities on matters related to the fight against organised crime or when there are national security reasons which require their presence in the country.<sup>94</sup> This permit is mainly granted to victims of trafficking in human beings; however, civil society organisations note that this permit is dependent on collaboration with the authorities and is not focused on protection purposes. As long as the trial is ongoing, individuals receive a provisional permit of one year, which grants them the right to work. If the trial confirms that they have been victim of gender-based violence or human trafficking, they can then have access to a five-year permit.

To be eligible for these humanitarian permits, the applicant must not have a criminal record, either in Spain or in any of their previous countries of residence during the last five years.

Individuals can apply independently for these humanitarian permits before the responsible authority. They need to provide a copy of their passport, which should be valid for at least four months; proof of their economic resources or, in other cases, an employment contract signed by their employer as well as the specific documentation related to one of the grounds for which this permit can be granted.

<sup>89</sup> [Law 12/2012, of 26 December](#), on urgent measures for the liberalisation of trade and certain services; [Law 4/2000, of 11 January](#), on the rights and freedoms of foreigners in Spain and their social integration Art. 31.3; [Law 39/2015, of 1 October](#), on the Common Administrative Procedure Of The Public Administrations; [Royal Decree 557/2011, of 20 April](#), Art. 62 to 69, 103 to 108, 123 to 130.

<sup>90</sup> [Royal Decree 557/2011, of 20 April](#), Art. 126(1). For more information, please see: PICUM, May 2020, [Insecure Justice? Residence Permits for Victims of Crime in Europe](#), pag. 58.

<sup>91</sup> [Royal Decree 557/2011, of 20 April](#), Art. 126(2).

<sup>92</sup> *Ibid.*, Art. 126(1) and 131.

<sup>93</sup> *Ibid.*, Art. 126(3); Subdirección General de Protección Internacional Oficina de Asilo y Refugio, 2021, [Informe de actividad 2020](#).

<sup>94</sup> [Royal Decree 557/2011, of 20 April](#), Art. 127, 135-137.

If the application for the humanitarian permit is rejected, the information provided during the application can expose them to return procedures. For this reason, many undocumented people do not apply, for fear of triggering deportation procedures. In one notorious case, a woman was issued a return decision when going to the police to report a crime she had been victim of.<sup>95</sup>

In addition, despite the apparent legal clarity on the different grounds on which the humanitarian permit can be granted, in practice several administrative burdens limit its practical accessibility.

In addition to the humanitarian permits, in Spain there is also the possibility to regularise one's position based on different grounds, including having worked for three years and having strong ties in the community.<sup>96</sup>

Spain					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
Only in some circumstances (e.g., victims of human trafficking, gender violence and victims of crime)	Yes	Depends on the grounds for which the humanitarian permit has been granted	Yes	Yes	Yes

<sup>95</sup> ElDiario.es, 17 June 2019, [La mujer que denunció una agresión y la Policía inició su proceso de expulsión: "Sólo les interesó que no tenía papeles"](#) [checked on November 2021]; Cadena Ser, 26 October 2020, [El Defensor del Pueblo pide a Interior que inmigrantes puedan denunciar delitos sin miedo a ser expulsados](#) [checked on November 2021].

<sup>96</sup> PICUM, February 2016, PICUM Country Brief, [Undocumented Migrants and the Europe 2020 Strategy: Making Social Inclusion a Reality for all Migrants in Spain](#); Ministerio de Inclusión, Seguridad Social y Migraciones, February 2021, [Autorización residencia temporal por circunstancias excepcionales. Arraigo social](#).

### Case study 3: The humanitarian permit in Poland

In Poland, there are two types of permits applicable to people with barriers to return: the humanitarian permit, which can be granted to people who cannot return based on human rights reasons, and tolerated stay, which applies to people who cannot return because of practical reasons (see below case study 7).

The humanitarian permit can be granted for human rights reasons related to the situation in the country of origin, and in particular when there are risks of violations of article 2 (right to life), article 3 (prohibition of torture and ill-treatment) and article 8 (private and family life) of the ECHR. It can also be granted for reasons related to the best interests of the child, when there is a risk that the return would significantly harm the child's development. It can be refused for reasons related to serious crimes and war crimes.

These human rights grounds are always examined automatically by the authorities (*ex officio*), during the return procedures. Migrants cannot apply independently but can provide evidence once the procedure has been initiated by the migration authorities. In certain cases, the Ombudsperson or the Ombudsperson for Children can also initiate the procedure. The appeal against the refusal of this permit has a suspensive effect.

This permit grants access to limited social assistance (shelter, food, some benefits and clothes) and the right to work. It can be revoked if the circumstances change considerably and if the person returns to their country of origin. After five years, people can apply for a permanent permit.

In practice, most of the humanitarian permits are granted for family ties, for instance to families with children and families which have been living in Poland for years and have strong ties in the country.

Poland					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
Yes, during the return procedures	No	Yes	Yes, limited	Yes	Yes

#### Case study 4: The permit for humanitarian or compassionate reasons in Cyprus

In Cyprus, the Ministry of Interior can grant undocumented people a residence permit for humanitarian or compassionate reasons. In this case, the return order is either not issued or suspended.

