

Immigration control must not deny access to basic rights

JRS Europe's policy position on destitution of migrants

Introduction

In this paper, the Jesuit Refugee Service (JRS) Europe describes the general positions on destitution of migrants who live in the European Union, and makes some recommendations to improve their situation. We focus on the situation of those migrants who are not citizens of the European Union ("third country nationals"). Where applicable the paper refers to special regulation that governs the treatment of certain groups of forcibly displaced persons, most notably refugees and asylum seekers.

The general message

Across Europe there are persons who have left their countries of origin and are made destitute. Among these destitute migrants are those who already have a *right* to stay, be it because of family reunification, as asylum seekers during their determination procedure or even as recognised refugees. Despite their legal status they become destitute.

To all affected migrants, destitution causes much harm.

Destitution therefore offends our belief in the inviolable dignity of a person created in the image of God. It similarly offends the better development of societies, along the lines of the common good, of global solidarity and of welcoming strangers.

Destitution is a human rights violation. Most notably, it infringes the economic and social rights of migrants. The European Union cannot allow Member States to make migrants destitute because it contravenes core values of the Union, most notably the respect for human rights of all people living in Europe. Human rights must be granted to all human beings.

The situation

Throughout Europe there are migrants who have little or no access to employment and to basic services such as education, social welfare, housing, and healthcare. They are left destitute as a consequence of states' laws and policies. These policies violate states' obligations under international and regional human rights and migration law for the respect and fulfilment of economic and social rights of refugees and other mi-

grants.¹ The exclusion of destitute migrants from society leads to new invisible borders that divide local communities, regions and countries.

Illustrative is the example of asylum seekers in many EU member states who are excluded from access to labour markets and to many forms of public relief and are often accommodated under dire circumstances. Their living conditions separate and often estrange them from the rest of the society and by that make them vulnerable to racism and xenophobia.

The definition of “destitution”

In this paper JRS Europe uses the following definition of “destitution”:

“Destitution” describes a lack of means to meet basic needs such as shelter, food, health or education as a consequence of a State’s policy which excludes groups from enjoying basic rights and receiving official assistance or severely limits their access to such official assistance and, simultaneously, deprives them of any opportunity to improve that situation in the near future, resulting in a continuing denial of the dignity of the person.

The principles

- The core value of the European Union as an area of freedom and justice must be reflected by day-to-day policies. The states are aware of the destitute migrants’ presence on their territories and therefore bear responsibility towards them.
- Destitution endangers the cohesion and solidarity within our societies and communities. The creation of a group or of groups of third-class denizens should be avoided.
- Seeking to coerce migrants to return to their countries of origin by denying them all forms of support and prohibiting the right to access the formal labour market violates their dignity.

The positions

- In the first instance JRS is not calling for residence permits or regularisation, but for respect of human rights. We bring the attention to the fact that international law guarantees access to basic human rights to *all* human beings no matter if their stay is regular or not.
- Recognised refugees must be able to enjoy all their rights under the 1951 Convention² and the 1967 Protocol³
- The treatment of asylum seekers in all stages of a determination process must be guided by the principle that is laid down in the UNHCR handbook⁴: A person does not become a refugee because of recognition, but is recognized because s/he is a refugee. Hence these persons must be given access to a fair and effective determination procedure. The environment must allow for a proper preparation and implementation of the process.

¹ For details see our Policy Note on Human Rights and Destitution of Migrants.

² United Nations Convention relating to the Status of Refugees, adopted 28 July 1951, 189 UNTS 137.

³ Protocol relating to the Status of Refugees, adopted 31 January 1967, 606 UNTS 267

⁴ UNHCR: Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, § 38.

- The state has a duty of care for destitute migrants until the moment of their return in safety and dignity. This responsibility is based upon the state's obligation to respect, protect and uphold economic and social rights of all regardless of nationality or status. This principal responsibility must not be shifted to civil society actors that then provide essential care to destitute migrants.⁵
- Education serves the common good, not the least by providing individuals with a strong measure of stability and dignity. It is, therefore, a right that should be enjoyed by everyone, irrespective of one's migration or other status.
- Access to healthcare is a fundamental human right. Providing it is the most basic way to respect the dignity of the person. The well-being of a society and of the individuals go hand-in-hand. Only a healthy person will be able to fully participate in the life of the community. Poor health, on the other hand, inhibits a person's ability to find and maintain work, or to participate in educational courses.
- Social and housing policies should focus on self-sufficiency and independence.
- All migrants, irrespective of residence status, have a right to private and family life. Especially children have a right to be nurtured in a suitable home.
- A pressing need of destitute migrants is access to information on rights and possibilities to improve the own situation. The dignity of a person calls for her or him being made aware of all relevant facts so that s/he is able to take an informed decision about what to do next.
- Society is missing out on the skills of destitute migrants by not offering them the right to enter the formal labour market. Not only do states not profit from their expertise and governments miss out on taxes and social security contributions: but destitute migrants who for long periods of time are not allowed to work become de-skilled, making integration into society more difficult. Therefore such policies are detrimental to the interest of EU member states.