There are no clear procedures nor criteria to access this permit, which is granted on a case-by-case basis. In some cases, people who had previously applied for asylum are denied the possibility to apply for this permit, because the previous unsuccessful asylum application is considered a negative factor. In other cases, undocumented people who applied for a humanitarian permit were recommended to apply for asylum instead. In practice, these permits have been issued to vulnerable people or for family reasons, for instance to people who have children that have lived in the country for more than ten years. In the past, they have been granted to people whose applications for international protection were rejected.

There is no automatic examination of whether the conditions to access this permit are fulfilled.

This residence permit is valid for one year. However, this is very limited in its application and its scope, as it does not grant access to social services nor health care. In order to have access to the labour market, an application for a separate permit is required. This permit is not convertible into other permits.

The process to receive a residence permit for humanitarian or compassionate reasons is lengthy and complex. After applying for this permit, applicants receive a letter from the Ministry, and then have a certain time, that can vary from one month to a year, to present all the documents which are needed to apply. Often, this timeframe is insufficient for applicants to gather all the documents requested, sometimes due to delays by the migration office itself. In this case, the applicant has to start the procedure again. In case of rejection, it is possible to present an appeal before the administrative court, however, this is often difficult in practice due to bureaucratic barriers.

This permit has been criticised because of the lack of clear criteria to access it, and because in practice it grants access only to very limited rights. There are no data on how many people receive this permit.

Cyprus					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
No	Yes	Only upon a separate application	No	No	Yes

#### Medical reasons

Several countries, including Belgium, Croatia, Greece, Italy, Luxembourg, the Netherlands, Slovenia, Spain and the United Kingdom, provide for mechanisms to apply for a residence permit on health-related grounds.<sup>97</sup>

PICUM's 2009 report "Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe" found that protection standards for seriously ill migrants vary significantly throughout EU member states.<sup>98</sup> While some EU member states provide explicit provisions for granting residence permits to migrants with severe health problems, the legislation and procedure in others remains ambiguous. According to a European Migration Network Study from 2010, twelve EU member states provide a temporary residence permit on medical grounds.<sup>99</sup>

#### Case study 5: The permit for medical barriers in the Netherlands

In the Netherlands, migrants who cannot return or be deported because the necessary medical care is not available or accessible in their country of origin can receive a permit for medical barriers, known as "Article 64 Permit". In order to apply for this permit, their nationality has to be known and any outstanding question in this regard needs to be solved. This permit is only granted in very serious instances, when the applicant is likely to die or to lose vital functions, based on information from the Medical Agency (BMA). Individuals must apply before the Immigration Agency (IND) by providing all necessary medical information.

If the verification of the information with the Medical Agency requires more than two weeks, the applicant receives a 'temporary article 64 status' with grants them the same rights as asylum seekers, including access to health services.

This permit grants access to different sets of rights based on its duration. During the first year, people receive the same treatment as asylum seekers, namely shelter in an asylum reception centre, pocket money and health insurance. After the first year, if the conditions subsist, the person receives a temporary permit, which includes the right to social benefits but not the right to work. Only after three years, a residence permit is granted, which includes the right to work.

While the granting of rights during the procedure is a positive practice, this permit is often difficult to access because of obstacles in gathering all relevant documentation from doctors and data on treatment options and their costs in country of origin.

Between 1,400 and 2,000 applications for an "Article 64 Permit" are filed annually, of which around one-third are approved by the IND.

<sup>97</sup> OSCE/ODIHR, August 2021, [Regularisation of Migrants in an Irregular Situation in the OSCE Region Recent Developments, Points for Discussion and Recommendations](#), p. 12.

<sup>98</sup> PICUM, 2009, [Undocumented and Seriously Ill: Residence Permits for Medical Reasons in Europe](#).

<sup>99</sup> [European Migration Network \(EMN\), December 2010, The different national practices concerning granting of non-EU harmonised protection statuses.](#)

The Netherlands					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
Yes, but only during the first (asylum/ admission) application	Yes	Only after 3 years	Yes, limited	Yes	Yes

### Permits for stateless people

As mentioned above, stateless people can be deported only when they are able to acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or if they enjoy permanent residence status in a country of previous habitual residence to which immediate return is possible.<sup>100</sup> It is not sufficient that the person holds a permanent right to reside in that country; such status must also be accompanied by a full range of civil, economic, social and cultural rights, as well as a reasonable prospect of obtaining nationality of that State, in conformity with the object and purpose of the 1954 Convention.<sup>101</sup> To ensure stateless people can access their rights under the 1954 Convention, states need to be able to identify and determine who is stateless on their territory. According to UNHCR, this is best fulfilled through a dedicated

statelessness determination procedure (SDP). Some EU countries have introduced such procedures, which lead to the granting of or possibility to acquire a residence permit.<sup>102</sup> The European Network on Statelessness briefing, "Statelessness determination and protection in Europe: good practice, challenges, and risks" provides an overview of different practices in Europe regarding the protection and rights afforded to stateless people.<sup>103</sup>

<sup>100</sup> UNHCR, 2014, [Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons](#), Geneva.

<sup>101</sup> Ibid.

<sup>102</sup> Bulgaria, France, Hungary, Italy, Latvia and Spain.a

<sup>103</sup> Statelessness Index, 2021, [Statelessness determination and protection in Europe: good practice, challenges, and risks](#).

### Case study 6: The Statelessness Determination Procedure in France

In France, undocumented people have access to a dedicated statelessness determination procedure which leads to a dedicated statelessness status. Recognised stateless people are granted permission to stay for four years (after which they can acquire a residence permit for ten years), they have access to a travel document, family reunification, education, and the right to work. Stateless people also have a route to naturalisation, although residence requirements for naturalisation are not reduced as they are for refugees.

Applicants do not have to pay any fee to access this procedure, nor is there any residence requirement. Authorities have a duty to examine all claims and applicants who are refused statelessness status have the right to appeal. However, the procedure cannot be initiated automatically by the authorities (*ex officio*).<sup>104</sup>

As there is no obligation to deliver a temporary status while the SDP is ongoing, people risk being detained and even deported before they are formally recognised as stateless.<sup>105</sup>

France					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
No	Yes	Yes	Yes	Yes	Yes – however, people risk being deported during the SDP

<sup>104</sup> Statelessness Index, March 2021, [France](#).

<sup>105</sup> See: Forum Réfugiés - Cosi, September 2021, [L'apatridie et la rétention administrative en France](#).

### Countries granting other types of statuses to people with barriers to return

In some countries, migrants who cannot return for human rights reasons or factors independent of their control have access to statuses which do not amount to an actual residence permit but enable them to stay in the country for a certain period. These statuses are regulated differently in each country.

#### Case study 7: The tolerated status in Poland

As mentioned above, in Poland there are two types of permits accessible to people with barriers to return: the humanitarian permit (see case study 3) and tolerated status.

The tolerated status can be granted in three circumstances: when return would not be possible for practical reasons independent of the individuals and the authorities; when there would be risks of fundamental rights violations which would normally lead to the granting of a humanitarian permit or international protection, but these permits are not granted for national security reasons; and when return can only occur to a country to which return is inadmissible under a court decision or by decision of the Minister of Justice.

This status is granted automatically by the authorities when the conditions are fulfilled (*ex officio*). However, in specific circumstances individuals can directly apply for it, for instance when a court decision or a decision of the Minister of Justice has assessed that return to their country of origin would not be possible.

The tolerated status grants access to work. People receive a document, but they are not allowed to leave Poland. If the circumstances that led to the granting of this permit cease to exist, the permit can be revoked at any time. It can also be revoked if the person is considered to be a threat to national security, in case of non-cooperation with the authorities or if the person left Poland. After ten years of tolerated status, individuals can apply for a permanent permit. However, people who are granted tolerated status because the return to their country of origin is not possible for practical reasons are excluded from the possibility to apply for a permanent permit.

In practice, the tolerated status is very rarely granted.

Poland					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
Yes	Only in limited circumstances	Yes	Yes, limited (on the same grounds as the beneficiaries of humanitarian permits – see case study 3)	Yes, except when return is impossible due to practical reasons	Yes

#### Case study 8: The “no-fault” permit in the Netherlands

In the Netherlands, a “no-fault permit” (*buitenschuldstatus*) can be granted to migrants whose return is impossible due to external reasons. This can include: not having received a *laissez-passer*; lack of cooperation by the country of origin; family members who cannot be deported together to the same country; children who don't have a family member or legal guardian in their country of origin; or people who are too sick to travel. A pre-requisite is that all doubts about the person's identity have been solved.

The procedure can be initiated by the Return Agency, which evaluates whether the person has sufficiently cooperated with the authorities in order

to organise their return, for instance by getting in contact with their embassy.

It can also be initiated by migrants themselves, through a request to the Immigration Agency (IND) and by paying a fee of 350€. In this case, the Immigration Agency decides based on an opinion from the Return Agency. The procedure can take years and applicants don't have any rights while the procedure is ongoing.

The “no-fault” permit grants access to work and to social benefits. It has to be renewed every year and becomes permanent after three years. However, the Return Agency very rarely accepts that there are barriers to return. Between 2015 and 2020, an average of 20 permits was granted each year, corresponding to less than 50% of the requests.

The Netherlands					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
Yes	Yes	Yes	Yes	Yes	No

### Case study 9: The tolerated status in Greece

In Greece, the police authorities can provide undocumented people with the status of postponement of removal<sup>106</sup> or protection from deportation<sup>107</sup>. These statuses have 6-month validity and correspond in practice to a tolerated status. After the initial six months, they can be renewed as long as the conditions persist.

The postponement of removal or protection from deportation can be granted for reasons of *non-refoulement*, including poor physical or mental health, and for practical reasons independent of migrants' control, such as lack of means of transport to the country of origin.

There is not a clear picture of how this practice is implemented, as no official data are collected by the authorities. In practice, police authorities are usually very reluctant to provide this postponement.

The postponement of removal or protection from deportation do not grant effective access to the health system but ensure that the person is not deported during this time.

Individuals can apply for a separate work permit, which can however only be issued in the areas of agriculture, livestock, clothing industry and domestic work. In practice, these work permits are granted only in very limited cases.