The recommendations

EU Policies

- The European Union must develop a coherent policy and strategy together with clear responsibilities for overcoming destitution among migrants.
- Where a Member State does not respect its obligations under the international law instruments with regard to the respect and fulfillment of economic and social rights of recognized refugees, it violates the EU Charter on Fundamental Rights. The Commission as the "Guardian of the Treaties" should then start an infringement procedure.
- Commission, Parliament and Council must recast the Reception Conditions Directive⁶ in order to ensure effective protection of the human rights, including economic, social and cultural rights, of asylum seekers.
- Commission, Parliament and Council are encouraged to evaluate and recast the Return Directive⁷ in order to lay down more precise minimum standards for the re-

⁵ This does of course not exclude the possibility for a state contracting services out to other actors.

⁶ Directive 2003/9/EC of the Council of 27 January 2003 laying down minimum standards for the reception of asylum seekers in Member States, OJ L 31, 6 Febr 2003, p. 18.

spect of economic and social rights of undocumented migrants. The Commission must refrain from interpretations of the said directive that restrict opportunities for Member States to adopt and maintain policies that ensure the access of undocumented migrants to basic social services.

Social inclusion policies

- Social inclusion and integration policies at the European and national level should ensure that migrants do not face destitution.

Education

- States should fulfil the right to education by providing access to basic education, as a minimum, to destitute migrant children.
- Authorities should explore ways to allow destitute migrants to take advantage of education opportunities.
- Local non-state actors, such as universities and charities, should make available low-cost or free education programs and opportunities for destitute migrants.
- Civil society organisations should raise migrants' awareness of existing educational opportunities.

Health care

- Where required, states should introduce new or amend existing policies and laws in order to ensure that every migrant irrespective of status is entitled to primary and secondary health care.
- Migrants must be provided with information on how to access health care.
- Health care clinics and other community health providers should combine resources to provide health care to migrants who otherwise do not have the means, at least as long as the State has not developed a scheme for financing it.
- "Hard data" on the costs of providing as well as on the consequential costs of denial of health care is needed; the Commission should fund studies on this subject.

Housing

- States must provide undocumented migrants with unconditional access to emergency accommodation.
- EU member states should improve their transposition of EU law, such as the Reception Conditions Directive, to ensure that refugees and asylum seekers have access to proper accommodation that respects their rights to private and family life.
- Providers of emergency shelter should not be criminalized for providing accommodation.

Public relief policies

- Public relief services must at least cover the basic needs of migrants so that they can have a life in dignity.⁸ A violation of this right constitutes a violation of the EU

⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 Dec 2008, p. 98.

⁸ Please note: *Recognised refugees* enjoy the right of access to public welfare to the same extent as nationals of the host country do. With regard to *asylum seekers*, the absolute minimum of services they are entitled to is defined in the Reception Conditions Directive.

Fundamental Rights Charter and should result in an infringement procedure of the Commission against the respective state.

- Social services must cover the special needs of migrants who are vulnerable persons, such as special food for the elderly or the ill, or aid for persons with disabilities.
- In order to ensure that migrants know their rights and possibilities, information providers should work closely together:⁹
- All information providers and counsellors, be they individual professionals, NGOs or State officials, must be exempt from an obligation to report the residence status of a migrant to police or migration control agencies.

Work

- Migrants should be given access to the national labour market.
- Migrants should be given the opportunity to 'regularize' their status through labour opportunities, and not simply via immigration procedures, i.e. if migrants have access to a job, then their residence permit should remain valid.
- Every migrant, including those without residence status, should be able to use the mechanisms provided in national law to effectively claim outstanding payment for work. This includes access to counselling services and Labour Courts.

⁹ An example of best practice in this regard is the office of the Portuguese High Commissioner for Immigration and Minorities (ACIDI) in Lisbon where a migrant can show up with questions and will be referred to offices of the relevant Government agencies being located in the same building.