In Greece, other recent reforms have further shrunk the protection space for people with barriers to return. In May 2020, a new law abolished the possibility for asylum seekers whose applications are rejected in second instance to be further considered for the potential application of a residence permit for humanitarian reasons.<sup>108</sup> This provision was repealed retroactively from 1 January 2020 and was completely abolished even for the older cases from September 2021.<sup>109</sup> Finally, with recent legal amendments the possibility for undocumented people to be employed in the rural economy was also abolished without any replacement.<sup>110</sup>

Greece					
Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
No	No	Limited	No	No	Yes

<sup>106</sup> [L. 3907/2011](#) on the establishment of an Asylum Service and a First Reception Service, transposition into Greek legislation of Directive 2008/115/EC "on common standards and procedures in Member States for returning illegally staying third country nationals" and other provisions, Art. 24.

<sup>107</sup> [L. 3386/2005](#) on the Codification of Legislation on the Entry, Residence and Social Integration of Third Country Nationals on Greek Territory, Art. 78 A.

<sup>108</sup> [Law 4686/2020](#) "Improvement of the migration legislation, amendment of L. 4636/2019 (A' 169), 4375/2016 (A' 51), 4251/2014 (A' 80) and other provisions" Gov. Gazette A' 96 /12-5-2020, art. 61.

<sup>109</sup> [L. 4825/2021](#) on Reform of deportation and return procedures of third country nationals, attraction of investors and digital nomads, issues of residence permits and procedures for granting international protection, Art. 40. The Commissioner of Human Rights has asked to reconsider the bill as it does not meet human rights standard, please see: [Council of Europe, September 2019, Greece's, Parliament should align the deportations and return bill with human rights standards](#), Strasbourg.

<sup>110</sup> [L. 4825/2021](#) on Reform of deportation and return procedures of third country nationals, attraction of investors and digital nomads, issues of residence permits and procedures for granting international protection, Art. 72 par. 4.

### Case study 10: The temporary suspension of deportation in Germany

In Germany, individuals who cannot return or be deported receive a temporary suspension of deportation ("Duldung"<sup>111</sup>), which can be granted for any duration between a few days and months.<sup>112</sup> The "Duldung" is not an actual residence permit, but only a temporary status which formally registers people's presence in the country. People who receive a "Duldung" are considered to be residing irregularly in the country and the return order remains valid. If return is possible again, people can be detained and deported even when the "Duldung" is still valid. In some cases, people are detained when they present themselves to the local office to renew the "Duldung".

A "Duldung" is issued when there are barriers to return, such as lack of documents, a ban to returns to a specific country, lack of flight routes, or when someone is too ill to travel. In these cases, the "Duldung" is granted *ex officio* by the immigration office at the municipality level.

The "Duldung" can also be granted for other reasons, including family reasons or personal reasons, for instance when individuals are receiving medical treatment or if they are caring for a sick family member. In these cases, it is granted on a discretionary basis.

The "Duldung" grants access to benefits at the same conditions as asylum seekers. Recipients of the "Duldung" do not have the right to move to another city or state within Germany while they are receiving benefits. While the "Duldung" does not grant automatic access to work, it is possible in principle to apply for a permit to work after three

months. However, there are numerous employment bans if people with a "Duldung" do not cooperate in removing the obstacle to departure.

Next to the normal "Duldung", there are special types of "Duldung" for vocational training or work that offer actual protection from deportation.

Since 2016, individuals can receive a "Ausbildungsduldung" if they have started or intend to start vocational training, by applying before the responsible Immigration Office.<sup>113</sup> In this case, the permit is valid for the whole duration of the vocational training. However, the conditions to apply for this permit are different based on whether the training has started before or after the end of the asylum procedure. After the end of the training, if the training company does not hire the individual, the "Duldung" is extended for job-seeking purposes for six months. If the applicant finds a job within this time, they can apply for a 2-year residence permit.<sup>114</sup> In addition, individuals who were ordered to leave the country and who are gainfully employed can also receive a "Beschäftigungsduldung".<sup>115</sup> However, this possibility will only remain open until the end of 2023, and is subject to very strict criteria, which strongly limit the number of beneficiaries.<sup>116</sup>

In certain cases, the "Duldung" can be converted into a residence permit, for instance if people are hired in the sector in which they conducted the training, if young people have successfully attended school for four years, or when adults have lived and worked in the country for eight years (six if they live together with their minor children).

When the authorities consider that an individual is not cooperating sufficiently with the return procedures, they issue a separate type of "Duldung"

<sup>111</sup> [Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet 1](#) (Aufenthaltsgesetz - AufenthG), § 60a Vorübergehende Aussetzung der Abschiebung (Duldung).

<sup>112</sup> Handbook Germany, [Tolerated Stay \("Duldung"\)](#).

<sup>113</sup> [Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet 1](#) (Aufenthaltsgesetz - AufenthG) § 60c Ausbildungsduldung.

<sup>114</sup> [Law of February 25, 2008](#) on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, § 18a.

<sup>115</sup> [Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet 1](#) (Aufenthaltsgesetz - AufenthG) § 60d Beschäftigungsduldung.

<sup>116</sup> PRO ASYL, 10 June 2020, [Was ist eigentlich eine »Duldung«?](#)

(the “Duldung für Personen mit ungeklärter Identität”), known as “Light Duldung”<sup>117</sup>.

Oftentimes, the “Light Duldung” is issued to people who do not have a passport, or whose passport is expired. In these cases, the authorities often consider individuals to be “at fault”, while in practice they face several external barriers when trying to renovate their passport.<sup>118</sup> Individuals with a “Light Duldung” are subject to an automatic work ban. Frequently, they are only granted access to lower social benefits that cover their “basic survival”. In addition, the time spent with a “Light Duldung” is not counted for regularisation purposes.

As of December 2020, more than 200,000 people had a “Duldung” in Germany.<sup>119</sup>

Separately from the “Duldung” system, people can also receive a “ban on deportation” (“Abschiebungsverbot”) when return would amount to a violation of article 3 ECHR, for instance for health reasons or due to the situation in their country of origin. These grounds are evaluated *ex officio* by the asylum authorities. Individuals can also directly apply for it. The “ban on deportation” grants access to a residence permit for at least one year and is renewable. However, this ban is only granted in very exceptional cases.<sup>120</sup>

As of December 2021, the new coalition government in Germany has pledged to reform this system, by piloting a regularisation scheme for people who have been living in Germany for five years, transforming the “Ausbildungsduldung” into a fully-fledged residence permit and lowering the criteria for the “Beschäftigungsduldung”.<sup>121</sup>

Germany						
	Does it have to be automatically examined by the authorities (‘ex officio’ examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
The temporary suspension of deportation “Duldung”	Yes	No (only in some limited cases)	Only upon a separate application	Yes, limited	Yes	No
The “Light Duldung” for people whose identity is unclear	Yes	No	No	No	No	No
The ban on deportation (“Abschiebungsverbot”)	Yes	Yes	Yes	Yes	Yes	Yes

<sup>117</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet 1) (Aufenthaltsgesetz - AufenthG) 1) (Aufenthaltsgesetz - AufenthG) § 60b Duldung für Personen mit ungeklärter Identität.

<sup>118</sup> PRO ASYL, 15 July 2019, [Aus der Praxis: Trotz aller Mühe bei der Passbeschaffung »nicht mitgewirkt«](#).

<sup>119</sup> PRO ASYL, 10 June 2020, [Was ist eigentlich eine »Duldung«?](#)

<sup>120</sup> Federal Office for Migration and Refugees, 28 November 2018, [National ban on deportation](#).

<sup>121</sup> PRO ASYL, 25 November 2021, [Koalitionsvertrag 2021–2025: Wichtige Erfolge, aber auch gravierende Lücken](#).

## Other residence permits

The analysis above focuses on permits specifically targeted at people with barriers to return. However, this list is not comprehensive. For instance, some countries provide access to residence permits based on factors such as length of residence, employment, school attendance of children and other local social ties.<sup>122</sup>

At least eight EU member states<sup>123</sup> have regularisation mechanisms accessible to children, young people or families.<sup>124</sup>

Some member states grant residence permits to victims of certain crimes (e.g., domestic violence, trafficking in human beings or particularly exploitative working conditions), to allow them to seek protection and report abuse in a safe way and to access remedy.<sup>125</sup> In particular, at least five EU member states<sup>126</sup> have legislation granting special permits for undocumented victims of domestic violence.<sup>127</sup>

In addition to these structurally embedded regularisation mechanisms, many countries have had temporary regularisation programmes. The most comprehensive study on regularisation programmes and mechanisms is the REGINE study, which identified that 24 of the 27 EU Member States implemented regularisation programmes or mechanisms between 1996 and 2008, and some several times.<sup>128</sup> An estimated total of 5.5 to 6 million people was regularised in that time. Most of them were regularised through one-off programmes: 43 regularisation programmes were implemented in 17 EU Member States in those twelve years, involving 4.7 million applicants, of which at least 3.2 million were regularised.<sup>129</sup>

<sup>122</sup> PICUM, February 2016, PICUM Country Brief. [Undocumented Migrants and the Europe 2020 Strategy: Making Social Inclusion a Reality for all Migrants in Spain](#).

<sup>123</sup> Belgium, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, and Spain.

<sup>124</sup> PICUM, March 2018, [Manual on regularisations for children, young people and families](#).

<sup>125</sup> PICUM, May 2020, [Insecure Justice? Residence Permits for Victims of Crime in Europe](#).

<sup>126</sup> France, Greece, Italy, the Netherlands, and Spain.

<sup>127</sup> PICUM, May 2020, [Insecure Justice? Residence Permits for Victims of Crime in Europe](#).

<sup>128</sup> ICMPD, February 2009, [Regularisations in Europe Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the European Union](#).

<sup>129</sup> PICUM, December 2021, [FAQ Regularisation and ensuring access to residence permits](#).

## 4. Conclusion

This report analysed the legal framework applicable to people with barriers to return, either for human rights or other reasons, as well as the obstacles they face in terms of rights and protection.

As analysed in chapter one, under international and EU law, there are several human rights reasons for which people who do not qualify for international protection cannot be deported, such as the principle of *non-refoulement*, protection of family and private life, the best interests of the child, the prohibition of arbitrary detention and protection on the grounds of statelessness. In most countries, these considerations fall outside of the scope of the asylum procedure.

In addition, as discussed in chapter two, several circumstances that are outside of an individual's control can make deportation or return impossible. For instance, people might not be able to obtain a valid passport, or they might be unable to travel due to medical reasons.

Over the past years, EU policies have tried to deny the existence of these people, by focusing instead on the impossible, and harmful, objective

### Initiation of the procedure

In some countries, the possibility to access humanitarian permits is examined automatically by the authorities (*ex officio*), on an individual basis, either in the context of the asylum procedures, after an asylum application is not approved (e.g., Italy); or in the context of return procedures (e.g., Poland). In other countries, people need to

of deporting everyone who is not recognised as qualifying for asylum. This often comes at the expense of other, more right based, approaches. Existing residence permits, rather than being improved in their substance and accessibility, risk being narrowed or made inaccessible by policies which impose an obligation to issue a return decision together with a rejection of an asylum application.<sup>130</sup>

Chapter 3 analysed different policies that states have implemented to provide rights and protection with people with barriers to return, through comparing ten different national level case studies. Different types of residence permits and statuses can be placed along a continuum, ranging from permits ensuring high levels of protection and stability, to statuses which fail to even provide adequate protection from deportation. This report analysed five different aspects: initiation of the procedure, right to work and access social services, pathways to a secure status, and protection from deportation. For a further comparison of the different policies analysed in chapter 3, please see Annex I.

apply for these permits themselves (e.g., Cyprus, Spain). A good practice, implemented by some countries (e.g., Italy; Finland), is to ensure both an *ex officio* examination and the possibility to apply independently. In fact, the *ex officio* consideration is useful as individuals are often not informed of the possibility to apply to this permit, particularly when

<sup>130</sup> PICUM, 2021, [Why is the Commission's push to link asylum and return procedures problematic and harmful?](#), Briefing Paper.

they are at the external borders. As highlighted by the European Parliament Implementation Assessment on the Return Directive, the automatic assessment of human rights barriers to return, including family and private life and art. 3 ECHR, is a good practice and further contributes to increase efficiency by reducing the number of necessary judicial procedures.<sup>131</sup> However, it is important for individuals to be able to apply independently as well, as the authorities might not otherwise be aware of their specific barriers to return.

The existence of clear criteria is an important element too. In some countries, the lack of clear procedures and criteria to access the permit leads to a very small number of permits being issued each year (e.g., Cyprus). In contrast, the permits in Italy are available based on clear criteria, which nonetheless allow for some level of discretion. Permits which are

### Right to work and access to social services

The permits issued when there are barriers to return grant automatic access to the labour market in some, but not all of the countries. For instance, access to the labour market is granted in Italy, Poland and in the Netherlands when people are issued a “no-fault” permit. Being able to work is extremely important to ensure that people can sustain themselves independently, through regular and declared employment, and live in dignity. Access to social services is also a key element, and the practice of some countries to limit access to basic needs is extremely problematic.

entirely or even strongly dependent on cooperation with the authorities are also problematic because of the often extremely high threshold, which leads to very few permits being issued each year (e.g., the Netherlands), the lack of clarity on what it means to be “cooperating”, and when they oblige people to facilitate their own return even when this would lead to violations of their rights. While there are common considerations and types of criteria in many procedures, often related to human rights reasons, their implementation and interpretation can vary significantly: for instance, the length of residence which would be considered as sufficient to positively influence the issuance of a permit based on private and family life varies from country to country. In the Netherlands, civil society organisations noted cases in which even having lived in the country for 30 years has been considered insufficient.

In some cases (e.g., the permit for medical barriers in the Netherlands), individuals have access to rights while the procedure is ongoing. This is a positive practice because it prevents gaps in access to services during often lengthy procedures, and governments' obligations to protect people's human rights and dignity remain.

<sup>131</sup> European Parliament, June 2020, [The Return Directive 2008/115/EC European Implementation Assessment](#), Study, p. 53-54.

## Pathways to more secure status

The possibility to convert these permits to other types of residence permits, such as work permits or longer-term permits, including access to naturalisation, is key. France, Italy, Spain, Poland and the Netherlands all allow for the possibility of conversion to more stable permits. In France, the statelessness determination procedure leads to a multi-annual residence permit, but the residence requirements for naturalisation are not reduced

## Protection from deportation

The analysis shows that the types of policies adopted by states can be broadly divided into two categories: in some countries, people receive permits which have a fixed duration which ensure they will not be deported during the entire period of the permit; while in other countries, individuals are only granted a temporary stay which does not protect them from deportation. The latter type does not reach the threshold necessary to ensure adequate rights and protection for people with barriers to return.

Overall, in the European Union hundreds of thousands of people with barriers to return<sup>132</sup> are left in limbo. This can happen either because national level permits are in practice not accessible, for instance because the criteria are too stringent or because the authorities have discretion to deny these permits without having to motivate why. In other cases, this happens because states fail to actually examine whether people may have access to these permits, because there is no obligation to

for stateless persons as they are for refugees. In Germany, people living with a “Duldung” can access more stable permits in specific situations only. As barriers to return are often enduring, it does not make sense to limit the access to secure, long-term permits. In addition, secure permits allow people to acquire more certainty over their future, plan their lives and gain full access to social and labour rights.

assess *ex officio* whether individuals might qualify for these permits.

Even when barriers to return have been identified, people can remain in limbo for years.<sup>133</sup> Many countries (Belgium, Bulgaria, Spain, France, Italy and the Netherlands) even fail to provide an official acknowledgement that the person cannot be deported, which is in breach of the EU Return Directive.<sup>134</sup> Proposals to link the asylum and return procedures risk further increasing the number of people who would be left in limbo and will lead to countries breaching their international legal obligations.<sup>135</sup>

Frequently, poor decision-making during the return procedures and the lack of adequate safeguards and individual assessments means that appeal and recourse to the higher courts is the only option for individuals facing a return decision. It is the only way for them to safeguard their rights and protect them from the risk of torture and human rights violations.

<sup>132</sup> European Commission, 29 March 2019, [Commission Staff Working Document Fitness Check on EU Legislation on legal migration](#).

<sup>133</sup> European Parliament, June 2020, [The Return Directive 2008/115/EC European Implementation Assessment](#), Study.

<sup>134</sup> *Ibid.*, p. 64, 75.

<sup>135</sup> PICUM, April 2021, [Recommendations on the Asylum Procedures Regulation Amended Proposal for a Regulation of the European Parliament and of the Council establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU](#).

Sometimes, the recognition that a return decision violates fundamental rights comes too late, when people have already been deported and faced arbitrary detention, ill-treatment, torture, or have lost their life.<sup>136</sup>

It is crucial that states comprehensively assess fundamental rights considerations (including but not limited to the right to health, private and family ties, best interests of the child, *non-refoulement* and the protection of stateless people) and whether third country nationals fulfil the criteria to apply for an autonomous residence permit or other authorisation granting a right to stay before a return decision is issued. For children, this means including a formal, individual and fully-documented procedure examining all aspects of a child's situation and considering all options in order to identify which durable solution is in the best interests of the child.<sup>137</sup>

One way to ensure this would be giving competence to the decision-making bodies (e.g., asylum commissions) which are deciding on international protection to assess and decide whether, in case an asylum application is rejected, applicants can be granted other types of permits, as it is currently the case in Italy and as it has been called for by civil society organisations in some countries.<sup>138</sup> This further requires decision-making bodies to be adequately trained and informed about the different

types of permits which could be applicable, and the different elements that should be assessed. Alternatively, this obligation could be included as part of the return procedures, through the implementation of individual assessments before decisions are issued.<sup>139</sup>

In addition, people should be able to apply for these permits independently too. They should also have access to legal aid and suspensive appeal procedures. Permits should ensure access to work and social rights, and should be convertible into longer, more stable permits.

A clear precondition to ensure that people with barriers to return are protected is ensuring that everyone has access to an individual assessment. Sadly, this basic principle is increasingly being violated at the EU external and internal borders, with practices of pushbacks constantly on the rise.<sup>140</sup> To stop this from happening, improved monitoring mechanisms and clearer accountability for human rights violations at the external borders are key.<sup>141</sup>

Lastly, the importance of ensuring access to legal aid, including at borders, cannot be underestimated, as people need to receive the adequate support to be able to navigate increasingly complex procedures.

<sup>136</sup> For instance, in the case of *Hirsi Jamaa and Others v. Italy* (ECtHR, 23 February 20, case of [Hirsi Jamaa and others v. Italy](#), App. no. 27765/09), the court considered the case of 24 people, of Somali and Eritrean origin, who were intercepted at sea by Italian authorities in 2009 and pushed back to Libya, where they faced inhuman and degrading conditions of detention. Two of the applicants died in unknown circumstances after the events.; In the case of *M.K. and others v. Poland* (ECtHR, 23 July 2020, [Case of M.K. and others v. Poland](#), App. nos. 40503/17, 42902/17 and 43643/17, para. 47), one of the applicants was subject to chain refoulement from Poland to Belarus and, subsequently, to Russia, where he was arbitrarily detained and tortured.

<sup>137</sup> PICUM, IOM, Unicef, UN Human Rights, Child Circle, ECRE and Save the Children, 2019, [Guidance to respect children's rights in return policies and practices. Focus on the EU legal framework](#). Three durable solutions are possible: integration in the country of residence, integration in the country of return or integration in a third country (e.g. family reunification). For more on durable solutions and how to identify them, [www.picum.org/durable-solutions](#).

<sup>138</sup> See, for instance, *Vluchtelingenwerk Vlaanderen et al*, 2021, [Bevraging Migratiewetboek: Inbreng Vluchtelingenwerk Vlaanderen](#).

<sup>139</sup> This is already a legal obligation when children are concerned. See PICUM, IOM, Unicef, UN Human Rights, Child Circle, ECRE and Save the Children, 2019, [Guidance to respect children's rights in return policies and practices. Focus on the EU legal framework](#).

<sup>140</sup> Please see: Lighthouse Report, 6 October 2021, [Unmasking Europe's Shadow Armies](#) [checked on November 2021]; Border Violence Monitoring Network, October 2021, [Summary and analysis of pushbacks and internal violence documented by BVMN during the month of September](#); DW, 14 October 2021, [Desperate migrants trapped between Belarus, Poland amid geopolitical row](#) [checked on 19 October]; on this topic, please see: PICUM, February 2021, [PICUM Input to the UN Special Rapporteur on the Human Rights of Migrants Report on pushback practices and their impact on the human rights of migrants](#).

<sup>141</sup> Amnesty International, ECRE, IRC, Save the Children, Oxfam, Refugee Rights Europe, Danish Refugee Council, Human Rights Watch, 10 November 2020, [Joint Statement: Turning rhetoric into reality: New monitoring mechanism at European borders should ensure fundamental rights and accountability](#).

## Recommendations

To build a legal system which respects fundamental rights, does not limit the possibility to access regular pathways granted at national level, and does not leave hundreds of thousands of people in an administrative limbo, we recommend:

### To the European Union:<sup>142</sup>

- Set an obligation for Member states to comprehensively assess fundamental rights considerations (including the right to health, private and family ties, best interests of the child, *non-refoulement* and the protection of stateless people) and whether third country nationals have the possibility to access an autonomous residence permit or other authorisation granting a right to stay before a return decision is issued.
- Ensure, in EU law, that the return decision is taken separately from any decision on the asylum application. Fundamental rights concerns and protection grounds which fall outside the scope of the asylum procedure need to be given proper consideration before a return decision is issued.
- Encourage member states to apply article 6(4) of the Return Directive (art. 8(4) of the Recast Return Directive), as also underlined by the European Parliament Resolution on the Implementation of the Return Directive.<sup>143</sup> This article provides Member States with the possibility to grant an autonomous residence permit on compassionate, humanitarian or other grounds to a third-country national staying irregularly on their territory and should be further utilised.<sup>144</sup>
- Ensure that EU law guarantees that third country nationals have access to residence procedures regulated at national level. This includes refraining from adopting provisions which could in practice limit access to these permits, such as provisions which exempt member states from implementing their national legal framework on part of their territory based on the so-called “fiction of non-entry”.

<sup>142</sup> Please see: PICUM's briefing: PICUM, 2021, [Why is the Commission's push to link asylum and return procedures problematic and harmful?](#) for more information and specific language recommendations at the EU level.

<sup>143</sup> European Parliament, 2 December 2020, [Report on the implementation of the Return Directive](#), (2019/2208(INI)), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Tineke Strik.

<sup>144</sup> Ibid.

### To member states:

- Ensure that different pathways for permanent or temporary, renewable or convertible regular status, are available and accessible, including humanitarian or other permits for people with barriers to return. Ensure that all individuals who are physically on their territory can effectively apply for these permits and statuses.
- Always assess fundamental rights considerations (including the impact of return on the right to health, private and family ties, best interests of the child and *non-refoulement*) as well as the possible application of different residence permits on an individual basis, before a return decision or refusal of entry is issued.
- Ensure that humanitarian permits and other permits and statuses accessible to people with barriers to return are evaluated automatically by the authorities (ex officio) and on an individual basis before the issuance of a return decision or a refusal of entry.
- Ensure that people with barriers to return have effective access to permits which:
  - » protect them from detention and deportation,
  - » grant access to the labour market and social services, and
  - » can be converted in longer term permits, and count towards naturalisation.
- Set up transparent and predictable procedures, with clear criteria and documentation requirements, impartial decision-making, and procedural safeguards, including a written motivation in cases of refusal, and the right to appeal with a suspensive effect.
- Ensuring that a proposed country of removal is identified prior to a decision to detain or return, and that persons who are stateless or at risk of statelessness are referred to a dedicated statelessness determination procedure leading to an adequate protection status.
- Grant access to free legal aid to people who are at risk of return or refusal of entry, including at the external borders.

## Annex I: Comparison of national level case studies

	Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
<b>CYPRUS:</b> permit for humanitarian or compassionate reasons (case study 4)	No	Yes	Only upon a separate application	No	No	Yes
<b>FRANCE:</b> Statelessness Determination Procedure (SDP) (case study 6)	No	Yes	Yes	Yes	Yes	Yes – however, people risk being deported during the SDP
<b>GERMANY:</b> "Light Duldung" for people whose identity is unclear (case study 10)	Yes	No	No	No	No	No
<b>GERMANY:</b> Ban on deportation ("Abschiebungsverbot") (case study 10)	Yes	Yes	Yes	Yes	Yes	Yes
<b>GERMANY:</b> Temporary suspension of deportation ("Duldung") (case study 10)	Yes	No (only in some limited cases)	Only upon a separate application	Yes, limited	Yes	No

	Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
<b>GREECE:</b> tolerated status (case study 9)	No	No	Limited	No	No	Yes
<b>ITALY:</b> permit for special protection (case study 1)	Yes (by the asylum authorities)	Yes	Yes	Yes	Yes	Yes
<b>NETHERLANDS:</b> permit for medical barriers (case study 5)	Yes, but only during the first (asylum/admission) application	Yes	Only after 3 years	Yes, limited	Yes	Yes
<b>NETHERLANDS:</b> "No-fault" permit (case study 8)	Yes	Yes	Yes	Yes	Yes	No
<b>POLAND:</b> humanitarian permit (case study 3)	Yes, during the return procedures	No	Yes	Yes, limited	Yes	Yes
<b>POLAND:</b> tolerated status (case study 7)	Yes	Only in limited circumstances	Yes	Yes, limited (on the same grounds as the beneficiaries of humanitarian permits – see case study 3)	Yes, except when return is impossible due to practical reasons	Yes

	Does it have to be automatically examined by the authorities ('ex officio' examination)?	Is it possible to apply independently?	Does it grant the right to work?	Does it grant access to social services?	Is it possible to convert it into other, more secure, residence permits?	Does it ensure protection from deportation for the whole duration of the permit?
<b>SPAIN:</b> humanitarian permit (case study 2)	Only in some circumstances (e.g., victims of human trafficking, gender violence and victims of crime)	Yes	Depends on the grounds for which the humanitarian permit has been granted	Yes	Yes	Yes



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